ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers

by
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Introduction

At its 2016 Annual Convention the American Bar Association (ABA) adopted an amendment to the ABA Model Rules of Professional Conduct, adding a new subsection (g) to Rule 8.4, the Model Attorney Misconduct Rule.[1] The new Rule makes it a violation of the Rules of Professional Conduct for lawyers to engage in harassment or discrimination in conduct related to the practice of law.

The new Model Rule has encountered significant opposition. Indeed, since the ABA amended the Rule nearly two years ago, only one state – Vermont – has adopted it.[2] The supreme courts of four other states – Arizona, Idaho, South Carolina, and Tennessee – have considered and rejected the Rule.[3]

One reason for the widespread opposition to the new Rule stems from concerns that the Rule may violate attorneys' constitutional rights. In fact, four state attorneys general have issued opinions that the Rule is unconstitutional. The Attorney General of Texas opined that:

> A court would likely conclude that the American Bar Association's Model Rule of Professional Conduct 8.4(g), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition

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1 MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2016).

2 *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017.

3 *Order: Re: Rule 42, ER 8.4, Rules of the Supreme Court,* Ariz. Sup. Ct. No. R-17-0032 (Aug. 30, 2018); *Notice*, Sup. Ct. Idaho, (Sept. 6, 2018); *Order*, Supreme Court of South Carolina, Appellate Case No. 2017-000498 (June 20, 2017); *Order: In Re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Apr. 23, 2018).

> a court would likely conclude that it was overbroad and void for vagueness.[4]

The Attorney General of South Carolina agreed with the Texas Attorney General, concluding 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."[5] The Attorney General of Louisiana wrote that "a court would likely find ABA Model Rule 8.4(g) unconstitutional under the First and Fourteenth Amendments."[6] And the Tennessee Attorney General stated that "Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution."[7] In addition, the Attorney General of Arizona, in a Comment filed with the Arizona Supreme Court, wrote that the Rule "raises significant constitutional concerns."[8] To the author's knowledge, no state Attorney General has issued an opinion that the Rule is constitutionally firm.

In addition to constitutional issues, critics have also raised concerns that the Rule impinges upon attorneys' professional autonomy in client selection decisions, regulates attorney conduct outside the legitimate interests of attorney regulation, and conflicts with other professional rules and obligations.

This article will address the new ABA Model Rule 8.4(g) and will apply it to professional circumstances matrimonial lawyers, in particular, may face. Part I provides an introduction to the substance of the new Rule. Part II discusses the free speech concerns the Rule raises, particularly issues of vagueness, overbreadth, viewpoint discrimination, and the chilling of attorney speech. Part III discusses the free exercise concerns the Rule presents. Part IV raises concerns that the new Rule may interfere with the historically recognized right of attorneys to make unfettered client selection decisions. Part V discusses concerns

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4 Tex. Att'y Gen. Op. KP-0123 at 8 (Dec. 20, 2016).

5 S.C. Att'y Gen. Op. at 15 (May 1, 2017).

6 La. Att'y Gen. Op. 17-0114 at 9 (Sept. 8, 2017).

7 Tenn. Att'y Gen. Op. No. 18-11 at 5 (Mar. 16, 2018).

8 Ariz. Att'y Gen.'s Comment to Petition to Amend ER 8.4, Rule 42, Ariz. Rules of the Sup. Ct., R-17-0032 (May 21, 2018).

that the new Rule allows professional disciplinary authorities to punish attorneys for conduct that is outside the legitimate regulatory interests of the bar. Part VI addresses concerns that the new Rule conflicts with a lawyer's other professional obligations. And, finally, Part VII addresses how these concerns may apply particularly to matrimonial lawyers. The article will conclude that ABA Model Rule 8.4(g), if adopted in a state, will raise constitutional free speech and free exercise concerns for matrimonial attorneys, infringe upon matrimonial lawyers' client and case selection decisions, and conflict with matrimonial lawyers' other rights and professional obligations.[9]

I. The New Rule

Rule 8.4(g) of the ABA Model Rule of Professional Conduct provides as follows:

> It is professional misconduct for a lawyer to: . . . (g) 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 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.[10]

And the three new Model Comments to Model Rule 8.4(g) provide:

> **Comment [3]** – Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession 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).

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9 Some of the content of this article is extracted from other material written, in whole or in significant part, by the author, including comments on ABA Model Ruled 8.4(g) submitted to various state supreme courts, committees, and other entities that have considered the Rule and statements on the Rule adopted by various legal organizations.

10 MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

> **Comment [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.
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> **Comment [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 or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). 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).[11]

To set the stage for what follows, there are several important things to note about the new Rule.

First is that Rule 8.4(g) – for the first time – inserts a black-letter non-discrimination/non-harassment provision into the Model Rules. Prior to the adoption of Model Ruled 8.4(g), the only non-discrimination provision in the Model Rules appeared in Comment [3] to Rule 8.4(d). Model Rule 8.4(d) provides that "It is professional misconduct for a lawyer to: . . . engage in conduct that is prejudicial to the administration of justice."[12] And previous Model Comment [3] to ABA Model Rule 8.4 provided 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 paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's find-

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11 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3-5.

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

> ing that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[13]

It is important to note that the previous Comment [3] – which has now been deleted from the Model Rules – only prohibited bias or prejudice "in the representation of a client" and, then, only if such bias or prejudice "prejudiced the administration of justice."

Second, the new Rule enlarges the number of protected classes. The previous Comment [3] to Rule 8.4(d) applied only to bias or prejudice based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, and socioeconomic status. The new Rule adds gender identity and marital status.

Third, unlike the previous Comment [3] to Rule 8.4(d), which prohibited bias or prejudice only with respect to an attorneys' conduct "in the representation of a client," the new Rule prohibits harassment or discrimination in any conduct "related to the practice of law."

And fourth, the new Rule – unlike the previous Comment [3] to Rule 8.4(d) – is untethered from any requirement that the proscribed speech or conduct prejudice the administration of justice.

Therefore, the new Rule 8.4(g) not only elevates the non-discrimination provision into the blackletter of the attorney misconduct rule, it is also much wider in scope – in several important respects – than the previous non-discrimination Comment.

Likewise, there are several important things to note about the new Comments to Rule 8.4(g). The first thing to note is that Comment [3] of the new Rule defines the term "discrimination" quite broadly. According to the Comment, discrimination includes "harmful verbal or physical conduct that manifests bias or prejudice towards others."[14] Similarly, Comment [3] defines the term "harassment" very broadly as well. Harassment includes not only sexual harassment, but also any "derogatory or demeaning verbal or physical conduct."[15]

The second thing to note is that Comment [4] of the new Rule defines the phrase "conduct related to the practice of law" very broadly. The phrase includes not only those sorts of profes-

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13 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3.

14 MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

15 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3.

sional activities usually associated with the practice of law – such as representing clients and interacting with witnesses, court personnel, and other lawyers while engaged in law practice – but also encompasses law firm employment practices, as well as participation in bar association, business, and even social activities.[16]

The breadth of the Rule has led to many concerns that the Rule is unconstitutional, impinges on the historically recognized right of attorneys to choose their own clients, regulates conduct outside the legitimate interests of the bar, and conflicts with other professional rules. Each of these concerns are discussed below.

II. Concerns that the Rule Violates Attorney Free Speech Rights

A. *Attorneys Have First Amendment Free Speech Rights When Acting in a Professional Capacity*

More than fifty years ago the U.S. Supreme Court held that lawyers do not surrender their First Amendment speech rights when they enter the legal profession.[17] In fact, the Supreme Court specifically held that, notwithstanding the state's interest in the regulation of the legal profession, a state may not, under the guise of prohibiting professional misconduct, ignore attorneys' constitutional rights and that regulatory measures, no matter how sophisticated, cannot be employed, in purpose or in effect, to stifle, penalize, or curb the exercise of lawyers' First Amendment rights.[18] Over a quarter century later, the Supreme Court of Tennessee made a similar observation, holding that an attorney's statements – even though disrespectful and in bad taste – were nevertheless protected speech and that use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights.[19] In so holding, the court stated that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court,

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16 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 4.

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

18 *Id.* at 439.

19 Ramsey v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., 771 S.W.2d 116 (Tenn. 1989).

does not create a chilling effect on First Amendment rights."[20] A few years later, the U.S. Court of Appeals for the Ninth Circuit stated that the substantive evil must be extremely serious and the degree of imminence of danger must be extremely high before an attorney's utterances can be punished under the First Amendment.[21]

It is interesting to note that even the ABA – the organization that adopted Model Rule 8.4(g) – recently argued that attorneys' professional speech is protected under the First Amendment. In an amicus brief it filed in a case challenging a law prohibiting physicians from questioning their patients as to the patients' gun ownership, the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates professional speech.[22] "On the contrary" – the ABA stated – "much speech by professionals . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect."[23] The ABA went on to write: "Simply put, States should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession."[24] The ABA rightly observed that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created."[25]

Importantly, the U.S. Supreme Court recently reiterated that a lawyer's non-commercial professional speech is fully protected under the First Amendment. In *National Institute of Family & Life Advocates v. Becerra*, the Court rejected California's

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20 *Id.* at 121.

21 Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1444 (9th Cir. 1995).

22 En Banc Brief of Am. Bar Ass'n as Amicus Curiae in Support of Plaintiffs-Appellees Dr. Bernd Wollschlaeger, et al. and Affirmance, Wollschlaeger v. Governor of Fla., 848 F.3d 1293 (11th Cir. 2017) (No. 12-14009), 2016 WL 3011484.

23 *Id.*

24 *Id.*

25 *Id.*

argument that professional speech deserved less protection than other speech, stating that:

> this Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . . The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[26]

The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal profession, and states may not ignore attorneys' constitutional rights under the guise of professional regulation, including in their Rules of Professional Conduct. For that reason, it is appropriate to ask whether a Rule of Professional Conduct – such as ABA Model Rule 8.4(g), that prohibits derogatory, demeaning, or harmful speech related to the practice of law – might unconstitutionally infringe on attorneys' First Amendment rights.

B. *Concerns That Rule 8.4(g) Is Void for Vagueness*

Under due process principles, an enactment is void for vagueness if its prohibitions are not clearly defined.[27] Vague laws are problematic for several reasons.

First, simple fairness demands that laws give people a reasonable opportunity to know what the law prohibits, so that they may intelligently direct their actions to comply with the law. "Vague laws may trap the innocent by not providing fair warning."[28]

Second, if laws do not provide explicit standards of application, they create situations where the state can apply those laws in an arbitrary and discriminatory manner.[29]

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26 National Inst. of Family & Life Advocates v. Becerra, 138 S. Ct 2361, 2374 (2018) (citations omitted).

27 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

28 *Id.*

29 *Id.* at 108-09.

And third, where a vague law encounters basic First Amendment rights, that law interferes with the exercise of those freedoms. Faced with a law of uncertain parameters, citizens will steer wide of the unlawful zone – thereby chilling their free speech – for fear of inadvertently straying into behavior that may violate the law.[30]

1. *The Term "Harassment" Is Unconstitutionally Vague.*

Rule 8.4(g) prohibits attorneys from engaging in harassment on the basis of any of the protected classes. But the term "harassment" is not defined in the Rule itself.

Some courts have determined that the term "harass" – standing alone – is unconstitutionally vague.[31]

Model Comment [3] attempts to define the term "harassment," explaining that harassment "includes derogatory or demeaning verbal or physical conduct."[32] But far from clarifying what the Rule means in prohibiting "harassment," terms such as "derogatory" and "demeaning" are themselves so subjective as to be unconstitutionally vague. What constitutes "demeaning" or "derogatory" speech to one person may very well not to another. Indeed, some courts have agreed, finding terms such as these unconstitutionally vague.[33]

The Attorney General of Texas has opined that the term "harassment" in the Rule is so unclear as to open the Rule up to invalidation on vagueness grounds.[34] The Attorney General of

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30 *Id*. at 109.

31 State v. Bryan, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses" in a stalking statute, without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). *See also* M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

32 Model Rules of Prof'l Conduct R. 8.4 cmt. 3.

33 Hinton v. Devine, 633 F. Supp. 1023, 1033 (E.D. Pa. 1986) (holding that where an Executive Order referred to "derogatory information" in loyalty investigations, without defining that term,"[i]t is difficult to imagine a regulation more vague."); Summit Bank v. Rogers, 142 Cal. Rptr. 3d 40 (Cal. Ct. App. 2012) (deciding that a statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

34 Tex. Att'y Gen. Op., *supra* note 4, at 6.

South Carolina agrees.[35] The Attorney General of Tennessee wrote that "the term 'harassment' [is] impermissibly vague."[36] And the Louisiana Attorney General opined that a court could find the term "harassment" to be unconstitutionally vague.[37]

2. *The Term "Discrimination" Is Unconstitutionally Vague.*

The term "discrimination" as used in the Rule fares little better than "harassment."

Many statutes and ordinances, of course, prohibit discrimination, in a variety of contexts. But, usually, such statutes and ordinances spell out what specific behavior constitutes discrimination.

For example, Title VII sets forth in some detail what employers are prohibited from doing, providing that:

> It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin.[38]

The federal Fair Housing Act does the same, providing that:

> [I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.[39]

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35 S.C. Att'y Gen Op., *supra* note 5, at 7.

36 Tenn. Atty'y Gen. Op., *supra* note 7, at 8.

37 La. Att'y Gen. Op., *supra* note 6, at 8.

38 42 U.S.C. § 2000e-2 (2012).

39 42 U.S.C. § 3604 (2012).

The Fair Housing Act also provides precise definitions of important terms used in the Act, such as "dwelling," "person," "to rent," and "familial status."[40]

Model Rule 8.4(g), however, provides no such guidance. Instead, the Rule leaves it up to each individual attorney to determine what particular speech or conduct may be considered discriminatory.

Model Comment [3] attempts to expand upon what the Rule means by "discrimination" but, just like the Comment's gloss on the term "harassment," the Comment falls short, providing that the term "discrimination" includes "*harmful* verbal or physical conduct that manifests bias or prejudice towards others."[41] It is a legitimate question to ask where the line is between speech that is "harmful" and speech that is not? In a similar context, the Ninth Circuit Court of Appeals determined that a rule of professional conduct requiring attorneys to "abstain from all offensive personality" was unconstitutionally vague because it would be impossible for an attorney to know when such behavior would be offensive enough to invoke the statute.[42] The same could be said with respect to a rule that prohibits attorneys from engaging in "harmful" speech or conduct that manifests bias or prejudice. What, exactly, constitutes "harm," and when does the speech or conduct manifesting bias or prejudice become harmful enough to invoke the Rule?

The Attorneys General of Texas, South Carolina, Tennessee, and Louisiana have all opined that the term "discrimination" in the Rule is so unclear as to subject the Rule to invalidation on vagueness grounds.[43]

3. *The Phrase "Conduct Related to the Practice of Law" Is Unconstitutionally Vague*

Unlike the prior Comment [3] to Model Rule 8.4(d) – which applied Rule 8.4(d) only to an attorney's conduct while "in the course of representing a client" – Rule 8.4(g) applies to any at-

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40 42 U.S.C. § 3602 (2012).

41 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (emphasis added).

42 United States v. Wunsch, 84 F.3d 1110 (9th Cir. 1996).

43 La. Att'y Gen. Op., *supra* note 6, at 8; S.C. Att'y Gen. Op., *supra* note 5, at 8; Tenn. Att'y Gen. Op., *supra* note 7, at 8; Tex. Att'y Gen. Op., *supra* note 4, at 6.

torney speech or conduct "related to the practice of law." The meaning of that phrase too, is difficult to decipher.

Model Comment [4] of the new Rule makes clear that the Rule's concept of conduct "related to the practice of law" extends quite far, including not only speech and conduct falling within activities widely-recognized as associated with the practice of law, such as "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law," but also extending to a lawyer's employment practices, bar association activities, and – perhaps most controversially – even "business or social activities in connection with the practice of law."[44] And it bears noting that this list of activities "related to the practice of law" is an explicitly non-exclusive one. Other attorney speech and conduct are also included, but left undefined.

The Attorney General of Texas has opined that the phrase "conduct related to the practice of law" in the Rule is so unclear as to open the Rule up to invalidation on vagueness grounds.[45] The Attorney General of South Carolina agrees.[46] And the Tennessee Attorney General asked, "[b]ut how is an attorney to know whether certain speech or conduct will be deemed sufficiently 'related to the practice of law' to fall within the ambit of the proposed rule."[47]

In fleshing out this issue, would conduct related to the practice of law include an attorney's attendance at a neighborhood block party, if the attorney attends the block party – at least in part – in the hope of establishing relationships that might eventually bring legal work to the lawyer's firm? Or what if an attorney is asked to serve on the governing board of the attorney's church, synagogue, temple, or mosque, not because of the fact that the attorney is an attorney, per se, but with the expectation that the attorney would be able to bring the attorney's legal expertise and leadership skills to the board's business, if and when required? Is an attorney's service on such a governing board, under such circumstances, related to the practice of law? If the answer to these questions is yes, then it illustrates the Rule is very broad. If one

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44 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 4.

45 Tex. Att'y Gen. Op., *supra* note 4, at 6.

46 S.C. Att'y Gen. Op., *supra* note 5, at 7.

47 Tenn. Att'y Gen. Op., *supra* note 7, at 8.

is unable to determine whether such circumstances would be related to the practice of law or not, it demonstrates that the Rule is quite vague. If the answer to these questions is "no," supporters of the Rule would have to explain why not. After all, an argument could be made that both these circumstances would be "related to the practice of law."

C. *Concerns That Rule 8.4(g) Is Unconstitutionally Overbroad*

Even if an enactment is otherwise clear and precise in what it prohibits, it may still be constitutionally infirm should its reach be so overbroad as to prohibit constitutionally protected speech or conduct.[48]

Speech is not unprotected merely because it is harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects.[49] Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[50] The government's attempt to prevent speech expressing ideas that offend strikes at the very heart of the First Amendment.[51]

Courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad.[52] In fact, in a different context, the Third Circuit Court of Appeals found that a school anti-harassment policy banning any unwelcome verbal conduct that offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, was facially unconstitutional, stating:

> there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, includ-

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48 *Grayned*, 408 U.S. at 114.

49 Snyder v. Phelps, 562 U.S. 443, 458 (2011).

50 Texas v. Johnson, 491 U.S. 397, 414 (1989).

51 Matal v. Tam, 137 S. Ct. 1744, 1764 (2017).

52 *Hinton*, 633 F. Supp. 1023 (holding that the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 142 Cal. Rptr. 3d 40 (finding that a statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech).

> ing statements that impugn another's race or national origin or that denigrate religious beliefs. . . . When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.[53]

There is no categorical rule divesting "harassing" speech of First Amendment protection.

Ethics Counsel Ann Ching and Senior Ethics Counsel Lisa Panahi of the Arizona State Bar acknowledge the broad reach of the Rule. They state that an attorney could be professionally disciplined under the Rule for telling an offensive joke at a law firm dinner party.[54]

The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided another example of the broad reach of the Rule. "If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status."[55]

It would seem, however, that the speech in both these examples would clearly be constitutionally protected. So the Rule would sweep within it protected speech.

There are two concerns with overbreadth. The first is that an overbroad law will subject a speaker to punishment for engaging in constitutionally protected speech.[56] The Rule would appear to do that.

The second concern with overbreadth, though, is just as problematic, and perhaps more dangerous from a free speech standpoint, and that is that an overbroad law will chill speech[57] – the very danger the overbreadth doctrine is designed to prevent.

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53 Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206-210 (3d Cir. 2001).

54 Ann Ching & Lisa M. Panahi, *Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)*, 53 ARIZ. ATT'Y 34 (Jan. 2017).

55 Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" but Not Diversity of Thought*, 191 Legal Memorandum, The Heritage Foundation 4 (Oct. 6, 2016).

56 *Grayned*, 408 U.S. at 114-15.

57 Massachusetts v. Oaks, 491 U.S. 576, 581 (1989)(explaining that the overbreadth doctrine is predicated on the danger that an overly broad statute may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of sanctions).

If a lawyer believes he can be disciplined for engaging in certain sorts of speech – even if that speech might be constitutionally protected – the lawyer might very well elect not to speak at all, thereby surrendering a constitutional right, for fear of being subject to a professional complaint and possible professional discipline.

One can easily see how the Rule could chill attorney speech. If an attorney contemplates engaging in speech, in light of Rule 8.4(g) she would be wise to ask herself whether anyone could consider what she is about to say "discriminatory," "harassing," "derogatory," "demeaning," or "harmful." And, if there is any possibility someone could perceive the speech in that way, the lawyer would be tempted to take the safer route of not speaking at all, rather than speaking and later having to defend her constitutional free speech rights in a professional disciplinary proceeding.

The ACLU of New Hampshire has commented on this issue, writing that the Rule:

> is overbroad and could capture within its scope speech that is protected under the First Amendment . . . For example, [it] could potentially sweep within its scope a panelist at a state bar function or CLE conference engaging in 'verbal . . . conduct' that 'manifests bias or prejudice' toward LGBTQ individuals, Christians, women, or men. Given the pervasiveness of bias and its often implicit or unconscious nature, this is a potentially sweeping prohibition.[58]

The Attorneys General of Texas, South Carolina, Louisiana, and Tennessee all found that the Rule was unconstitutionally overbroad. The Attorney General of Texas opined that "Because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable."[59] The Attorney General of South Carolina agrees.[60] The Louisiana's Attorney General wrote, "It is therefore our opinion that ABA Model Rule 8.4(g) is unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally pro-

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58 Letter from ACLU of New Hampshire to the New Hampshire Supreme Court Advisory Committee on Rules re: Proposed New Hampshire Rule of Professional Conduct 8.4(g) at 2 (May 31, 2018).

59 Tex. Att'y Gen. Op., *supra* note 4, at 5.

60 S.C. Att'y Gen. Op., *supra* note 5, at 8.

tected speech and conduct."[61] And the Attorney General of Tennessee concluded that Rule 8.4(g) "would sweep in a substantial amount of attorney speech" and "would undoubtedly chill attorneys from engaging in speech in the first place."[62]

D. *Concerns That Rule 8.4(g) Constitutes Unconstitutional Viewpoint Discrimination*

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the Rule may also constitute an unconstitutional content-based speech restriction.[63] The U.S. Supreme Court recently addressed this issue in *Matal v. Tam*.[64] In that case the Court found that a Lanham Act provision prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" was facially unconstitutional because it was a species of viewpoint discrimination. The Court determined that "[g]iving offense is a viewpoint"[65] so that such a provision – even when applied to a racially derogatory term – "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[66]

In a concurring opinion, Justice Kennedy described the constitutional infirmity of the Act's disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'"[67] The problem, he pointed out, was that under the disparagement provision, "an applicant may register a positive or benign mark but not a derogatory one" and that "The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This the essence of viewpoint discrimination."[68]

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61 La. Att'y Gen. Op., *supra* note 6, at 6.

62 Tenn. Att'y Gen. Op., *supra* note 7, at 8.

63 Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456 (S.D. N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

64 *Matal*, 137 S. Ct. 1744.

65 *Id*. at 1763 (Kennedy, J., concurring).

66 *Id.* at 1751 (majority opinion).

67 *Id.* at 1766 (Kennedy, J., concurring)(citations omitted).

68 *Id*.

Similarly, under Model Rule 8.4(g), attorneys may engage in positive or benign speech, but not "derogatory," "demeaning," or "harmful" speech.[69] Thus, it can be convincingly argued that under the Supreme Court's *Matal* decision, Model Rule 8.4(g)'s prohibitions constitute viewpoint discrimination and, therefore, are presumptively unconstitutional.

The late Professor Rotunda used the following hypothetical as an example of how the new ABA Rule may constitute an unconstitutional content-based speech restriction:

> At a[ ] bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, "Black lives matter." Another responds, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime." A third says, "All lives matter." Finally, another lawyer says (perhaps for comic relief), "To make a proper martini, olives matter." The first lawyer is in the clear; all of the others risk discipline.[70]

Other examples of how Model Rule 8.4(g) may constitute viewpoint based discrimination come easily to mind. For example, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that constitutes discrimination on the basis of sexual orientation or marital status, while a lawyer who speaks in favor of same-sex marriage would not be. Or, an attorney who speaks favorably about a particular religious belief would not be in violation of the Rule, whereas a lawyer who speaks unfavorably about a religious belief may have violated the Rule's prohibition on discrimination on the basis of religion. Or, an attorney who blames individual poverty on capitalism would not be in violation of the Rule, but an attorney who blames poverty on individuals' bad financial choices may be in violation of the Rule for having engaged in discriminatory speech based on socioeconomic status.

These examples illustrate how the Rule may constitute a presumptively unconstitutional content-based speech restriction – which has led some critics to characterize the Rule as a speech code for lawyers.[71] Indeed, in some states that have modified

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69 MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

70 Rotunda, *supra* note 55.

71 Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express "Bias," Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/

their Rules to include black-letter discrimination rules, those rules have already been enforced as free-standing speech codes. For example, in Indiana, an attorney was professionally disciplined merely for asking someone if they were "gay."[72] Another Indiana attorney had his license suspended for applying a racially derogatory term to himself.[73] In neither case did the court find that the attorneys' speech had prejudiced the administration of justice or rendered the attorneys unfit. It was sufficient that the attorneys had engaged in speech, the content of which was considered to have manifested bias or prejudice.

III. Concerns that the Rule Will Violate Attorney Free Exercise Rights

Some commentators have contended that Model Rule 8.4(g) will also violate attorneys' free exercise of religion and freedom of association rights. The national Catholic Bar Association, for example, has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional, but that it is "incompatible with Catholic teaching and the obligations of Catholic lawyers."[74]

The Attorney General of Texas has opined that "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."[75] The Attorney General of South Carolina agrees.[76] The Tennessee Attorney General wrote that the Rule "would also interfere with attorneys' First Amendment right to free exercise of religion."[77] And the Attorney General of Louisiana opined that the Rule "could also result in lawyers being punished for practicing their religion."[78]

The ACLU of New Hampshire has also raised concerns with respect to this issue, stating that "the rule could also implicate advocacy by lawyers who represent religious organizations and

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10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.66a7d64e4dcf.

72 *In re* Kelley, 925 N.E.2d 1279 (Ind. 2010).

73 In the Matter of McCarthy, 938 N.E.2d 698 (Ind. 2010).

74 Catholic Bar Association Board of Trustees Resolution (May 21, 2018).

75 Tex. Att'y Gen. Op., *supra* note 4, at 4.

76 S.C. Att'y Gen. Op., *supra* note 5, at 8.

77 Tenn. Att'y Gen. Op., *supra* note 7, at 9.

78 La. Att'y Gen. Op., *supra* note 6, at 7.

who are giving advice based on that organization's faith, as one person's religious tenet could be another person's manifestation of bias."[79]

In this regard it is relevant to note that the Rule contains no exception for religiously motivated speech or conduct, nor does the Rule contain any exception for religiously-based legal organizations. As an illustration of this problem, the late Professor Rotunda posited the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. Professor Rotunda explained that, if the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. In fact, he pointed out, attorneys might be in violation of the Rule merely for being members of such an organization.[80] This issue will be more fully discussed in Section VII.E. below.

IV. Concerns that the Rule Will Interfere with Attorneys' Client Selection Decisions.

In addition to concerns that ABA Model Rule 8.4(g) may infringe upon attorneys' constitutional rights, many scholars have raised a concern that the Rule will interfere with a lawyer's client and case selection decisions by subjecting attorneys to professional discipline for having declined or withdrawn from representation on a basis that, under the terms of the Rule, could be considered discriminatory or harassing – that is, derogatory, demeaning, or harmful.

A straightforward reading of the Rule leads to the conclusion that an attorney's client and case selection decisions will fall within the Rule's purview. The Rule, by its own terms, reaches any attorney speech or conduct "related to the practice of law." A lawyer's client and case selection decisions are certainly "related to the practice of law." Therefore, the Rule appears on its face to prohibit attorneys from declining representation if to do

79 Letter from the ACLU of N.H., *supra* note 58.

80 Rotunda, *supra* note 55, at 4-5.

so would constitute discrimination or harassment, as those terms are used in the Rule.

And the provision of the Model Rule that reads: "This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16,"[81] does not change this result, because Model Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline.

Rule 1.16 addresses three circumstances in which an attorney is *prohibited* from representing a client, namely: "(a) if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in violation of the Rules of Professional Conduct or other law."[82] None of these circumstances addresses an attorney's decision not to represent a client because the attorney does not want to represent the client. Rule 1.16 only addresses the opposite situation – namely, in what circumstances an attorney who otherwise *wants* to represent a client *may not* do so. Therefore Rule 1.16 does not provide an exception from the Rule for client selection decisions

Further, it is now quite clear from the Vermont Supreme Court's adoption of the new Model Rule that the Rule will apply to an attorney's client selection decisions. In its *Reporter's Notes* to its adoption of Rule 8.4(g), the Vermont Supreme Court explicitly addresses Rule 1.16's relation to Rule 8.4(g). Although the Court's language is somewhat confusing, a fair reading of it is that Rule 1.16's provisions "must also be understood in light of Rule 8.4(g)" so that an attorney's client decisions "cannot be based on discriminatory or harassing intent without violating that rule."[83] At least one other jurisdiction – New York – has come to a similar conclusion.[84]

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81 MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

82 MODEL RULES OF PROF'L CONDUCT R. 1.6.

83 *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017.

84 *See, e.g.*, N.Y. Ethics Op. 1111 (N.Y. St. B. Assn. Comm. Prof. Ethics 2017), 2017 WL 527371)("Rule 8.4(g) . . . may limit a lawyer's freedom to decline representation").

V. Concerns that the Rule Will Punish Attorneys for Conduct Outside the Legitimate Regulatory Interests of the Bar

Prior to the adoption of subsection (g), Model Rule 8.4 appeared to recognize that attorney misconduct within the legitimate interests of the profession extended only to attorney conduct that, if not prohibited, would either adversely impact an attorney's fitness to practice law or would prejudice the administration of justice.

The list of prohibited conduct under Model Rule 8.4(a) – (f) illustrate this principle. Prior to the adoption of subsection (g), prohibited conduct under Rule 8.4 was limited to:

(a) Violating or attempting to violate the Rules of Professional Conduct;
(b) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) Engaging in conduct that is prejudicial to the administration of justice;
(e) Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; and
(f) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[85]

All of these prohibitions concern attorney conduct that, if not prohibited, could either prejudice the administration of justice or render the attorney unfit to practice law.

A good example of the more constrained nature of Model Rule 8.4 prior to the adoption of subsection (g), is Model Rule 8.4(b). That Rule makes it a violation of the Rules for a lawyer to commit a criminal act. But, importantly, not every criminal act constitutes a violation of Rule 8.4(b) – only "criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or

85 MODEL RULES OF PROF'L CONDUCT R. 8.4.

fitness as a lawyer in other respects."[86] As Model Comment [2] to Rule 8.4(b) provides: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[87]

But Model Rule 8.4(g) is not so constrained. Under Model Rule 8.4(g), any act of discrimination or harassment constitutes a violation of the Rule[88] – without regard to whether such discrimination or harassment is unlawful, or reflects adversely on the lawyer's fitness, or prejudices the administration of justice. This has led some critics of the Rule to complain that Rule 8.4(g) purports to regulate types of attorney behavior that are outside the legitimate interests of the legal profession.

The two Indiana cases discussed above illustrate this issue. In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. Indeed, in neither case did the court even inquire as to what, if any, actual adverse effect the offending behavior might have had on attorney fitness or the administration of justice. In both cases it was deemed sufficient that the attorneys had used language that the disciplinary authorities considered offensive, as manifesting bias or prejudice.[89]

VI. Concerns that the Rule Will Conflict with Other Professional Obligations and Rules of Professional Conduct

Some critics of the Rule complain that Rule 8.4(g) conflicts with other professional obligations and Rules of Professional Conduct.

For example, Model Rule 1.7 provides that:

> (a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsi-

86 MODEL RULES OF PROF'L CONDUCT R. 8.4(b).

87 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2.

88 MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

89 *Kelley*, 925 N.E.2d 1279; *McCarthy*, 938 N.E.2d 698.

> bilities to another client, a former client or a third person or by a personal interest of the lawyer.[90]

And the *Restatement (Third) of the Law Governing Lawyers* clarifies that: "A conflict under this Section need not be created by a financial interest. . . Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs."[91]

To the extent Rule 8.4(g) requires an attorney to accept clients and cases that run counter to the attorney's deeply held religious, philosophical, political, or public policy beliefs, while Rule 1.7 prohibits the attorney from accepting such clients or cases, Rule 1.7 and Rule 8.4(g) conflict.

Similarly, Model Rule 1.3 requires that a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[92] "Zeal" means "eagerness and ardent interest in pursuit of something." Synonyms are "passion" and "fervor."[93]

Critics of the Rule contend that an attorney would not be able to zealously represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs. To the extent that Rule 8.4(g) would require an attorney to represent a client the attorney could not represent zealously, Rule 8.4(g) and Rule 1.3 conflict.

Model Rule 6.2 provides that "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause: such as: . . . (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."[94] And Model Comment [1] to Rule 6.2 sets forth the general principle that "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."[95]

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90 MODEL RULES OF PROF'L CONDUCT R. 1.7.

91 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125, Comment C (Am. Law. Inst. 2000).

92 MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 1.

93 *Zeal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/zeal (last visited Oct. 13, 2018).

94 MODEL RULES OF PROF'L CONDUCT R. 6.2.

95 MODEL RULES OF PROF'L CONDUCT R. 6.2, cmt. 1.

Again, critics of the Rule point out that Rule 8.4(g) and Rule 6.2 conflict because Rule 8.4(g) may require an attorney to represent a client or cause the attorney finds so repugnant as to likely impair the client-lawyer relationship, while Rule 6.2 provides that an attorney should avoid representing such a client.

Finally, Rule 1.16(a)(1) provides that: "(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law."[96] As already discussed, Rule 1.7 prohibits an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct. But Rule 8.4(g) will require attorneys to accept clients and cases that – due to the attorney's personal beliefs about the client or the case – the attorney would otherwise have to decline. For that reason, critics of the Rule contend that Rule 1.16 and Rule 8.4(g) conflict.

VII. Matrimonial Lawyers and Model Rule 8.4(g)

In addition to the concerns the new Model Rule raises with respect to attorney conduct in general, it is important to note what Model Rule 8.4(g) might mean for matrimonial lawyers in particular. Posing the following questions will serve to bring this issue into focus.

Under Model Rule 8.4(g), may a matrimonial lawyer restrict his or her practice to representing only men – or only women – in divorce actions?

May a matrimonial attorney who practices adoption law and who has sincerely held religious, philosophical, or public policy beliefs that adoptive children should not be placed with adoptive parents unless those parents are in a stable marriage and have a certain level of income, decline – under the Rule – to represent adopting parents who are not married, or who have not been married long, or do not meet the attorney's income criteria?

May a matrimonial attorney who has a sincerely held religious belief that marriage is only between one man and one wo-

96 MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1).

man, or that only married opposite-sex couples should be eligible to adopt children, or that children with a particular religious belief should only be placed with adoptive parents sharing that religious belief, express that view at a law firm dinner party, or would doing so violate the new Rule?

May a matrimonial lawyer, participating on a CLE panel discussing "Hot Topics" in matrimonial law, criticize the U.S. Supreme Court's *Obergefell v. Hodges*[97] same-sex marriage decision on public policy grounds, without violating the new Rule?

Or may a matrimonial lawyer be a member of a religious legal organization which limits its membership to adherents of a particular religious faith – or would that violate the new Rule?

An analysis of these selected scenarios will shed light on how Model Rule 8.4(g) may impact matrimonial lawyers.

A. *Under the Model Rule 8.4(g), May a Matrimonial Lawyer Restrict His or Her Practice to Representing Only Men – or Only Women – in Divorce Actions?*

Model Rule 8.4(g) provides that: "It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sex."[98] And Comment [4] of the Rule explains that "Conduct related to the practice of law includes representing clients."[99] Further, Comment [3] of the new Rule provides that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[100]

If, then, a matrimonial attorney were to limit his or her practice to representing only men or only women in marriage dissolution actions, this would appear to facially violate the Rule, because an attorney providing marriage dissolution representation to only one sex would be manifesting bias or prejudice on the basis of sex in conduct related to the practice of law.

Comment [5] of the Rule provides that "A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to mem-

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97 135 S. Ct. 2584 (2015).

98 MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

99 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 4.

100 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3.

bers of underserved populations in accordance with these Rules and other law."[101] However, this exception would not appear to provide a safe harbor for matrimonial attorneys wishing to restrict their practices on the basis of sex, because one would be hard pressed to contend that men are members of an underserved population. In fact, it would probably also be just as true that a lawyer could not objectively contend that women are members of an underserved population either, at least as far as matrimonial law practice is concerned.

That being the case, it appears that the new Rule would preclude a matrimonial attorney from limiting his or her practice to representing only men – or only women – in divorce actions, as some matrimonial lawyers apparently do.[102]

Imagine then, a female matrimonial attorney who, due to having been a victim of domestic violence, or due to her particular feminist or public policy beliefs, does not want to represent men, and believes she cannot provide men with zealous representation, in divorce actions. Would forcing such an attorney to represent men be in the best interests of the men who seek her representation? How could such an attorney provide men with zealous, un-conflicted, and competent representation?

In fact, a circumstance in many ways similar to this hypothetical has actually been at issue in at least one reported case, albeit not in the context of a professional disciplinary proceeding. In *Stropnicky v. Nathanson*, the Massachusetts Commission Against Discrimination found that a female matrimonial attorney who, due to her feminist principles and other professional considerations, limited her divorce practice to representing only women, violated the Massachusetts Public Accommodations Statute, which prohibits sex discrimination in public accommodations.[103] And this was true despite the fact that attorney Nathanson offered what appeared to be legitimate professional reasons for her practice of representing only women in divorce actions.

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101 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 5.

102 *See, e.g.,* Florida Women's Law Group, https://floridawomenslawgroup.com/ (last visited Dec. 18, 2018); Kenny Leigh & Associates; www.menonlyfamilylawonly.com (last visited Dec. 18, 2018); Law Office of Mark Werner, www.azdivorceformen.com/ (last visited Dec. 18, 2018); The Law Offices of Paul H. Nathan, https://www.nathanlawoffices.com (last visited Dec. 18, 2018).

103 19 M.D.L.R. 39 (Mass. Comm'n Against Discrimination Feb. 25, 1997).

Given the fact that the *Nathanson* case involved a matrimonial attorney, the case is particularly relevant to one inquiry and, for that reason, deserves some sustained attention.

The facts of the case as set forth by the Commissioner who first heard the case are straightforward: Joseph Stropnicky was a man in the process of executing a divorce settlement agreement with his wife. The mediator who drafted the settlement agreement advised Mr. Stropnicky to have the agreement reviewed by an attorney and provided Stropnicky with a list of attorneys, including attorney Judith Nathanson, a female lawyer practicing family law in Lawrence, Massachusetts. When the complainant contacted Nathanson's office seeking to retain her to review the separation agreement, Nathanson's secretary informed him that Nathanson did not represent men in divorce proceedings. Mr. Stropnicky insisted on speaking with Nathanson and demanded that she return his call. Nathanson returned Stropnicky's phone call and explained that she would not review the separation agreement because she only represented women in divorce proceedings. She maintained this position even after Stropnicky told her that his marital circumstances were like those traditionally associated with women in divorce proceedings. Following their telephone conversation, Mr. Stropnicky sent Nathanson a letter stating that her "women only" divorce practice was discriminatory. He then filed a discrimination complaint against Nathanson with the Massachusetts Commission Against Discrimination. In response to his letter, Nathanson wrote Stropnicky a letter apologizing for offending him and offering to review his settlement agreement. However, Mr. Stropnicky declined Nathanson's offer because, given the circumstances, Stropnicky no longer felt confident that Nathanson would be able to represent his best interests. Stropnicky testified that respondent's gender-based policy made him feel angry, humiliated, and defeated.[104]

In the proceeding before the Massachusetts Commission Against Discrimination, attorney Nathanson explained the reasons she limited her divorce practice to representing women.

> Nathanson testified that she represented only women in divorce cases, in part, because she sought to devote her expertise to eliminating gender bias in the court system. She stated that the issues that arise in representing wives in divorce proceedings differ from those

104 *Id.*

> involved in representing husbands. By example, she noted that wives' attorneys emphasize the value of homemaker services and the limited future earning potential of homemakers re-entering the work force, while husbands' attorneys tend to minimize these issues. . .
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> Nathanson testified that she needs to feel a personal commitment to her client's cause in order to function effectively as an advocate, and that in family law she has only experienced this sense of personal commitment in representing women. She testified that her female divorce clients derive a specific benefit from her limited practice. They feel comfortable sharing their anxieties and concerns with an advocate whom they trust to be wholeheartedly as well as intellectually committed to their interests. Nathanson believes that her practice of advancing arguments only on behalf of women enhanced her credibility with judges she appeared before in the family law courts.
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> Nathanson testified that all of her potential clients undergo a screening process. She does not make a final decision about whether to represent a particular client in divorce proceedings without having spoken at length to the client about the matters in controversy and conferring with her partners. She would not represent women whose positions in divorce litigation were repugnant to her personal values. She testified that in other legal proceedings, not involving controversies between men and women, she has no ethical problem with representing men.[105]

The Commissioner found first, that "It is clear that Respondent's law office is an 'establishment' which 'dispenses personal services' to the public and solicits the business of clients. There is no practical reasons to determine why a law office should be viewed differently from the office of a doctor or dentist."[106] The Commissioner then found that:

> [T]he fact that Respondent provides a service and solicits the business of the general public is sufficient to place her business within the ambit of the statute. . . . The fact that Nathanson advertised her services to the general public and invited potential clients to consult with her at her place of business renders her business a place of public accommodation within the meaning of the statute and requires her to abide by the Commonwealth's anti-discrimination laws pertaining to such establishments[107]

Finally, the Commissioner determined that Nathanson's act of refusing to represent the complainant because the complainant was a man violated Massachusetts's anti-discrimination in

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105 *Id.*

106 *Id.*

107 *Id.*

public accommodations law, and awarded the complainant $5,000 in emotional distress damages.[108]

It is important to parse out the personal and professional reasons the attorney gave for her practice of representing only women in divorce actions. Her reasons were both professional and personal. On the personal side, Nathanson articulated that she would not represent any client – even a woman – whose legal position Nathanson found repugnant to her personal values. Thus, Nathanson raised in defense her right to practice law in accordance with her sincerely held ethical beliefs.

Nathanson also stated that she restricted her divorce practice to representing only women because she sought to devote her expertise to eliminating gender bias in the court system. Hence, attorney Nathanson raised in the defense of her right to practice law in accordance with her sincerely held political or public policy beliefs.

On the professional side, Nathanson raised several reasons for limiting her divorce practice to representing only women. First, Nathanson stated that, for her to function effectively as an advocate, she needed to feel a personal commitment to her client's cause, and she only felt that commitment in the divorce context when representing women.[109] In other words, the attorney raised as a defense that she could not fulfill her professional obligation to provide zealous representation if she did not personally feel committed to the client or the client's cause.

In addition, Nathanson stated that limiting her divorce practice to representing only women benefitted her clients in several distinct ways.[110] First, it created, essentially, a safe space for her clients, because knowing that their attorney represented only women in divorce actions enabled her clients to feel comfortable sharing their anxieties and concerns with an advocate whom they could trust to be wholeheartedly as well as intellectually committed to their interests. Second, Nathanson believed that her practice of advancing arguments only on behalf of women enhanced her credibility with judges she repeatedly appeared before in the family law courts. And finally, Nathanson believed that, because the issues that arise in representing wives in divorce proceedings

108 *Id.*
109 *Id.*
110 *Id.*

differ from those involved in representing husbands, she could be more effective – presumably from a professionally experiential perspective – in representing only wives in divorce proceedings.

However, none of the personal and professional reasons the attorney proffered in defense of her practice of declining to represent men in divorce proceedings convinced the Commissioner – or the Commission as a whole – that her practice ought to be recognized as legitimate in the context of a lawyer's family law practice.

What the Commissioner – and later the Commission as a whole – clearly held was that an attorney may not, without violating the anti-discrimination statute, limit her practice to representing only women in divorce actions, even if that practice was based upon otherwise legitimate professional reasons, such as to avoid personal conflicts of interest, practice within a chosen area of legal expertise, or to foster and protect client interests.

There has been extensive academic interest in this twenty year old case – and most of the academic commentary is critical of the decision.

For example, Harvard Law School Professor Martha Minow criticized the result in *Nathanson,* writing:

> I share the view . . . that as a matter of law, Nathanson should be allowed to turn down Stropnicky based on her commitment to eradicate gender bias in the realm of divorce law. The seemingly varied arguments grounded in statutory construction, freedoms of speech and association, a plethora of analogies, and assessments of what makes lawyers effective converge around a central idea: Lawyers bring too much of their own selves to the task of lawyering to be compelled to represent any particular individual. Lawyers are not like taxi drivers who must take all comers because lawyers transport clients with their words, reputations, and personal credibility, not with a standard-issue vehicle. Moreover, any other rule will simply lead to less honest (but perfectly lawful) rejections than the one Nathanson gave to Stropnicky. So any other result would promote lies by lawyers (not exactly what the world, needs) and probably insurmountable enforcement difficulties.[111]

Western New England College School of Law Professor Leora Harpaz defended attorney Nathanson's "women-only" practice under a *Hurley v. Irish-American Gay Lesbian and Bisexual*

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111 Martha Minow, *Foreword: Of Legal Ethics, Taxis, and Doing the Right Thing*, 20 W. NEW ENG. L. REV. 5, 6 (1998).

Group of Boston analysis.[112] Under that analysis, Professor Harpaz concluded that

> Ms. Nathanson's claim should succeed. First, she can demonstrate that her speech on behalf of the clients she has chosen to represent receives the full protection of the First Amendment. Second, her objection to representing Mr. Stropnicky is based on her political decision to support the rights of women. Third, she would be forced to communicate to the public a willingness to represent men in divorce matters and to advocate their rights, a message that is contrary to her self-selected message as an exclusive advocate of the rights of women. Fourth, because of her compelled representation of men, the public would perceive the pro-male message she would be forced to communicate as one endorsed by Ms. Nathanson, a message she would not be able to disclaim. Finally, the state cannot justify its interest in forcing Ms. Nathanson to communicate a state-favored message by its desire to eradicate discrimination in places of public accommodation.[113]

Western New England College School of Law Professor Bruce K. Miller also supported Nathanson's right to choose her clientele. He concluded that:

> Nathanson's decision to represent only women in divorce cases is protected by the First Amendment, not because she is entitled as a lawyer to indulge whatever biases she chooses in her selection of clients, but because, as a lawyer of integrity who has melded her personal values and professional skills in service to the profession's best ideals, she is entitled to represent her chosen clients as she sees fit.[114]
>
> Her limited refusal to accept men as clients is motivated as much by widely shared professional values as by her own commitment to gender justice. If Nathanson is warranted in believing that excluding men as divorce clients enhances her own commitment to her female clients, her clients' trust in her and her credibility with judges, then the exclusion is as integral to her obligation to represent her clients as effectively as she can as it is to her political commitment.[115]

In other words, Nathanson's "women-only" divorce practice serves the legitimate professional purpose of insuring that she provides effective legal counsel to her clients. It is important to

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112 Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

113 Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49 (1998).

114 Bruce K. Miller, *Lawyers' Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW. ENG. L. REV. 93, 101 (1998).

115 *Id*. at 100.

note that Professor Miller links Nathanson's "women-only" practice to her sincerely held political and philosophical views. In doing so, Professor Miller acknowledges that:

> This does not mean that Nathanson's argument would never be asserted by a lawyer whose choice of clients is motivated by racial, sexual, religious, or other forms of bigotry. A bigoted lawyer's political commitments are fully protected by an indispensable principle of First Amendment law: That the government may not discriminate among citizens on the basis of the viewpoints they hold. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 388-96 (1992). But under the argument advanced here, such a lawyer may invoke the First Amendment as a shield against the application of the antidiscrimination principle only if his/her discrimination in selecting clients also enhances the quality of the legal representation provided to the clients he/she does represent. For example, a lawyer, if there is one, whose practice is devoted to furthering the perceived common integrity of Aryan, Christian men could refuse representation to Blacks, Jews, and women. A racist, sexist, anti-Semitic commercial litigator, however, could not.[116]

Another Commentator – in support of Nathanson's practice of confining her divorce practice to representing only women – has argued that:

> it would be counterintuitive to prevail on a lawyer to act morally, to impose on him a duty to take on a representation he finds offensive, and then to require him to zealously represent that client in a manner that necessarily requires him to act offensively. This lawyer is in the classic "catch-22" situation. Therefore, discretion in choosing one's clients is essential for the lawyer whose goal it is to act morally. . . . It is also important to remember that the duty of zealous representation not only supports the prerogative of the lawyer in choosing her client, it also protects the potential client whom the lawyer is considering representing.[117]

Assistant Professor Gabriel J. Chin agrees, writing that:

> Because lawyers are important, and their mistakes not easily rectified, the ethical norms of the profession correctly discourage and arguably prohibit a lawyer from taking a case where their representation may be impaired. . . When Judith Nathanson said to Joe Stropnicky, "you're better off with somebody else," she not only gave advice of

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116 Miller, *supra* note 114, at 100 n.24.

117 Amy B. Letourneau, Stropnicky v. Nathanson: *Choosy Massachusetts Lawyers, Choose Your Fights with Care!*, 33 NEW ENG. L. REV. 125, 155-56 (1998).

> great practical value, she also complied with a principled ethical obligation of the profession.[118]

And the authors of another law review article agree that the result in *Nathanson* – coercing a lawyer to represent a client she does not want to represent – places

> Ms. Nathanson's personal beliefs in conflict with the requirements of zealous advocacy. . . lawyers who must zealously represent causes that are repugnant to their personal views cannot always reconcile the outward-looking and inward-looking aspects of professionalism. In this respect, a lawyer's professional and private sides are at war; a state in which the client suffers, the lawyer and profession suffer, and the administration of justice suffers.[119]

In short, many commentators believe there is something unique about what lawyers do, that renders it inappropriate to subject attorneys to public accommodation discrimination laws.

Of course, not all commentators agree. For example, the late Assistant Professor Chris Iijima questioned whether lawyers should be exempt from antidiscrimination laws, stating that "I believe that an institution and profession that would enforce society's decision to ban invidious discrimination, but consciously exempt itself from that ban neither fosters nor deserves the public trust."[120] Professor Iijima asserted that "If a client is confronted with an attorney who tells him that she will take his case only because she is forced to take it, and that the client's race or gender is repugnant to her . . . the more probable reality is that such a client will go elsewhere" unless the client has no alternative.[121]

As applied to ABA Model Rule 8.4(g), however, Professor Iijima's approach ignores three important factors. First is that, under an ABA Model Rule 8.4(g) regime, a client would never know an attorney has an objection to her, or her case, because the Rule would prohibit the attorney from even expressing that opinion to the client. Expressing that opinion would itself violate the Rule. Therefore, the Rule would not give the client the op-

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118 Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9, 16 (1998).

119 Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23, 35, 37-38 (1998).

120 *See, e.g.*, Chris K. Iijima, *When Fiction Intrudes upon Reality: A Brief Reply to Professor Chin*, 20 W. NEW ENG. L. REV. 73, 78 (1998).

121 *Id.* at 75.

tion of going elsewhere, because the client would never know of the attorney's animosity.

Second, Professor Iijima appears to be concerned only with prohibiting lawyers from engaging in "invidious" discrimination.[122] That is certainly a valid and laudable concern. However, public accommodation laws, and Rule 8.4(g), prohibit "discrimination" generally and comprehensively — not just "invidious discrimination." Nathanson's reasons for not wanting to represent men in divorce actions were not invidious – that is, unfair.[123] Rather, as noted above, she rejected them because she felt a calling to help women and believed, for arguably valid professional reasons, that limiting her practice to representing women allowed her to represent women in particularly effective ways, and that representing men would adversely affect her representation of women. For that reason, although attorney Nathanson's rejection of men as clients constituted "discrimination," it did not constitute invidious – that is "unfair" – discrimination. Because Rule 8.4(g) prohibits all discrimination – not just invidious discrimination – it is much broader and sweeps in much more attorney conduct than Professor Iijima's concerns would justify.

And third, Professor Iijima's analysis ignores the fact that an attorney who has a sincerely held religious, philosophical, political, or public policy belief contrary to the client or the client's case is *prohibited* by Model Rules 1.3 and 1.7 from representing that client. Indeed, Rules 1.3 and 1.7 would prohibit an attorney with such a conflict from representing the client even if the client has no other attorney to which to turn, a hypothetical situation so unusual as to rarely if ever exist. Further, Rules 1.3 and 1.7 would prohibit such representation even if the client wants to retain the attorney despite the attorney's personal conflict of interest, which even Professor Iijima admits would be improbable because a client would not want such an attorney to represent him. In fact, Rule 8.4(g) would create an unsolvable ethical conundrum, because on the one hand Rules 1.3 and 1.7 would prohibit a lawyer with a personal conflict of interest from representing the client, while on the other hand Rule 8.4(g) would both require the attorney to represent the client, as well as

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122 *Id.* at 78.

123 *Invidious*, DICTIONARY.COM, www.dictionary.com/browse/invidious (last visited Nov. 1, 2018).

prohibit the attorney from even disclosing to the client the attorney's conflict of interest, because merely expressing the grounds of the conflict to the client might itself constitute discrimination under the Rule.

For those reasons, Professor Iijima's analysis fails to confront the realities of how Rule 8.4(g) would, in fact, operate.

Another commentator – who argues that a family law practice limiting its representation to men should be both unlawful and constitute unprofessional conduct – has, for that reason, opined that *Nathanson* was correctly decided.[124] Citing *Nathanson*, she wrote that:

> "Men Only" law firms exhibit a facially discriminatory practice [and] when conduct is facially invalid, there is no need for further analysis. When attorney conduct is facially discriminatory, it should support a finding that it is unlawful, thus eliminating the need for a determination under anti-discrimination statutes and eliminating freedom of speech defenses.[125]

This author's analysis is unsatisfying for at least two reasons. First, it does not follow that a facially discriminatory policy is facially invalid. Take, for example, the fact that most law firms charge a specified hourly rate for their legal services. That rate structure is, by definition, facially discriminatory, discriminating as it does against all those who cannot financially afford that rate. But no one would suggest that such a rate policy was facially invalid merely because it was facially discriminatory, let alone – as the author suggests – that it either is or should be unlawful and constitute unprofessional conduct. If it were, nearly all attorneys would be engaged in unlawful and unprofessional behavior every day.

Second, the author's conclusion that facially discriminatory conduct eliminates free speech defenses is also unsupportable. As noted above, it does not follow that facially discriminatory conduct is unlawful. Nor does it follow that whatever the state brands as "unlawful" is constitutional. Indeed, many sorts of conduct the state brands "unlawful" are later ruled unconstitutional in violation of First Amendment speech protections. Al-

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124 Michelle N. Struffolino, *For Men Only: A Gap in the Rules Allows Sex Discrimination to Avoid Ethical Challenge*, 23 AM. U. J. GENDER SOC. POL'Y & L. 487 (2014).

125 *Id.* at 526.

though examples of that are so common and numerous as to obviate the need for authoritative citations to prove the point, one need only refer to the many cases cited in Section II above that do precisely that.

In short, branding an attorney's client selection decisions "discriminatory" does not necessarily render those decisions invalid, unlawful, or unprofessional. Nor does it immunize Model Rule 8.4(g) from claims that the Rule is constitutionally infirm. To that extent, the author's analysis leaves much to be desired.

Regardless – and despite all these commentators' positions for and against it – the *Nathanson* decision remains. So the question is – has ABA Model Rule 8.4(g) essentially adopted the same position on attorney-client selection decisions as the Commission adopted in *Nathanson*? The two seem indistinguishable.

As discussed above, Model Rule 8.4(g) prohibits attorneys from engaging in discrimination on the basis of any of the protected classes – including sex – in any conduct related to the practice of law. And, certainly, client selection decisions qualify as conduct related to the practice of law, both generally, as well as more specifically under Comment [4] to the new Rule. At least one commentator has pointed out that "[c]lient selection is an absolutely fundamental aspect of the practice of law requiring the lawyer to exercise professional knowledge, discretion, and judgment in determining whom to represent."[126] He argues that, if client selection does not fall within the ambit of the "practice of law," then why are the solicitation and selection of clients so heavily regulated? Why does the duty of confidentiality attach prior to the establishment of a formal attorney-client relationship? And why are attorneys regulated with respect to other non-clients, such as adverse parties, witnesses, judges, and other attorneys?[127]

Furthermore, as pointed out above, Vermont, the only state to have actually adopted Model Rule 8.4(g), seems to have made it clear that the new Rule will, indeed, apply to attorneys' client selection decisions.[128]

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126 Robert T. Begg, *Revoking the Lawyers' License to Discriminate*, 7 GEO. J. LEGAL ETHICS 275, 321 (1993).

127 *Id.* at 321-22.

128 *See supra* note 83.

That being the case, it seems evident that, in any state that adopts ABA Model Rule 8.4(g), a matrimonial attorney will be prohibited from restricting his or her practice to representing only men – or only women – in divorce actions or other areas of matrimonial law. And that, of course, would have the practical effect of prohibiting matrimonial attorneys from declining representation they would otherwise decline.

As pointed out above, such a result may very well conflict with other Rules of Professional Conduct to which attorneys are subject – such as the Rule prohibiting attorneys from representing clients with whom the attorney may have a personal conflict of interest. And for matrimonial attorneys in particular, this problem is accentuated by virtue of the fact that the American Academy of Matrimonial Lawyers' Bounds of Advocacy reiterates that representation under such circumstances is unprofessional. Section 3 of the Bounds reiterates the Model Conflict of Interest Rule,[129] providing that "A conflict exists if the representation of a client 'may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests'" and that "The influences that might dilute a matrimonial lawyer's loyalty to a client are unlimited."[130] But the Bounds goes further than the Model Rules. Section 2.7 of the Bounds of Advocacy specifically provides that "An attorney should not allow personal, moral or religious beliefs to diminish loyalty to the client or usurp the client's right to make decisions concerning the objectives of the representation."[131] And the Comment to Section 2.7 provides that:

> Attorneys would not be human without personal beliefs about issues affecting family law practice. No lawyer should be expected to ignore strongly held beliefs. . . .Therefore, the lawyer should withdraw from representation if personal, moral or religious beliefs are likely to cause the attorney to take actions that are not in the client's best interest.[132]

So, for matrimonial lawyers, the conflict between Model Rule 8.4(g) and professional rules prohibiting conflicts of interest

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129 MODEL RULES OF PROF'L CONDUCT R. 1.7.

130 Bounds of Advocacy, American Academy of Matrimonial Lawyers § 3 (2018).

131 *Id.* § 2.7.

132 *Id.* § 2.7 cmt.

– particularly with respect to client and case selection decisions – is more heightened than for many other attorneys.

B. *May a Matrimonial Lawyer Who Has Sincerely Held Beliefs that Children Should be Placed Only with Financially Secure Adoptive Parents in a Stable Marriage Decline to Represent Adoptive Parents Who Do Not Meet Such Requirements?*

Model Rule 8.4(g) provides that: "It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . marital status or socioeconomic status."[133] And Comment [4] of the Rule explains that "Conduct related to the practice of law includes representing clients."[134] Further, Comment [3] of the Rule provides that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[135]

Imagine, then, a matrimonial lawyer who practices adoption law. Imagine, further, that the attorney has a sincerely held religious, philosophical, or public policy belief that adoptive children should only be placed in adoptive homes in which the adoptive parents are in a stable marriage, so as lessen the risk of subjecting the adopted child to a broken family situation. And imagine, further, that the lawyer has a sincerely held belief that adoptive children should only be placed in financially secure adoptive homes, to ensure the adoptive parents have the financial resources necessary to properly care for the child. Finally, imagine that, for those reasons the lawyer restricts her services to representing only adoptive parents who have been married for a minimum of five years and have no plans to divorce, own their own home, and have a combined annual income of not less than $75,000. Would such a lawyer be in violation of the Rule? It would appear she would, because such a practice – no matter how sincerely held and no matter how justifiable from a best interests of the child perspective – could be considered to consti-

133 *See supra* note 98.

134 *See supra* note 99.

135 *See supra* note 100.

tute discrimination on the basis of marital status and socioeconomic status.

C. *May a Matrimonial Lawyer Who Has a Sincerely Held Religious Belief that Marriage Is Only Between One Man and One Woman Express that View at a Law Firm Dinner Party Without Violating the Rule?*

Model Rule 8.4(g) provides that: "It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sexual orientation."[136] Comment [4] of the Rule explains that "Conduct related to the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law."[137] And Comment [3] of the new Rule provides that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[138]

If, then, a matrimonial lawyer who has a sincerely held religious, moral, or philosophical belief that marriage can only between men and women expresses that view at a law firm dinner party, this statement would appear to facially violate the Rule, because the attorney would be expressing a view, at a business or social activity related to the practice of law, that manifests bias or prejudice based upon sexual orientation. And remember that the State Bar of Arizona Ethics Counsel has opined that a law firm dinner party is an activity "related to the practice of law" under the Rule.[139]

The risks illustrated in this factual scenario and others like it – discussing the legal, religious, and policy aspects of marriage – are, of course, heightened for matrimonial attorneys because matrimonial lawyers are specialists in marriage law and commonly discuss both legal and policy questions relating to marriage and the family. For that reason matrimonial lawyers would have to be on their guard under the Rule to a greater extent than, perhaps, other attorneys.

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136 *See supra* note 98.

137 *See supra* note 99.

138 *See supra* note 100.

139 Ching & Panahi, *supra* note 54.

D. *May a Matrimonial Lawyer Participating on a Bar-Sponsored CLE Criticize the U.S. Supreme Court's* Obergefell *Same-Sex Marriage Decision on Public Policy Grounds Without Violating the Rule?*

Model Rule 8.4(g) provides that: "It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sexual orientation."[140] And Comment [4] of the Rule explains that "Conduct related to the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law."[141] Further, Comment [3] of the new Rule provides that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[142]

The U.S. Supreme Court's *Obergefell* decision established same-sex marriage throughout the United States.[143] Imagine a matrimonial lawyer who believes the recognition of same-sex marriage is bad public policy because recognizing same-sex marriage changes the public understanding and purpose of marriage and, for that reason, will result in fewer opposite-sex couples getting married. Imagine that lawyer participating in a bar-sponsored CLE panel entitled "Hot Topics in Matrimonial Law" in which the lawyer expresses that viewpoint. Would expressing that viewpoint in that context violate ABA Model Rule 8.4(g)? That expression would appear to facially violate the new Rule, because the attorney would be expressing a view at a bar association activity that could be considered a manifestation of bias or prejudice based upon both sexual orientation and marital status.

Or what about a matrimonial attorney who participates in a CLE sponsored by a religious-oriented legal organization – such as the Christian Legal Society or the Catholic Bar Association – that discusses transgender legal issues from a religious perspective and, in doing so, questions some of the premises of transgender theory? Given the fact that both the Christian Legal Society and the Catholic Bar Association are organizations com-

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140 *See supra* note 98.

141 *See supra* note 99.

142 *See supra* note 100.

143 *Obergefell*, 135 S. Ct. 2584.

prised of and operating for the benefit of lawyers – thereby arguably engaged in conduct "related to the practice of law" – and that questioning the underlying premises of transgender theory may be considered by some people to constitute discrimination or harassment based on gender identity, one could conclude that participation in such a CLE would violate the new Rule.

That Rule 8.4(g) may be applied in this way is not entirely fanciful. Indeed, this sort of interpretation and use of the Rule has already materialized. In May of 2018 the Minnesota Lavender Bar Association ("MLBA") – "a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community"[144] – objected to a CLE lecture entitled "Understanding and Responding to the Transgender Moment/St. Paul," which addressed transgender issues from a Roman Catholic perspective. The MLBA alleged that the CLE was "discriminatory and transphobic," "encourages bias by arguing against the identities [of transgender people]," was contrary to the bar's diversity efforts, and constituted "harassing behavior" under Rule 8.4(g) of the Model Rules of Professional Conduct.[145] The MLBA further characterized the presentation as "transphobic rhetoric" and stated that "Discrimination is not legal education."[146] Because of the MLBA's allegations, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota.[147] Although no bar complaints have yet to be filed against any attorneys associated with the presentation, one might be hard pressed to come up with a reason why the Rule could not be applied to attorneys participating in a CLE in which allegedly "discriminatory and transphobic" rhetoric was a part. After all, CLEs are clearly conduct related to the practice of law.

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144 Minn. Lavender Bar Ass'n, https://gumroad.com/mlba (last visited Oct. 3, 2018).

145 Barbara L. Jones, *CLE Credit Revoked*, MINN. LAW. (May 28, 2018), https://minnlawyer.com/2018/05/28/in-a-first-cle-credit-revoked/.

146 *Id*.

147 *Id*.

This incident supports those who claim that Rule 8.4(g) will be used to silence attorney expression of politically incorrect views and ideas.

E. *May a Matrimonial Lawyer Be a Member of a Religious Legal Organization Which Limits Its Membership to Adherents of a Particular Religious Faith, or Would that Violate the New Rule?*

If a matrimonial attorney is a member of a professional legal organization which restricts its membership to adherents of a particular faith, would that membership violate the new Rule?

In analyzing that question, it would help to consider an actual religious legal organization, the Christian Legal Society.

The Christian Legal Society has been in operation for more than fifty years.[148] According to its *Find a Christian Lawyer Directory*, 113 of its members practice family law.[149] The Society states, on its website, that the "Christian Legal Society is dedicated to serving Jesus Christ through the practice and study of law"[150] and one of its objectives is "To encourage Christian lawyers to view law as a ministry and help them integrate faith and their legal practice."[151] The Christian Legal Society has started more than sixty Christian Legal Aid Clinics around the country[152] which assist more than 8,000 needy people per year with legal counsel.[153]

In accordance with its mission, membership in the Christian Legal Society is limited to Christians. The Society's bylaws provide that "no applicant shall be accepted as a member [of the Christian Legal Society] unless he or she affirmatively indicates in the application that he or she is trusting Jesus Christ as his or her personal Savior and accepts and agrees with the corpora-

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148 *About Us*, Christian Legal Society, https://www.christianlegalsociety.org/about (last visited Oct. 3, 2018).

149 *Find a Christian Lawyer*, Christian Legal Sociedty, http://www.christianlegalsociety.org/resources/find-christian-lawyer (last visited Oct. 3, 2018).

150 Christian Legal Society, https://www.christianlegalsociety.org/ (last visited Oct. 3, 2018).

151 *About Us*, *supra* note 148.

152 *Clinic Directory*, Christian Legal Society, https://www.christianlegalaid.org/about/clinic-directory (last visited Oct. 3, 2018).

153 *About Us Pg 1*, Christian Legal Society, https://www.christianlegalsociety.org/about/about-us-1 (last visited Oct. 3, 2018).

tion's statement of faith."[154] The Society's Statement of Faith provides:

> Trusting in Jesus Christ as my Savior, I believe in: [1.] One God, eternally existent in three persons, Father, Son and Holy Spirit. [2.] God the Father Almighty, Maker of heaven and earth. [3.] The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return. [4.] The presence and power of the Holy Spirit in the work of regeneration. [5.] The Bible as the inspired Word of God.[155]

So, the question is whether a matrimonial attorney's membership and participation in the Christian Legal Society would constitute a violation of ABA Model Rule 8.4(g)?

Model Rule 8.4(g) provides that: "It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . religion, . . . in conduct related to the practice of law."[156] And Comment [4] of the Rule explains that "Conduct related to the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law."[157]

The first question in the analysis, then, is whether membership in the Christian Legal Society would – under the Rule – constitute "conduct related to the practice of law"? It would certainly appear to. The name of the organization itself identifies it as a "Legal Society." It is an organization of and for attorneys. One of its primary purposes is to encourage Christian lawyers to view law as a ministry and help them integrate their faith and their legal practice. And the Society is dedicated to serving Jesus Christ through *the practice and study of law*. Given those facts, one would be hard-pressed to conclude other than that the Christian Legal Society is "related to the practice of law" and that, therefore, an attorney's membership and participation in the Society would constitute "conduct related to the practice of law" as that phrase is used in the Rule.

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154 Article 4 – Members, Bylaws of Christian Legal Society, https://www.christianlegalsociety.org/pdfs/785.pdf (last visited Oct. 25, 2018)

155 *Statement of Faith*, Christian Legal Society, https://www.christianlegalsociety.org/about/statement-faith (last visited Oct. 3, 2018).

156 *See supra* note 98.

157 *See supra* note 99.

This is particularly true in light of the fact that Comment [4] of the Model Rule specifically provides that "conduct related to the practice of law" includes participation in bar association activities.[158] Although the Christian Legal Society is not a bar association, per se, it is certainly akin to one – serving many of the same purposes for Christian lawyers that bar associations serve for attorneys in general. And even if the Christian Legal Society were not considered a bar association, its activities would certainly fall under Model Comment [4]'s provision that conduct related to the practice of law includes business and social activities related to the practice of law. Therefore, an attorney's membership and participation in the Christian Legal Society would appear to satisfy the Rule's requirement that the proscribed conduct be "conduct related to the practice of law."

That being established, the next question would be whether, under the Rule, the Christian Legal Society's membership policy would constitute "discrimination" on the basis of religion? Again, it would appear it would. Indeed, limiting Society membership to Christians – categorically and explicitly excluding from membership those of any other faith or no faith – would appear, by the Rule's definition, to constitute "discrimination" on the basis of religion. The Rule prohibits "discrimination" on the basis of religion, period. It does not limit its proscription to invidious discrimination. Nor does the Rule contain any exception for religious organizations. Certainly the Rule would apply to attorneys who belong to professional legal organizations that determine membership by race or sex, so how could one conclude otherwise than that the Rule would apply to attorneys who belong to professional legal organizations that determine membership on the basis of religion?

The inescapable conclusion, then, is that attorneys who are members of and participate in the Christian Legal Society might very well be in violation of ABA Model Rule 8.4(g), and subject to professional discipline for that conduct. The same would presumably be true of an attorney's membership and participation in any professional legal organization with a membership policy based upon religious belief, such as the national Catholic Bar As-

158 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 4.

sociation, which requires its members to be practicing Roman Catholics.[159]

A related question is whether an attorney would be in violation of Model Rule 8.4(g) if she were a member of an attorney organization having official positions that might be considered discriminatory under the Rule. Again, take the Christian Legal Society as an example.

The Christian Legal Society has adopted a Community Life Statement, binding upon all members, which provides: "We renounce unbiblical behaviors, including deception, malicious speech, drunkenness, drug abuse, stealing, cheating, and other immoral conduct such as using pornography and engaging in sexual relations other than within a marriage between one man and one woman."[160] The Statement goes on to provide that "Any CLS member may be suspended or expelled from membership, in accordance with the provisions and procedures of Article 4, Section 6 of the CLS Bylaws, for unrepentant conduct or active support of a position that undermines the CLS Statement of Faith or Community Life Statement."

In short, the Christian Legal Society and its attorney members subscribe to the position that all sexual behavior outside the confines of a marriage between one man and one woman – which would include parties to a same-sex marriage as well as all sexual relations, whether same-sex or opposite sex, outside marriage – are immoral, and that engaging in such behavior, or actively taking a position supporting such behavior, are grounds for suspension or expulsion from the Society. In light of this, participation in the Christian Legal Society would appear to violate Model Rule 8.4(g). Membership in the Society certainly falls within Rule 8.4(g)'s definition of "conduct related to the practice of law." And threatening the expulsion of members who engage in the prohibited activity, or actively support others who do, could be considered by some to constitute discrimination on the basis of sexual orientation or marital status.

Indeed, the case of the Minnesota Lavender Bar Association – discussed above – suggests that certain members of the legal

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159 *Membership*, Catholic Bar Association, https://cba16.wildapricot.org/membership (last visited on Oct. 3, 2018).

160 *Community Life Statement*, Christian Legal Society, https://www.christianlegalsociety.org/community-life-statement-0 (last visited Oct. 3, 2018).

profession would not hesitate to allege that such policies constitute discrimination or harassment under Rule 8.4(g), claiming that a policy holding that homosexual behavior, including same-sex marriage, is immoral, and that engaging in such behavior, or actively supporting it, are grounds for expulsion, is "derogatory," "demeaning," and/or "harmful" conduct based on sexual orientation, marital status, or both.

Conclusion

ABA Model Rule 8.4(g) prohibits attorneys from engaging in discriminatory or harassing behavior on the basis of certain protected classifications in any speech or conduct related to the practice of law.

Critics contend the Rule is unconstitutional – claiming it is unconstitutionally vague, overbroad and a content-based speech restriction. Critics also contend the Rule interferes with attorneys' client and case selection decisions, extends beyond the legitimate interests of the profession in regulating attorney conduct, and conflicts with other Rules of Professional Conduct.

As discussed in this article, those criticisms appear persuasive and meritorious.

The Rule renders it unprofessional behavior for an attorney to engage in discrimination or harassment – defined as including derogatory, demeaning, or harmful speech or conduct – in any activity related to the practice of law, including bar association, business and even social activities. Therefore, the Rule would appear to thereby prohibit constitutionally protected speech, chill constitutionally protected speech, and interfere with attorneys' free exercise of religion rights.

It also seems beyond question that the Rule would force lawyers to represent clients with whom they have personal conflicts of interest, and the representation of whom would conflict with other Rules of Professional Conduct and, for matrimonial lawyers, the Matrimonial Lawyers' Bonds of Advocacy.

Although the Rule would clearly apply to all attorneys, the Rule would appear to disproportionately impact matrimonial lawyers. This is because matrimonial law intersects with some of the Rule's protected classes – such as sex, sexual-orientation, gender identity, and marital status – in a greater number of circumstances and across a wider spectrum of issues than in other

practice areas. A partial list of such practice areas would include the contracting of marriage, nuptial and cohabitation agreements, marriage dissolution, child custody, and adoption.

For these reasons, matrimonial lawyers who are concerned about their free speech, free association, and free exercise rights, as well as those who believe it is important for lawyers to be able to choose their clients in accordance with their best independent professional judgment, and to practice law in conformance with their faith, their personal moral and ethical principles, and their other professional obligations, have cause for great concern should ABA Model Rule 8.4(g) be proposed as adopted in their jurisdictions.