



The Pitfalls in the New ABA Model Rule 8.4(g) February 2017

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to knowingly engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.¹ Unfortunately, in adopting the rule, the ABA largely ignored over 450 comment letters,² most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter³ questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

Nonetheless, the new ABA Model Rule 8.4(g) poses serious concerns for attorneys' First Amendment rights and should be rejected for that reason, among its other serious problems. The fact that no state has adopted a rule as broad as ABA Model Rule 8.4(g) also counsels against its adoption. The rule creates new problems for lawyers without any track record in any state to show that the new rule solves any problem that is not already adequately addressed by application of current state disciplinary rules that universally make it misconduct for a lawyer to engage in conduct that prejudices the administration of justice.

I. Model Rule 8.4(g) operates as a speech code for attorneys.

There are many areas of concern with the new rule. Perhaps the most troubling is the likelihood that the new rule will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on various political, religious, and social issues. Because of the importance of lawyers as spokespersons and leaders in any political, social, or religious movement, a rule that threatens to discipline a lawyer for his or her speech on such issues should be rejected as a detriment to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society that continually births movements for justice in a variety of contexts.

¹ Model Rule and its accompanying comments are in the attached Appendix 1. The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

² American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

³ Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

Concerns about the chilling effect of ABA Model Rule 8.4(g) have been expressed by two renowned constitutional scholars. Professor Ronald Rotunda, who has authored a treatise on American constitutional law,⁴ also wrote the ABA's treatise on legal ethics.⁵ He explained in a piece for *The Wall Street Journal* entitled "The ABA Overrules the First Amendment"⁶ that:

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

Professor Rotunda has just published a more extensive critique of Model Rule 8.4(g) entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,"⁷ which is essential to understanding the threat the new rule poses to attorneys' freedom of speech.

Influential First Amendment scholar and editor of a daily legal blog for *The Washington Post*, Professor Eugene Volokh of the UCLA School of Law, has similarly described the new rule as a speech code for lawyers, explaining:⁸

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the

⁴ Professor Rotunda is the well-known author of textbooks and treatises on constitutional law. See, e.g., AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

⁵ *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

⁶ Ron Rotunda, "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech," *The Wall Street Journal*, Aug. 16, 2016, <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

⁷ Ronald D. Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016, <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

⁸ Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities," *The Washington Post*, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beac8a086.

sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."

The concerns of these two leading First Amendment scholars, as well as other legal commentators, should raise a large red flag for those states considering whether to adopt ABA Model Rule 8.4(g). Without attempting to be comprehensive, the following points discuss some of the problems that the new rule creates for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions of current political, social, and religious issues.

A. By expanding its coverage to include all "conduct related to the practice of law," Model Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

ABA Model Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all of an attorney's "conduct related to the practice of law." Comment 4 explicitly delineates the broad scope of Model Rule 8.4(g)'s extensive reach: "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." (Emphasis supplied.)

Note that Model Rule 8.4(g) greatly expands upon the predecessor Comment 3 that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016, in at least three ways. First, Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." Second, Model Rule 8.4(g) is much broader in scope than the predecessor Comment 3, which applied only to conduct "in the course of representing a client."⁹ Instead, the new Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." As discussed below, this is a breathtaking expansion of the previous comment's scope. Third,

⁹ Comment 3 to Model Rule 8.4(d) was in place from 1998-2016 and is found in the attached Appendix 2.

former Comment 3 applied only to “actions when prejudicial to the administration of justice.” By deleting that qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys’ lives.

Indeed, the substantive question becomes, “what conduct does Model Rule 8.4(g) *not* reach?” Virtually everything a lawyer does is “conduct related to the practice of law.” Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes both “business or social activities in connection with the practice of law” because there is no real way to delineate between the two. So much of a lawyer’s social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities that likely fall within Model Rule 8.4(g)’s scope include:

- teaching CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to non-profits
- serving at legal aid clinics
- serving political or social action organizations
- serving one’s religious congregation
- serving one’s alma mater college, if it is a religious institution of higher education
- serving religious ministries that serve prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving fraternities or sororities
- serving political parties
- serving social justice organizations
- other pro bono work that involves advocating controversial socioeconomic, religious, or other issues

Lest these examples seem unlikely, recall that the nationally acclaimed Atlanta fire chief, Chief Kelvin Cochran, lost his job in 2014 because he published a book based on lessons he taught in his Sunday School class at his church, which included his traditional religious beliefs regarding sexual conduct and marriage. His moving testimony before a congressional committee describes the racial harassment he experienced in the 1980s when he joined the Shreveport Fire Department and rose to become its first African-American fire chief. But as he notes, he was never fired for his race. Instead, he was fired for his religious beliefs. His testimony before a

congressional committee is a somber reminder that in America today people are losing their jobs because their religious beliefs are in disfavor among some government officials.¹⁰

1. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries. Many lawyers sit on the boards of their churches, religious schools and colleges, and other religious non-profit ministries. As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. But they also face innumerable legal questions and regularly turn to the lawyers serving on their boards for pro bono guidance.

For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

The rule will do immense harm to the good work that many lawyers do for religious institutions. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law." Because Model Rule 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

2. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline. Of course, lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues of the day. Lawyers are asked to speak *because they are lawyers*. Often lawyers' speaking engagements have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- Verbal conduct includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics, uses controversial words to make a point, or expresses unpopular viewpoints? Must lawyers

¹⁰ Chief Cochran's written statement, which was submitted to the House Committee on Oversight and Government Reform for its July 12, 2016, *Hearing on Religious Liberty and HR 2802, the First Amendment Defense Act*, can be read at <https://oversight.house.gov/wp-content/uploads/2016/07/2016-07-12-Kelvin-Cochran-Testimony.pdf>. His oral testimony can be watched at <https://oversight.house.gov/hearing/religious-liberty-and-h-r-2802-the-first-amendment-defense-act-fada/> (beginning at 41:47 minutes).

forswear writing blogposts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as “manifest[ing] bias or prejudice towards others”? If so, public discourse and our free civil society will suffer from the ideological paralysis that Rule 8.4(g) imposes on lawyers who are often at the forefront of new movements and unpopular causes.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within Rule 8.4(g)’s prohibition. But even if some public speaking were to fall outside the line of “conduct related to the practice of law,” how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of “sexual orientation” or “gender identity” as a protected category in a nondiscrimination law being debated in a state that lacks such a provision? Is the lawyer subject to discipline if she testifies before a state legislature or city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The doubt created by the proposed rule will inevitably chill lawyers’ public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, Model Rule 8.4(g) suffocates attorneys’ speech.

3. Attorneys’ membership in religious, social, or political organizations may be subject to discipline: Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, last year, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts because of the organization’s teaching regarding sexual conduct. Calif. Sup. Ct., Media Release, “Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate,” Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

Does Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Does it subject lawyers to disciplinary action for belonging to a political organization that advocates for laws that promote traditional values regarding sexual conduct and marriage? These are serious concerns that mitigate against adoption of Model Rule 8.4(g).

Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to

its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by the proposed rule's strictures.

For example, according to some government officials, the right of a religious group to choose its leaders according to its religious beliefs is "religious discrimination." But it is simple common sense and basic religious liberty that a religious organization's leaders should agree with its religious beliefs. As the Supreme Court found in a unanimous decision in 2012:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, ___, 132 S. Ct. 694, 710 (2012).

B. The proposed rule institutionalizes viewpoint discrimination against some lawyers' public speech on important current political, religious, and social issues.

Model Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to "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." Because "conduct" includes "verbal conduct," the rule impermissibly favors speech that "promote[s] diversity and inclusion" over speech that does not.

But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Model Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, which speech or actions do or do not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of Rule 8.4(g) gives governmental actors (here state bar officials) unbridled discretion to determine which speech is permissible and which is impermissible, which speech “promote[s] diversity and inclusion” and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors’ subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens’ free speech is unconstitutional. See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006).

C. The proposed comment highlights a troubling gap between protected and unprotected speech under the proposed rule.

The legitimate concern about whether a lawyer’s public speech falls inside or outside the parameters of “conduct related to the practice of law” highlights the circularity of Model Rule 8.4(g). This circularity itself compounds the threat Model Rule 8.4(g) poses to attorneys’ freedom of speech.

Rule 8.4(g) cursorily states that it “does not preclude legitimate advice or advocacy *consistent with these rules*.” But the qualifying phrase “consistent with these rules” makes Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects “legitimate advice or advocacy” only if it is “consistent with” Rule 8.4(g). Speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is permissible? By what standards? It is not good for the profession or for our free society for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone to disagree and file a disciplinary complaint.

II. All State Black-Letter Rules Are Narrower in Significant Ways than Model Rule 8.4(g)’s Expansive Scope.

Twenty-four states and the District of Columbia have adopted black-letter rules dealing with “bias” issues.¹¹ Thirteen states have adopted a comment, but not a black-letter rule, while fourteen states have neither adopted a rule nor a comment addressing “bias” issues.

Each of these black-letter rules differs from ABA Model Rule 8.4(g) and is in some significant way narrower than that rule. Examples of the differences between state black-letter rules and Model Rule 8.4(g)’s expansive scope include –

¹¹ Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.
- Many states limit their rules to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."
- Many states require that the misconduct be prejudicial to the administration of justice.
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)'s protected characteristics.
- No black-letter rule utilizes Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

III. Modifications are Essential If Model Rule 8.4(g) Is to Protect, rather than Violate, Attorneys' First Amendment Rights.

CLS recommends that Model Rule 8.4(g) not be adopted by a state. Because no demonstration of an empirical need for its adoption has been made, individual states should not adopt Model Rule 8.4(g).

A. Proposed Model Rule 8.4(g)'s serious problems must be remedied before it merits serious consideration.

Before it merits serious consideration, Model Rule 8.4(g) would need to be significantly modified in order to protect attorneys' First Amendment rights. These modifications include:

1. In the first sentence, delete "in conduct related to the practice of law" and substitute language from former Comment [3], which applied, first, to conduct "in the course of representing a client" and, second, "when such conduct is prejudicial to the administration of justice."
2. Anchor the definitions of "discrimination" and "harassment," by adding the sentence: "The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies."
3. Include the Supreme Court's definition of "harassment" in order to avoid violating the First Amendment, by adding the following sentence: "The term 'harassment' shall be defined, in accordance with the United States Supreme Court's decision in *Davis*

v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

4. Provide explicit protection for lawyers' freedoms of speech, assembly, expressive association, religious exercise, and press, by adding the following sentence: "This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws."

5. Modify the last sentence to read: "Advocacy respecting the foregoing factors does not violate this paragraph." Note that this modification deletes the modifier "legitimate," because it gives a government actor unconstitutional unbridled discretion to determine whether advocacy is "legitimate" or not "legitimate." Such unbridled discretion violates the First Amendment's prohibition on viewpoint discrimination, as well as the Fourteenth Amendment's prohibition on laws that are unconstitutionally vague. Similarly, the deletion of the phrase "consistent with these rules" eliminates the sentence's circularity, which is currently unconstitutional because it gives a government actor unbridled discretion in determining which advocacy is "consistent with these rules," and which is not. Again, this unbridled discretion violates the First Amendment's prohibition on viewpoint discrimination and the Fourteenth Amendment's prohibition on laws that are unconstitutionally vague.

With those modifications, the rule would read (additions underlined and deletions in brackets):

"It is professional misconduct for a lawyer to: . . .

"(g) engage in conduct, in the course of representing a client, 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 when such conduct is prejudicial to the administration of justice [in conduct related to the practice of law]. This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. Advocacy respecting the foregoing factors does not violate this paragraph. [This paragraph does not preclude legitimate advice or advocacy consistent with these rules.] The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies. The term

“harassment” shall be defined in accordance with the United States Supreme Court’s decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice.”

B. The ABA’s new Comments accompanying Model Rule 8.4(g) are seriously flawed.

CLS does not recommend that the proposed Rule 8.4(g) include the ABA’s new Comment [3], Comment [4], and Comment [5]. But if those comments were added, several additional modifications would be necessary, including:

1. In Comment [3], delete the sentence stating that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” Several of these terms are unconstitutionally vague and give government actors unbridled discretion in enforcement of the rule. Specifically, what is the standard for determining what “verbal or physical conduct” is “harmful” or “manifests bias or prejudice”?
2. Comment [3] threatens attorneys’ First Amendment rights because “verbal conduct” is simply another term for “speech.” Therefore, delete the phrases “verbal conduct” and “derogatory or demeaning verbal conduct.” By deleting these phrases, the current second, third, and fourth sentences are tightened to reduce redundancy and to avoid infringing on speech by focusing on prohibiting actual physical conduct. The three sentences are reduced to one sentence which reads: “Harassment includes sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other unwelcome physical conduct of a sexual nature.”
3. Because the rule no longer applies to all “conduct related to the practice of law,” delete the first sentence of Comment [4]. The phrase “conduct related to the practice of law” particularly threatens the First Amendment because Comment [4] had interpreted “conduct related to the practice of law” to include “participating in bar association, business or social activities in connection with the practice of law,” making the rule applicable to most, if not all, that a lawyer does.
4. Delete the second sentence of Comment [4] because it violates the First Amendment’s basic prohibition on viewpoint discrimination by stating that: “Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”
5. Delete “alone” from the first sentence in Comment [5] (which is now Comment [4]), so that an attorney is not subject to discipline for exercising peremptory challenges. With these modifications, the Comments would read as follows:

“Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. The term “harassment” is defined, in accordance with the United States Supreme Court’s decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice. Harassment includes sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other unwelcome physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies.¹²

“Comment [4] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not 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).”

¹² Most of Comment [3] would not be necessary if the proposed Rule 8.4(g) were modified as proposed in Part II.A.

Appendix 1: ABA Model Rule 8.4(g) and comments adopted August 2016

On August 8, 2016, the ABA House of Delegates adopted new Model Rule 8.4(g) and three accompanying comments, which provide 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 in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

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).

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.

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).

Appendix 2: Predecessor Comment [3] to Model Rule 8.4(d), 1998-2016

In 1998, the ABA adopted Comment [3] to Rule 8.4(d), which stated:

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

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, September 13, 2018 1:40 PM
To: Tracy, Mary
Subject: FW: Comment in Opposition to Proposed GR 38
Attachments: Comment on GR 38 (ABA 8.4(g)).pdf

From: Steve & Mim McFarland [mailto:mcfarfam@verizon.net]
Sent: Thursday, September 13, 2018 1:40 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment in Opposition to Proposed GR 38

For any and all of the reasons laid out by one of our nation's most experienced civil liberties lawyers, Kimberlee Wood Colby, in the attached, I urge the Court not to adopt ABA 8.4(g) in the form of GR 38.

See also <https://www.clsnet.org/document.doc?id=996>

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