"NOTHING TO SEE HERE": MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G) AND THE FIRST AMENDMENT

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There is a story about a Texan driving his Cadillac, with big bullhorns on the hood, in rural Vermont. He stops to talk with a Vermont farmer, who tells him, "That's my farm; it goes from here all the way over to there." The Texan says, "Well, I have a ranch in Texas, and if I start driving at the east end, I won't even reach the west end by the end of the day." The Vermont farmer thinks for a minute and responds, "Yep, I had a car like that once too."

Like the Texan's ranch, the American Bar Association's new Model Rule of Professional Conduct 8.4(g) does not warrant the hype. Four points establish this proposition. *First*, Rule 8.4(g) is not unprecedented. It is not a dramatic expansion of the law. It is not even all that new. *Second*, although Rule 8.4(g) reaches speech, its primary focus is conduct—discrimination and harassment. That predominance affects the First Amendment standards. *Third*, the hypothetical horribles that critics have paraded are remote and implausible. Were they to arise, there would be a remedy: an as-applied challenge. The imaginative misapplications of Rule 8.4(g) conjured up by critics cannot sustain an argument about chilling First Amendment rights. And *fourth*, remitting these issues to state employment laws is an ill-advised approach to regulation of the legal profession.

As to the first point, in the overall regulatory scheme, Model Rule 8.4(g) is neither new nor anomalous. Twenty-four states and the District of Columbia address discrimination in their

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Rules of Professional Conduct.[1] In another twelve states, the proscription appears in the official comments to the rules.[2] Though arguably more inclusive than any single rule, Rule 8.4(g) draws its elements from these precursors.[3] Provisions prohibiting discrimination beyond the context of representing a client, for example, appear in at least ten states.[4] In some jurisdictions, the Rules of Professional Conduct specifically focus on discrimination in employment.[5]

Nor is it novel for Model Rule 8.4(g) to regulate the business side of law practice. The Rules of Professional Conduct already cover many aspects of the legal business, for example, payments by a law firm to a deceased partner's estate,[6] terms of law firm compensation or retirement plans,[7] and the purchase

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1. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEG. ETHICS 196, 198, 208 (2017).

2. *Id.* at 197.

3. In addition, the Model Code of Judicial Conduct provides that:

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

ABA MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR. ASS'N 2011). Judges also must require lawyers before the court to refrain from such conduct. *Id.* at r. 2.3(C).

4. *See, e.g.*, IND. RULES OF PROF'L CONDUCT r. 8.4(g); OHIO RULES OF PROF'L CONDUCT r. 8.4(g); N.J. RULES OF PROF'L CONDUCT r. 8.4(g); MD. RULES OF PROF'L CONDUCT r. 8.4(e); MINN. RULES OF PROF'L CONDUCT r. 8.4(g)–(h); WIS. RULES OF PROF'L CONDUCT r. 8.4(i); FLA. RULES OF PROF'L CONDUCT r. 8.4(d); N.Y. RULES OF PROF'L CONDUCT r. 8.4(g); IOWA RULES OF PROF'L CONDUCT r. 8.4(g); WASH. RULES OF PROF'L CONDUCT r. 8.4(g).

5. *See, e.g.*, D.C. RULES OF PROF'L CONDUCT r. 9.1; VT. RULES OF PROF'L CONDUCT r. 8.4(g).

6. MODEL RULES OF PROF'L CONDUCT r. 5.4(a)(1) (AM. BAR. ASS'N 2016) [hereinafter MODEL RULES] (permitting an agreement between a lawyer and a firm, partner, or associate to "provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified person").

7. *Id.* at r. 5.4(a)(3) (permitting law firms to include non-lawyer employees in their compensation or retirement plans).

of a law practice.[8] Further, the Rules regulate the names of law firms,[9] as well as supervisory relationships within firms.[10]

It also breaks no new ground for the Rules of Professional Conduct to apply to a lawyer's professional life outside the courtroom or client relationships. For example, the Rules prohibit a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation—at any time, in any context.[11]

Finally, it is not new for the Rules of Professional Conduct to regulate lawyers' speech. Rule 1.6 forbids disclosure of clients' confidential information.[12] The Rules prohibit lawyers from saying certain things to people who are not their clients.[13] Rule 3.6 imposes duties with regard to trial publicity,[14] and Rule 7.2 governs advertising.[15] These strictures have been on the books for many years.

My second major point is that the explicit and primary focus of Model Rule 8.4(g) is conduct. The provision is, after all, part of the Rules of Professional *Conduct*. The title of Rule 8.4 is, "Mis*conduct*."[16] Subsection (g) is part of a list that follows the lead-in sentence: "It is professional mis*conduct* to . . . ."[17] To be sure, the Rule specifically refers to verbal conduct, which gen-

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8. *Id.* at r. 1.17 (regulating the sale of law practices).

9. *Id.* at r. 7.5 (regulating firm names and letterheads).

10. *Id.* at r. 5.1 (identifying the responsibilities of a partner or supervisory lawyer); *id.* at r. 5.2 (identifying the responsibilities of a subordinate lawyer); *id.* at r. 5.3 (identifying responsibilities regarding nonlawyer assistance).

11. *Id.* at r. 8.4 (b)–(d).

12. *Id.* at r. 1.6(a) ("A lawyer shall not reveal information relating to the representation of the client" unless the client consents expressly or by implication, or other exceptions apply).

13. *Id.* at r. 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . . . The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel" if there is a possible conflict with the interests of the client).

14. *Id.* at r. 3.6(a) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

15. *Id.* at r. 7.2.

16. *Id.* at r. 8.4 (emphasis added).

17. *Id.* (emphasis added).

erally entails speech. Indeed, it would be impossible to regulate the profession without roping in speech. Most of what lawyers do involves speech. But limiting speech is not the primary focus of Model Rule 8.4(g). The primary focus is harmful verbal or physical conduct that manifests bias or prejudice towards others, and harassment through derogatory or demeaning verbal or physical conduct, sexual advances, and requests for sexual favors—in other words, invidiously disparate *treatment* and abusive or predatory *behavior*.[18] To the extent that items in this litany do or can involve speech, the involvement is largely incidental to the point of the prohibition. Primarily, speech is evidence of the discrimination. For speech to serve that function is neither unusual nor impermissible, so long as speech is not the sole gravamen of the prohibition.[19]

The comments to Rule 8.4 suggest that the "substantive law of anti-discrimination and anti-harassment statutes and case law" give content to these prohibitions.[20] Those sources cover a far broader array of conduct than public advocacy that gives offense. Under *Broadrick v. Oklahoma*,[21] the sweep of the legitimate applications of a statute affects the First Amendment standard.[22] The Supreme Court in *Broadrick* upheld a law barring state employees from engaging in partisan political activities.[23] The Court refused to apply the overbreadth doctrine, which invalidates laws that may seek to cover conduct, but encompass, and thereby chill, a significant measure of protected speech.[24] The Court held that for a statute to violate the First Amendment on that basis, "the overbreadth . . . must not only be real, but substantial as well, judged in relation to the stat-

18. MODEL RULES, *supra* note 6, at r. 8.4(g).

19. *Cf.* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (relying on the evidentiary use of speech to determine that the defendant attacked the victim based on race); Whitaker v. Thompson, 353 F.3d 947, 953 (D.C. Cir. 2004) (determining that the First Amendment permits "the evidentiary use of speech" in criminal law). Were speech, in an individual case, to be the sole gravamen of charges brought under the broad prohibition, the attorney could challenge the Rule as applied.

20. MODEL RULES, *supra* note 6, at r. 8.4(g) cmt. 3.

21. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

22. *Id.* at 612

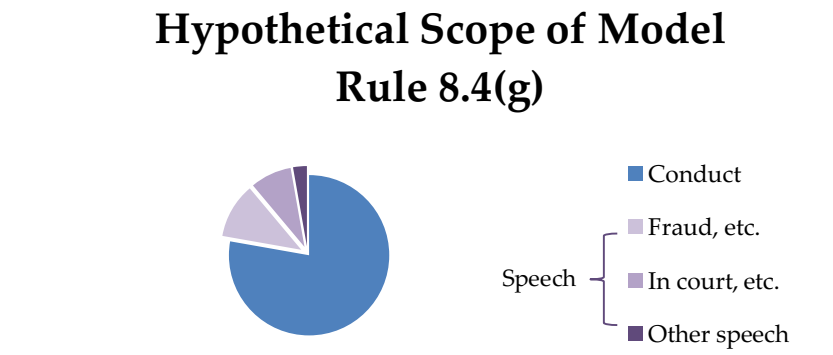
23. *Id.* at 602.

24. *Id.* at 618.

ute's plainly legitimate sweep."[25] The alleged overbreadth with regard to Rule 8.4(g) is not substantial in relation to the Rule's plainly legitimate sweep.

Turning now to my third point—to the extent that Model Rule 8.4(g) affects speech, it does not raise the First Amendment concerns that critics hypothesize. My conclusion regarding the validity of Rule 8.4(g) under the First Amendment does *not* rest on an assessment of the social value of particular speech. Although perhaps not a First Amendment purist in the mold of Justice Black, I lean toward an expansive view of First Amendment rights and disagree with those who distinguish between high-value and low-value speech. To rely on such distinctions requires that someone in authority assess the value of the speech and determine whether or not it is protected. In my view, the First Amendment should forbid such determinations. But they are beside the point here, because Model Rule 8.4(g) does not reflect or require value judgments about particular content or speakers or types of speech. It is not a speech code.

To show that, I will flesh out the comparative exercise discussed above with respect to *Broadrick*, and derive some additional conclusions. If we assume some common-sense proportions to illustrate the point, a pie chart that reflects the coverage of Rule 8.4(g)might look like this:



25. *Id.* at 615; *see also* Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (for overbreadth doctrine to apply, "a law's application to protected speech [must] be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications"); New York v. Ferber, 458 U.S. 747, 767–74 (1982) (rejecting overbreadth challenge to child pornography statute).

The majority of the pie chart, shaded blue, is conduct, such as sexual advances, discriminating in promotions or allocation of work, and treating people unfairly. Discrimination by and large is disparate treatment, not disparate words. A smaller portion of the pie is speech, denoted by the various shades of purple. This speech, however, must be subdivided, because there can be no legitimate dispute that it is appropriate to regulate some speech occurring in court proceedings and in the context of representing a client (such as revelation of client confidences). So a part of the small purple slice is lighter to represent that relatively safe harbor for regulation. Further, there is little if any dispute that courts or bar disciplinary authorities can regulate some speech by lawyers occurring outside court and not in the representation of a client, such as speech in furtherance of a fraud. That is another shade of purple. What is left is a thin sliver of dark purple on the pie chart, constituting speech beyond what is indisputably subject to regulation, the speech that critics say is exposed to the hypothetical speech police. We could debate the appropriate width of the sliver, but eliminating conduct plus the other categories of speech makes it hard to contend that the remaining speech represents a major part of what the Rule covers. And it likewise would be hard to contend that a Rule so tangential to protected communication is a speech code. Therefore, the question is whether to invalidate the significant predominance of legitimate applications of Rule 8.4 based on possible abuses pertaining to *some* speech within the small sliver.

Notwithstanding the holding in *Broadrick* about the other legitimate subjects a regulation might cover, should we be concerned that the coverage intersecting with this sliver will have an outsize impact on speech? That is a fair question, because the premise underlying the overbreadth doctrine dictates vigilance. First Amendment rights are so important that we need to depart from the normal rule allowing litigants to challenge only restrictions directly affecting them—here, restriction of their own speech.[26] Limitations on speech not directly applicable to

26. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("It has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected

the litigant could deter, or "chill," others from speaking, inflicting broad First Amendment harms that otherwise would be difficult to challenge.[27] But chill arises from realistic possibilities of enforcement based on reasonable interpretations of the law, not on speculation about potential misapplications.[28] Thus, for example, Professor Eugene Volokh raises the specter of lawyers being subject to discipline for advocating against same-sex marriage, or lawyers facing harassment claims based on innocent or harmless innuendo or banter.[29] But by and large, his examples do not come from bar disciplinary proceedings under the existing anti-discrimination Rules of Professional Conduct. Even if they did, it would violate the First Amendment for an attorney disciplinary system to punish speech in these key scenarios, and Rule 8.4(g) does not go there. There is a difference between advocating discrimination and discriminating, just as, for example, there is a difference—dispositive of First Amendment claims—between advocating conversion therapy and engaging in conversion therapy.[30] If a lawyer engaged in the type of conduct hypothesized, if a speaker at a bar function, for example, asserted that Milo Yiannopoulos is a

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speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."); Gooding v. Wilson, 405 U.S. 518, 521 (1972) ("The transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965))).

27. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."); *Gooding*, 405 U.S. at 518 ("Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.").

28. *Cf. Broadrick*, 413 U.S. at 615 ("[Although laws,] if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.").

29. *See* Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, WASH. POST: VOLOKH CONSPIRACY (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/ [https://perma.cc/4G3Z-FXVV].

30. *See* Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir.), *cert. denied*, 134 S. Ct. 2781 (2014), *and cert. denied*, 134 S. Ct. 2881 (2014).

saint, or praised a foreign legal system that subordinated women, it would be unreasonable, based on that conduct alone, to charge a disciplinary violation under Rule 8.4(g)—unreasonable *and* highly unlikely.

To be clear, I am neither proposing nor endorsing a "trust us" argument, a plea to rely on the good faith and judgment of bar authorities to apply an unacceptably vague or otherwise unconstitutional rule prudently so as not to restrict disfavored speech. The constitutionality of a law cannot turn on our estimation of the people who enforce it.[31] But it can and should turn on our evaluation of the text, structure, and purpose of the rule. On those measures, the examples offered are hypothetical hyperbole, not realistic concerns.

The introductory discussion of Scope in the Rules of Professional Conduct seeks to stave off such speculative approaches, describing the ethical prescriptions that follow as "rules of reason" that must be interpreted "with reference to the purposes of legal representation and of the law itself."[32] Particularly when viewed with that perspective, the text, structure and purpose of Rule 8.4(g) debunk the critics' concerns. The Rule appears in a section entitled "Maintaining the Integrity of the Profession."[33] That statement of purpose should guide interpretation of the Rule.[34] The acts covered by the other subsections of the Rule—for example, criminal acts, dishonesty, conduct prejudicial to the administration of justice—also should inform the interpretation of Rule 8.4(g).[35] Looking at those other subsections, Professor Volokh characterizes subsection (g) as a major departure. That is a topsy-turvy mode of interpretation. That Professor Volokh interprets subsection (g) as a major de-

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31. *See* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J. concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ."); Florida Cannabis Action Network, Inc. v. City of Jacksonville, 130 F.Supp.2d 1358, 1362 (M.D. Fla. 2001) ("The whim, self-restraint, or even the well-reasoned judgment of a government official cannot serve as the lone safeguard for First Amendment rights.").

32. MODEL RULES, *supra* note 6, at pmbl. ¶ 14.

33. *Id.* at r. 8.4

34. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 217 (2012) (Canon 34: "A preamble, purpose clause, or recital is a permissible indicator of meaning."); *id.* at 221 (Canon 35: "The title and headings are permissible indicators of meaning.").

35. *Id.* at r. 8.4(a)–(f).

parture strongly suggests that his interpretation is wrong. A proper interpretation is the one that, to the extent the language of the provision permits, avoids such dissonance.[36] When we assess Rule 8.4(g) in context, including the Rule's other provisions and its role in the overall regulation of the legal profession, it is clear that advocating against same-sex marriage or for a religious test for immigration—while in my view wrong and even shameful—is not a disciplinary violation.

Public advocacy lies at the heart of the First Amendment.[37] Rule 8.4(g) does not address the substance of a lawyer's advocacy in the public forum of a hypothetical CLE course or bar debate, be the topic immigration or same sex marriage or any other controversy. In some contexts, the Rule may address *how* the lawyer advocates the point, and, subject to limitations, the First Amendment allows such regulation. But under the well-established doctrine of constitutional avoidance, we cannot interpret Rule 8.4(g) as raising a constitutional problem, before any effort, or even any threat, to apply it in an unconstitutional manner has occurred.[38]

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36. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (acknowledging the Court's duty "to construe statutes, not isolated provisions" (quoting Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010))); Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2563 (2013) ("That these three provisions appear adjacent to each other strongly suggests" that operative phrases "should be read in harmony"); Jones v. United States, 526 U.S. 227, 234 (1999) ("If a given statute is unclear about treating such a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so."); New Cingular Wireless PCS, LLC v. Finley, 674 F.3d 225, 249 (4th Cir. 2012) ("adjacent statutory subsections that refer to the same subject matter should be read harmoniously" (quoting United States v. Broncheau, 645 F.3d 676, 685 (4th Cir. 2011))).

37. *See* Schenk v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 358 (1997) (recognizing that commenting in the public forum on "matters of public concern" lies "at the heart of the First Amendment"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (noting that "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776-77 (1978) (finding speech about a tax referendum to be "at the heart of the First Amendment's protection").

38. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) (explaining that statutes "ought not be construed to violate the Constitution if any other possible construction remains available"); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 60 (2010) (holding that "the principle of constitutional avoidance demand[ed]" interpreting the statute to include a *mens rea* requirement); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568,

Further, Model Rule 8.4(g) expressly provides that the provision does not preclude "legitimate advice or advocacy."[39] There is no reason to interpret "advocacy" as restricted to the courtroom, particularly given the force of the doctrine of constitutional avoidance. Beyond that safeguard, Model Rule 8.4(g) has a *mens rea* requirement: a lawyer violates the Rule only if he or she "knows or reasonably should know" that the conduct at issue is discrimination or harassment. When that *mens rea* requirement is linked to, for example, the definition of discrimination in the rule—which requires that the lawyer's conduct actually be harmful—liability under Rule 8.4(g) would be quite unlikely unless the lawyer knew or should have known that his or her conduct was harmful, but did it anyway.[40] Violation of the Rule does not turn on whether a sensitive listener perceives a statement as discriminatory or otherwise takes umbrage. It turns on the lawyer's knowledge that he or she is engaging in harmful conduct, i.e., in discrimination as defined by the Rule.

No doubt, someone could misapply Rule 8.4(g) in a manner that infringes on legitimate advocacy, just as someone could misapply the prohibition of fraud and misrepresentation,[41] the requirement of candor to the tribunal,[42] and the duty to maintain client confidences.[43] If such a First Amendment violation occurred, the remedy would be to challenge it then, rather than to anticipate a possible, but unlikely misapplication. The ostensible chill on protected speech is too attenuated to move First Amendment policy here. The checks identified above diminish the plausibility of the horribles the critics parade, and that in turn diminishes the prospect of chilling protected speech.

A finding of chill, moreover, generally comes from the judicial gut. It is a prediction based on no empirical evidence. But here, twenty-four states have barred discrimination as part of

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575 (1988) ("[C]ourts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

39. MODEL RULES, *supra* note 6, at r. 8.4(g).

40. Although the *mens rea* requirement is not expressly applicable to harassment, the term "harassment" generally entails both intentionality and repetition or extended duration.

41. MODEL RULES, *supra* note 6, at r. 8.4(c).

42. *Id.* at r. 3.3.

43. *Id.* at r. 1.6.

the ethical obligations of counsel. The types of laws vary. Some cover employment, and some do not. Some are broad. Others are tightly focused. The states, as Justice Brandeis envisioned, are fulfilling their generative role as laboratories of democracy.[44] If these longstanding provisions chilled speech, these state laboratories should have produced some empirical evidence of it. If such evidence is out there, I have not seen it.

This is not to suggest that *litigants* raising First Amendment challenges should have to present empirical evidence to support an alleged chilling effect. Litigation is not at issue here. The issue is whether individual states should adopt the Model Rule proposed by the ABA. The critics arguing against the proposed Rule on the ground that it chills protected speech ought to offer evidence to support their speculation. They have not.

Rule 8.4(g) deals with a very real problem in the profession. I have seen attorneys in depositions and other contexts use racist and sexist insults for tactical advantage, or just gratuitously. If the perpetrator of this conduct had the requisite *mens rea*, in particular, actual knowledge that the conduct would cause harm, it would raise a legitimate issue about his fitness to practice law. The conduct is properly within the scope of the Rules of Professional Conduct.

Finally, I want to address whether employment law is the proper vehicle for regulation of discrimination by lawyers. Our system largely allows the legal profession to regulate itself. As the comments to the Rules of Professional Conduct observe, the profession in each state is largely self-governing. In return for regulating itself effectively, the profession receives a number of benefits. It has a monopoly; non-lawyers cannot practice law. Lawyers get access to compulsory process. And the profession is answerable to the courts rather than to the legislature.[45] Vesting oversight in the courts helps maintain the independence of

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44. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

45. *See* MODEL RULES, *supra* note 6, at pmbl. ¶ 10:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

the profession—under the aegis of the courts, lawyers can more readily represent unpopular clients and put the interests of clients first, no matter the partisan currents.[46] If the legal profession is to keep this level of independence and to avoid regulation by legislatures, lawyers need to show that the profession is regulating itself *effectively*. The *sine qua non* of effective self-regulation is public as well as judicial confidence, which go hand in hand. And the *sine qua non* of that confidence is representativeness, fairness, and legal compliance. That is a good reason to have a rule against discrimination. Relying on employment laws to regulate additional aspects of lawyers' activities, or to be the sole check on lawyers' discriminatory conduct, would invite state legislatures to assert more authority over lawyers. That development could undermine important values of the profession.

Any system of regulation poses a risk of abuse. Such risk arises whether discrimination and harassment cases are handled through the disciplinary system or through employment laws. But there are reasons why, if anything, the risk of abuse is lower in the disciplinary system. First, the disciplinary rules, unlike the employment laws, are not focused on compensation. Outside the context of defalcation, there is little monetary incentive for putatively injured parties to initiate proceedings. Second, complainants do not get to prosecute the case themselves. They must persuade the disciplinary authorities to proceed with a complaint. And third, the standard of proof the disciplinary authorities bear is generally clear and convincing evidence, a higher burden than individuals usually must satisfy in malpractice or discrimination cases.[47]

I am a defense lawyer—including the defense of lawyers in disciplinary proceedings. My first concern upon learning of this proposed change to the Model Rules was whether it

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46. *Id.* at pmbl. ¶ 11:

> Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

47. *See In re* Barach, 540 F.3d 82, 85 (1st Cir. 2008) (noting that "most jurisdictions require clear and convincing evidence" in attorney disciplinary proceedings).

weaponized the Rules of Professional Conduct for exploitation by particularly contentious litigants. But closer study persuaded me that abuse of the Rule, including its use as a speech code for lawyers, is very unlikely because of the barriers and safeguards described above. If transgressions against First Amendment rights occur, there are well-established pathways to deal with them. We can bring First Amendment challenges to unlawful applications of the Rule. We can defend lawyers against unwarranted disciplinary charges. And we can insist to censors of every ilk that the First Amendment does not permit regulation based on disapproval of protected speech.

But, without evidence that existing rules barring discrimination have chilled free speech, without a textual or historical basis to expect the new rule to mutate into a speech code, there is no justification for displacing this important weapon against discrimination in and by the legal profession.