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# The Crusade against Model Rule 8.4(g)

by Dennis Rendleman

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It has been a little over two years since the ABA House of Delegates adopted Model Rule 8.4(g):

> It is professional misconduct for a lawyer to:
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> (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.

Vermont is the only state that has adopted the rule; several states have either formally or informally declined to adopt or consider adoption. At the same time, more than 25 jurisdictions already had provisions in their Rules of Professional Conduct making it an ethical violation for a lawyer to discriminate or harass another.

One can discern two general themes in opposition to Rule 8.4(g). First, are the opponents who object on the grounds of "religious liberty." However, the evidence indicates that the primary philosophy underlying that opposition is objection to legal equality for LGBTQ. Second is the academic/libertarian opposition that appears more oriented from legal scholarship or political philosophy than from religious zealotry.

The notion of a rule prohibiting harassment and discrimination by lawyers when those lawyers are engaged in conduct related to the practice of law has been sucked into the national partisan political morass – what the late Supreme Court Justice Antonin Scalia called a Kulturkampf[i].

All the issues being raised against Rule 8.4(g) were raised during the three-year development process, and were considered by the drafters, and are accommodated in the balance that Rule 8.4(g) presents. It is worth noting that the amendment passed the 598-member the ABA House of Delegates by a unanimous voice vote.

First Amendment, freedom of religion:

Professor Noah Feldman of Harvard Law School began his 2005 book "Divided by God," telling the story of then-Alabama Chief Justice Roy Moore and 10 days in August 2003 when Moore refused to follow the federal court order to remove from the state Supreme Court the two-and-a-half-ton block of granite inscribed with the Ten Commandments that Moore had erected. Feldman stated that the confrontation between "the evangelicals and the secularists" that occurred over Moore's rock was a "microcosm [of] the national debate about the right relationship between religion and government in the United States."[ii] Little could Feldman know that his 2005 statement would become equally applicable in 2017.

In an article in the ABA Journal, a representative of a religious organization opposed to Model Rule of Professional Conduct 8.4(g) alleged the Rule was overbroad. That claim by various religious organizations is founded upon two prongs of their religious beliefs: first, that same-sex marriage (or, indeed, any form of same-sex relationship) is morally wrong, and second, that therefore, anyone, including lawyers, may discriminate against and harass homosexuals. The religious advocates proclaim that their "sincerely held religious beliefs"[iii] are entitled to greater social value and legal recognition than equal treatment for all individuals. This position has been embraced by the current attorney general and administration in Washington.

While the religious advocates emphasize their argument that lawyers with sincerely held religious beliefs will be discriminated against by the Rule, there is no recognition or sensitivity to the discrimination that occurs against those who are the victims of their "sincerely held religious belief."[iv] These opponents to Model Rule 8.4(g) argue that their First Amendment freedom of religion not only allows, but permits, them to discriminate against LGBTQ. The latest spin on this argument made before the U.S. Supreme Court is that the refusal to bake a cake for a same-sex couple's wedding celebration is founded upon the baker's status as a "cake artist" whose speech is being forced by the state because he must use his artistic skills in a manner contrary to his religious beliefs. The baker/cake artist is not discriminating against gay people, the president of the religious organization representing him says. "Creative professionals should be free to create art and other expression consistent with their beliefs."

But are we not all "creative professionals"? The skilled professional who keeps my 2002 Mazda running is very creative. And, one might argue that there are very few lawyers who are not "creative professionals." Will such an argument provide a basis for lawyers or

auto mechanics to refuse service to the LGBTQ? As noted in the ABA amicus brief in Masterpiece Cake:

> Many business activities—from serving meals to seating patrons to providing legal advice and counseling—can be recast as expressive in nature. Permitting compelled-speech claims to override public accommodations laws therefore would vitiate those laws, leaving individuals vulnerable to the stigma of being refused service based on business owners' beliefs and hobbling government's authority to enforce a basic guarantee of equal dignity.

First Amendment, freedom of speech:

The libertarian/academic argues the Rule is unconstitutional because "[l]awyers do not surrender their First Amendment rights for the privilege of practicing law."[v] Lawyers do, indeed, agree to limit the exercise of some First Amendment rights for the privilege of practicing law. Recently amended Model Rules 7.1, 7.2 and 7.3 restrict the First Amendment commercial speech of lawyers in ways that non-lawyers are not limited. Model Rule 5.4(b) limits a lawyer's right of association. Model Rule 3.6 limits the ability of a lawyer to speak publicly about a matter. These are just a few examples of restrictions on a lawyer's First Amendment "rights" when practicing law.

A significant part of the free speech argument against the Rule is based upon two red herring arguments: First, there is a speculative argument that the Rule would serve to "chill" a lawyer's speech, particularly when teaching at a CLE or during conversation at a bar association social event because the lawyer will fear a bar complaint being filed based on statements made during the event.

Drafters of Model Rule 8.4(g) heard from female lawyers who represent other women lawyers in harassment and discrimination complaints against their employers. Time after time, the ABA was told of illegal and inappropriate harassment taking place at firm outings, dinners and bar association events—and this was long before Time magazine named as Person of the Year 2017 "The Silence Breakers," women (and men) who spoke out about sexual harassment and named names. Therefore, drafters of Rule 8.4(g) included these events as part of the definition of "conduct related to the practice of law."

Second, contrary to one professor's argument in opposition to Rule 8.4 (g), there is no legal cause of action for harassment based upon the speech of "one-to-many." This commenter has speculated that there have been cases in criminal harassment law that have expanded from comments specifically to a person to speech *about* a person. While the professor argues that such an expansion is unconstitutional, he proclaims that Rule 8.4(g) is such an unconstitutional "one-to-many" harassment rule.

Reading Rule 8.4(g) in this way, the scholar argues that a lawyer speaking at a CLE or another lawyer gathering could violate the rule if someone—anyone—in an audience feels discriminated against or harassed by the lawyer's statement.

The scholar follows this line of thinking by hypothesizing that a violation of the rule could result from a CLE that debates same-sex marriage laws or immigration from Muslim countries or use of bathrooms determined by gender identity versus biological sex "even when they aren't said to or about a particular offended person." Cherry-picking language from a comment, this scholar claims that such a statement would be "verbal...conduct" that "manifests bias or prejudice," which is within the scope of Comment [3] elaboration on discrimination.[vi] But, there are no facts in the hypothesis that the CLE

debates were directed to anyone. Rather, the scholar argues, under his own "one-to-many" harassment theory, the word "others" in the Comment means that if someone or several people in the audience view whatever is said as "harmful," it violates the Rule. But "harmful" is an objective standard as it would apply to whether whatever was said manifests bias or prejudice. Since there is no discussion in the hypothesis clarifying how the CLE discussions of legal issues to an audience becomes harassment or discrimination against any individual, one is hard pressed to discover how the rule is violated.

Another scholar has hypothesized that a statement from one lawyer to another in connection with a case such as "I abhor the idle rich. We should raise capital gains taxes" would violate Rule 8.4(g) because it is "manifesting bias based upon socioeconomic status."

This hypothesis is as creative as it is unreasonable.

First, the Scope statement to the Rules explains "The Rules of Professional Conduct are rules of reason....The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule...The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Such guidance is supported by the interpretive doctrine noted by Antonin Scalia and Bryan A. Garner that it is a "false notion that words should be strictly construed." [vii] Rather, one should adhere to the "fair meaning" of the text—not a reading that Learned Hand called "a sterile literalism...[that] loses sight of the forest for the trees."[viii]

Second, it is a subjective, qualitative judgment to determine not only whether a statement "manifests bias," but also whether whatever the statement "manifests" rises to the level of harassment or discrimination and, if it does, whether it is based upon socioeconomic status. This does not even address other elements of the rule, such as whether the

lawyer knew or reasonably should have known the statement was harassment or discrimination. Moreover, it is axiomatic that "a statute should be interpreted in a way that avoids placing its constitutionality in doubt."[ix]

## Conclusion

Given the startling revelations that have continued since the Fall of 2017 regarding revelations of sexual harassment by a number of public figures in entertainment, government and news media, it is hard to fathom that anyone could reasonably object to Rule 8.4(g) prohibiting such conduct in connection with the practice of law. Arguments against the Rule fall upon scrutiny as products of underlying agendas or fantasies of creative commentators. Illustrative of how specifically applicable and narrowly drafted Rule 8.4(g) is can be found by returning to the conduct of the twice former Alabama Supreme Court Chief Justice and Republican Senate candidate Roy Moore that dominated much news reporting during October 2017. It was reported that when he was a county district attorney forty-odd years ago, Moore harassed young women and girls. And that his official status as a county attorney intimidated his victims into silence. However, in many of the instances reported, Moore was not "engaged in conduct related to the practice of law"—his conduct was apparently done outside his practice or his office. This behavior likely falls outside of that regulated by Rule 8.4(g).[x] However, there is another allegation that he groped a woman who was a client while she was leaving his private practice law office after an appointment. This would be within the scope of Rule 8.4 (g) as it was conduct related to the practice of law.

In sum, the crusade of opposition to Rule 8.4(g) based upon a political agenda has transcended the question of what is appropriate for disciplinary standards for lawyers in the practice of law. As such, this

crusade against Rule 8.4(g) appears to have created an overwhelming partisan political barrier to the adoption of the Rule on the its merits.

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[i] Romer v. Evans, 517 U.S. 620 (1996), Scalia dissent

[ii] Noah Feldman, "Divided by God: America's Church-State Problem—And What We Should Do About it," (New York, 2005: Farrar, Straus and Giroux) pp. 3-4.

[iii] Burwell v. Hobby Lobby, 573 U.S. __ (2014)

[iv] Scholarly research is documenting that conservatives/Republicans disregard facts and reasoning. "The tenacity of many of the right's beliefs in the face of evidence, rational arguments, and common sense suggest that these beliefs are not merely alternate interpretations of facts but are instead illusions rooted in unconscious wishes." John Ehrenreich, "Why Are Conservatives More Susceptible to Believing Lies?", Slate, November 9, 2017,

[v] Marc Randazza, quoted in ABA Journal, October 2017

[vi] Rule 8.4(g) Comment [3] "Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."

[vii] Antonin Scalia and Bryan A. Garner, "Reading Law: The Interpretation of Legal Texts," (2012, Thomson/West) p. 355.

[viii] Id. P. 356, citing *New York Trust Co. v. Commissioner,* 68 F.2d 19, 20 (2d Cir. 1933) (per L. Hand J.)

[ix] Id., p. 247

[x] That does not mean that other provisions of Rule 8.4 may not be applicable.

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