In Support of Pennsylvania Adopting Model Rule 8.4(g)

Pennsylvania should adopt ABA Model Rule 8.4(g). Adopting this rule will put Pennsylvania at the vanguard of states that are holding attorneys to more rigorous standards of professional conduct worthy of the elevated position that lawyers occupy in American life. Adopting Rule 8.4(g) is not the radical departure from established professional norms or the insidious, creeping threat to the First Amendment that its detractors characterize it as. This essay outlines the primary reasons why Pennsylvania should take the beneficial and prudent course of action of adopting Rule 8.4(g).

First, lawyers – unique among the professions – are self-regulated. Unlike doctors, architects, engineers, and countless others, our profession has been given an enormous degree of freedom in being able to draft its own rules and to impose its own disciplinary measures, with little involvement from the state. This reality puts lawyers in an exceptional position relative to other professionals. Because the legal community is not regulated by state legislation or administrative agencies, it must do everything it can to preserve its reputation by its own means. If attorneys fail in this regard, the respectability and independence of the entire profession is at stake.

Adopting Rule 8.4(g) is a reasonable way of garnering the public's trust in and respect for attorneys, as well as protecting members of the legal community from the pernicious effects of intra-professional discrimination. By expanding the scope of Rule 8.4's non-discrimination rules beyond "the administration of justice," Rule 8.4(g) brings the rules of professional conduct into closer alignment with contemporary standards regarding what meaningful protection from discrimination should entail. The modified rule expands the classes of individuals covered under

Rule 8.4's anti-discrimination provisions and broadens covered activities to include "conduct related to the practice of law."

As more businesses, municipalities, and states adopt legislation protecting an expanded class of persons under their anti-discrimination policies and laws, the legal profession should not allow itself to fall out of step with overarching, progressive trends in society. In cases where legal protections have not been extended – for example, to individuals who do not conform to societal expectations about how they should express their gender identity, a reality in much of Pennsylvania – the legal profession can be a norm creating institution that serves as an example of the direction in which society and public policy ought to move. As a self-regulated profession, it is incumbent upon the Pennsylvania legal community to ensure that it can protect clients in interactions with attorneys, as well as attorneys interacting with each other.

Second, the addition of subsection (g) to Rule 8.4 is not a rash, political, or "woke culture" change to the longstanding rule. Rather, the expanded anti-discrimination protections are a logical and studied outgrowth of many years of discussion and debate on this issue. The ABA adopted the original version of Rule 8.4 in 1983. Official discussions around amending the rule to give it broader applicability date back to at least 1994. Notably, the ABA groups that were most focused on issues relating to bias, harassment, and discrimination, were the Criminal Justice Section, the Young Lawyers Division, and the Standing Committee on Ethics and Professional Responsibility. Voting on a proposed amendment to the Rule in 1998 failed to lead to the desired change, but it spurred the ABA to adopt a comment to Rule 8.4(d) explaining what types of conduct should be deemed "prejudicial to the administration of justice."

Even after the addition of this comment, which one can view as a "bridge" toward Rule 8.4(g), the ABA continued its mission to make the legal profession a more inclusive one. In

2008, the ABA included eliminating bias and increasing diversity to its list of organizational goals. Work in this area led to subsection (g) being added to Rule 8.4 by a large majority of the 598-member House of Delegates in 2016. Since its adoption, the amended rule has had considerable impact. Since 2016, twenty-nine states have adopted comments to their anti-discrimination rules, including thirteen states that have not yet adopted Rule 8.4(g) and two that have expressly rejected the amended rule. So far one state, Vermont, and three United States territories have adopted the rule.

Third, it makes logical sense to expand the ABA's prohibition of conduct that exhibits biased or discriminatory behavior to cover not solely acts that are "prejudicial to the administration of justice" but to also cover "conduct related to the practice of law." Critics of the revision characterize Rule 8.4(g) as "overly broad." Subsection (g) is certainly broader than subsection (d), but this is not without reason – and it is emphatically *not* overly broad. No reasonable attorney would dispute that lawyers should not, in the course of representing a client, knowingly manifest bias toward a legally protected class. Giving clients a vigorous representation is at the core of what it means to be a lawyer, but it is not the only way an attorney exercises their professional capacity. Working as a lawyer necessitates engaging in many professional activities that do not directly involve client representation but that are ripe with opportunity for discriminatory behavior that have negative effects on the profession as a whole. Prime examples of this include coworker interactions, managing a law practice, teaching law students, participating in professional associations, and attending CLE events. Covering these are areas is not such a large leap from the current rule.

Critics of the expanded coverage under Rule 8.4(g) have opposed not only the enlarged range of activities that fall under the scope of the rule, but also the expansion of whom the rule

protects. In addition to the original protected categories, which were *only* covered in the "administration of justice," the updated model rule expanded in scope to cover ethnicity, gender identity, and marital status. The result is that a range of kulturkampf issues, including same-sex marriage, and rights for transgender individuals, have been brought under the scope of Rule 8.4 in a wide variety of contexts. This result has angered some cultural conservatives and bleeds into arguments that Rule 8.4(g) would have a chilling effect on free speech. However, the amended rule is necessary to ensure that lawyers are not only subject to disciplinary measures when they act in a biased way towards clients in the course of representing them, but also when they act in similar ways in all facets of their professional life. Activities that fall outside of an attorney's duties as an attorney do not fall under the scope of this rule. Rule 8.4(g) is not overly broad in its coverage, and it is essential to the ABA's mission of countering issues of systemic discrimination that research and recent events have shown exist at all levels of society.

Fourth, Rule 8.4(g) is not the threat to the First Amendment's protection of freedom of religion and freedom of speech its critics have made it out to be. One should note at the outset, that the ABA's House of Delegates carefully considered these issues and yet still adopted the rule by a large majority, and no one in attendance at the vote raised their voice in opposition. The rule was drafted to accommodate the fact that we live in a country with a strong tradition of freedom of religion, speech, and association. One should also note that Rule 8.4(g) is only one of several – widely adopted – model rules that place speech restrictions on lawyers.

Two United States Supreme Court cases have been held forth as roadblocks to successful implementation of Rule 8.4(g). In *Matal*, the Court held that a federal statue was facially unconstitutional because it allowed federal officials to punish disparaging speech by denying trademarks for terms that might bring living or dead persons into contempt or disrepute. The

majority concluded that the statue offended the principle that speech may not be banned solely because it is offensive. Writing for the plurality, Justice Alito wrote that, though speech may be hateful, allowing speech that offends is a hallmark of American free speech jurisprudence. In *NIFLA*, the Court held that restrictions on the speech of lawyers must be subject to strict scrutiny. These restrictions are content-based, and thus are presumptively unconstitutional unless they are shown to be narrowly tailored to serve a compelling state interest. In this case, the Court did not recognize professional speech as a separate category of speech from, for example, political speech. However, neither did the Court entirely foreclose on the idea that there could be some possibility that a reason for treating some types of professional speech differently might exist.

In adopting Rule 8.4(g), Pennsylvania can distinguish the restrictions on speech in the rule from those the Supreme Court rejected in *Matal* and *NIFLA*. Unlike in *Matal*, we are not dealing with federal legislation. The state's rules of professional conduct are adopted by the state Supreme Court and enforced by the Disciplinary Board. Further, unlike in *Matal*, the policy at issue here does not give attorneys barred in Pennsylvania authority to provide or to deny a service or benefit based on the contents of the policy. Like in *Matal*, some covered individuals will be attorneys who work for the federal government, but there is no federal or state law at issue akin to that in *Matal*. Finally, the biased and discriminatory speech covered under Rule 8.4(g) is not subject to disciplinary measures simply because it is offensive. It is covered precisely because it is speech that has a high likelihood of interfering with a lawyer's ability to adequately serve as an officer of the court and their ability to serve in a profession that must be held to a higher standard of conduct.

Pennsylvania can also fit adopting Rule 8.4(g) into the requirements of *NIFLA*. This case requires that restrictions on content-based speech of lawyers be able to pass strict scrutiny. Lawyers serve as officers of the court. This is abundantly clear when they are acting in the "administration of justice." However, the strictures of Rule 8.4(g) are also applicable when lawyers are engaged in conduct "related to the practice of law." Even when they are not directly representing clients, lawyers have professional duties and ethical obligations that do not extend to other citizens. Two elements of the amended rule make sure that it is narrowly tailored to only cover specific conduct of interest to the state. First, the rule adds a knowledge component. The prohibited conduct is conduct that a lawyer "knows or reasonably should know" is harassment or discrimination. These terms are defined in the MRPC and are terms that *all* attorneys should be familiar with and well accustomed to complying with in all aspects of their work. The legal profession is a one that is built around the power of the spoken and written word. The knowledge requirement is reflective of this. Second, the rule specifies that it covers "conduct related to the practice of law." When they are acting outside of their professional capacity, attorneys are not covered by the rule.

Critics of Rule 8.4(g) have tended to argue that anyone attending, for example, a CLE event, who feels offended or discriminated against by something a speaker said could bring a disciplinary complaint against that speaker under a "one-to-many" theory. This argument is speculative and not the kind of conduct Rule 8.4(g) is intended to cover anyways. This argument elides the rule's knowledge requirement and ignores the fact that determining whether conduct or speech "manifests bias" – and whether that conduct rises to the level of harassment or discrimination – is a subjective, qualitative judgment. In sum, there are sufficient safeguards built in to Rule 8.4(g) to ensure that it can withstand constitutional scrutiny.

For the reasons discussed above, Pennsylvania should adopt Rule 8.4(g). This rule, which has developed over time, for a self-regulated profession, serves as a normative model of what good citizenship and ethics in a rapidly changing society look like. Rule 8.4(g) does not invite the parade of horribles of First Amendment violations its detractors claim it will. Taking a "wait and see" approach" to Rule 8.4(g), as some commentators encourage, will leave Pennsylvania behind the curve. Adopting this rule will put our state at the forefront of positive, structural change in the legal community.