# SEE SOMETHING; SAY SOMETHING: MODEL RULE 8.4(g) IS NOT OK

*William Hodes**

## I. AN AMERICAN BAR ASSOCIATION PANEL DISCUSSION FAILED TO DELIVER THE ADVERTISED CONTENT—BUT WHY?

The title of this Article combines two common memes in a most uncommon way. This juxtaposition was suggested by another juxtaposition—the title and description of a panel discussion at the May 2019 American Bar Association ("ABA") National Conference on Professional Responsibility in Vancouver on the one hand, and its *actual* content on the other.

The panel was entitled *Harassment and Discrimination in the Rule 8.4(g) and #MeToo Era*,[1] and the description in the program brochure looked promising. According to the brochure, the panelists would discuss how sexual harassment and discrimination in the legal workplace might "present an issue of professional misconduct."[2] They would, moreover, "confront the issues that harassment and discrimination raise" under the ABA's Model Rules of Professional Conduct, with particular emphasis on Model Rule 8.4(g), which had been adopted by the ABA House of Delegates in August 2016.[3]

But the attendees in Vancouver heard—in the undying words of Monty Python—*something completely different*[4]: although Model Rule

---

* Professor Emeritus of Law, Indiana University. B.A. Harvard College (1966); J.D. Rutgers University School of Law-Newark (1969).

1. ABA 45TH NAT'L CONF. PROF'L RESP. (Vancouver, May 29-31, 2019).

2. AM. BAR ASS'N, 45TH ABA NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY 1 (2019) (Conference Pamphlet on file with author).

3. *Id.* at 2.

4. It is regrettable—but possible—that some readers might not recognize the reference. *Monty Python's Flying Circus* was a British sketch comedy series that ran on British and American television from 1969 to 1974, featuring a mixture of absurdist and erudite skits, interwoven with animation sequences. The opening credits of each show always ended with the same disheveled character croaking, "And Now, For Something Completely Different!" *Monty Python's Flying Circus* (BBC 1969–74).

8.4(g) was featured in the title of the program and included in the accompanying materials, *neither it nor any other ethical rule was mentioned by any of the panelists during the presentation, even in passing*. The highlight of the program title was treated with the kind of embarrassed silence usually reserved for a crazy relative safely stowed in the attic.

That was more than a little odd, especially for the signature ABA legal ethics event of the year, and especially for a high-profile ABA rule that was closing in on three full years of contentious post-adoption debate.[5] But what caused this oddity? What was its significance? A lot of historical ground stands between those questions and some possible answers.

## II. THE UNEASY HISTORY OF MODEL RULE 8.4(g), FROM ITS INCEPTION THROUGH THE AMERICAN BAR ASSOCIATION CONFERENCE IN VANCOUVER

As has been discussed in more detail in contributions to this Symposium,[6] Rule 8.4 of the Model Rules of Professional Conduct was amended in August 2016 by the addition of a new paragraph, Model Rule 8.4(g). In adopting the new provision, the ABA House of Delegates placed—for the first time—a direct and enforceable prohibition against discrimination and harassment by lawyers into the black-letter text of the Model Rules.[7]

Prior to that (and since 1998), a comment to Model Rule 8.4 had instructed that "knowingly manifest[ing], by words or conduct, bias or prejudice" could subject a lawyer to discipline for professional misconduct.[8] But such discipline was possible, according to the comment, *only* if the misconduct occurred "in the course of representing

---

5. Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, A.B.A. (Oct. 2018) https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g.

6. *See, e.g.*, Michael Ariens, *Anti-Discrimination Ethics Rules and the Legal Profession*, 50 HOFSTRA L. REV. (forthcoming 2022).

7. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). The full text of paragraph (g) is as follows:

Rule 8.4. 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.

*Id.*

8. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 1998).

a client," and then *only* to the extent that the conduct was "prejudicial to the administration of justice," which had long been the textual prohibition of Model Rule 8.4(d).[9]

The new paragraph (g) that was added in 2016 elevated anti-discrimination and anti-harassment principles from the comments to the directly enforceable black-letter text and removed the necessity of piggy-backing enforcement onto another aspect of Rule 8.4 (namely Rule 8.4(d)).[10] But paragraph (g) and its accompanying comments also dramatically expanded the scope and intensity of the regulation,[11] and that is what caused most of the controversy that attended the adoption of the rule and continues today.

Model Rule 8.4(g) applies to all conduct—both physical *and* verbal[12]—that is "*related to* the practice of law," *whether or not* there is a client in the picture, and *whether or not* there is any prejudice to the administration of justice.[13] But there is precious little that lawyers do

---

9. Between 1998 and 2016, Comment [3] to Rule 8.4 read as follows, in relevant part: "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*." *Id.* (emphasis added).

10. *See* Myles V. Lynk, *Report*, 2016 A.B.A STANDING COMM. ON ETHICS & PRO. RESP. 4-5 (2016).

11. In judging the potential impact of any rule of professional conduct and in applying it to individual cases, it is critically important to consider the relationship between the black-letter text of the rule and the applicable comment. The formal relationship is that comments "explain and illustrate the meaning and purpose of the rule," and that "[t]he Comments are intended as guides to interpretation, *but the text of each Rule is authoritative*." MODEL RULES OF PRO. CONDUCT Preamble & Scope ¶ 21 (AM. BAR ASS'N 2020) (emphasis added). Thus, a comment cannot "trump" a rule, and comments that are manifestly at odds with the text of a rule will be disregarded. But significant divergence between a Model Rule and its comments is rare; both are drafted, debated, and adopted roughly contemporaneously by roughly the same group of people. The hard cases arise when a comment is neither overtly inconsistent with the text of a rule nor compelled by it. The question is always why the additional meaning contained in the comment—if it was truly intended—was not stated in the rule. In the case of Model Rule 8.4(g), however, it is fair to say that the fit between rule and comment is especially tight, so that they should be read as interchangeable. The substantive provisions that were in play changed hardly at all during the several-year drafting process, while their placement in text *versus* comment morphed frequently. Including a particular proposition in the black-letter text, repositioning it to a comment, or movement in the opposite direction, was often a matter of political horse-trading dictated by the need for compromise among competing American Bar Association ("ABA") entities. *See* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 221-32 (2017) [hereinafter *Legislative History*].

12. The black-letter text of Model Rule 8.4(g) refers only to "conduct"; the extension to both physical *and* verbal conduct—by all odds the most contentious issue—appears only in Comment [3]. However, there is no possible doubt that both the proponents of the new provisions and the ABA House of Delegates intended the prohibition against harassment and discrimination to include many situations in which the lawyer's misbehavior consisted of speaking harmful words *only*. *See Legislative History*, *supra* note 11, at 205-10, 212-14.

13. *Id.* at 214.

that is not at least "related to" the practice of law in some arguably plausible way, especially if that term is given a broad reading. Moreover, even strictly personal and private activities might *still* be deemed to be "related to" the practice of law if lawyers are thought of as "representatives" of the law whose "off-duty" misconduct might call into question their "fitness" to be lawyers.[14]

Official comments adopted in 2016, along with the revised text, confirmed that the new language was intended to be read broadly, extending to management and operation of a law firm or law practice, as well as to participation in bar association, business, and even social activities "in connection with the practice of law."[15] But that is little more than a tautological trope. The term "*in connection with* the practice

14. This is not a fanciful concern. Model Rule 8.4(b) prohibits committing a criminal act "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," *whether or not related to the practice of law, and whether or not a conviction results*. MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS'N 2020). The "fitness as a lawyer" aspect of the rule replaced the notoriously vague and subjective crimes of "moral turpitude" language that had appeared in earlier codes of professional discipline. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 2016). But disciplinary authorities and courts have continued to reach deeply troubling results. In *In re Nishikawara*, 937 N.E.2d 810, 810-11 (Ind. 2010), for example, a lawyer was publicly reprimanded merely for having patronized a prostitute—which was a misdemeanor. There was no discussion of why that minor criminal act reflected adversely on the respondent's fitness as a lawyer. Similarly, in *Bar Counsel v. Erin Marie O'Connor, Esq.*, BBO No. 684283 (Mass. Bd. Bar Overseers Sup. Jud. Ct. Sept. 3, 2021), a lawyer who struck and killed a pedestrian while glancing at her cell phone just before a crosswalk was publicly reprimanded after having been convicted of misdemeanor vehicular homicide by negligent operation. Once again, there was no explanation as to why this criminal conduct, though freighted with tragic results, had anything to do with O'Connor's *fitness* to continue her legal career. These and similar cases should not be directly applicable to Model Rule 8.4(g) and its state counterparts, because Rule 8.4(b) does not include a "related to the practice of law" component. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020). But the danger that the two rules will gradually be conflated in application cannot be dismissed, because an inquiry into whether a particular lawyer is "fit" to *continue* being a lawyer cannot be completely divorced from consideration of what it means to "practice law." See, for example, *In re Schlossberg*, 137 N.Y.S.3d 44, 45-48 (App. Div. 2020), in which a lawyer loudly berated the staff at a Manhattan sandwich shop for speaking Spanish to each other and to other customers and threatened to alert immigration authorities. Schlossberg, the defendant, was disciplined under a New York provision comparable to Model Rule 8.4(b) rather than 8.4(g), because no one at the sandwich shop knew that he was a lawyer. *Id.* at 47. But it is not hard to imagine another "purely private" case in which the respondent's status as a lawyer is known or is obvious, and it is not hard to then imagine that a disciplinary authority would find that a sufficient connection to satisfy the "related to the practice of law" requirement of Rule 8.4(g).

15. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2020). When Model Rule 8.4(g) was approved by the ABA House of Delegates in 2016, Comment [3] was replaced by new Comments [3] through [5]. New Comment [4] was as follows, in relevant part:

[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.

MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N, Revised Resolution 2016).

of law" is essentially indistinguishable from the term "*related to* the practice of law," which it was supposed to elucidate, and one is just as vague (and potentially overbroad) as the other.[16]

In addition, the terms "discrimination" and "harassment" were not defined in the black-letter text, and the new comments made the situation worse by employing a series of even broader and vaguer terms that were supposed to "explain" what was meant. "Discrimination" was said to *include* "harmful verbal or physical conduct that manifests bias or prejudice towards others."[17] Yet, there was no indication of what *other* speech or conduct might be regarded as discriminatory, and there was no suggestion as to how "harmful" was to be defined.[18] Similarly, the term "[h]arassment" in the text of Rule 8.4(g) *included* "derogatory or demeaning verbal or physical conduct," but the comment again failed to indicate what—if anything—would be *excluded*, and again provided no measuring stick for assessing those follow-on terms.[19]

Even more ominously, while the text of Rule 8.4(g) proscribed only discriminatory and harassing conduct, the new comments repeatedly asserted that this included *verbal or physical* conduct.[20] But because verbal conduct is speech, this meant that the rule prohibited *at least* all "harmful" speech that "manifests bias or prejudice towards others," with "harmful" *still* undefined.[21] According to the comments, the rule prohibited, as well, "derogatory or demeaning" speech, with those terms not only undefined, but subject to the sensitivity or whims of a hearer.[22]

---

16. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020); *id.* cmt. 4.

17. *Id.* cmt. 3.

18. The new Comment [3] that replaced the 1998 Comment [3] in the revision reads as follows:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine 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).

*Id.*

19. *Id.*

20. Certainly, this accurately reflected the intended meaning of the black-letter text. It is remarkable, however, that *none* of the five official drafts of what became Model Rule 8.4(g) included "verbal conduct" in the text. *See Legislative History*, *supra* note 11, at 211-31. The most plausible explanation is that the ABA hoped that mentioning verbal conduct "only" in a comment would, at least to some extent, obscure the First Amendment difficulties of the rule.

21. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020).

22. *Id.* The situation would be markedly different if either Model Rule 8.4(g) or its comments limited the concepts of "harmful" speech or "derogatory or demeaning" speech to speech directed at or targeting a specific individual *in the presence of that individual*. Although not free from all

Most important, once the Model Rule was adopted for use in an individual state, it would cease being merely a rule to curb odious speech within the ranks of the ABA, but would become state action for purposes of the Fourteenth Amendment: a *government-imposed* rule that directly regulated the speech of lawyers.[23] A not especially threatening 1998 Comment that prohibited speech that "manifest[ed] . . . bias or prejudice," but *only* during representation of clients and *only* when it rose to the level of being "prejudicial to the administration of justice," was instantly transformed into a generally applicable speech code for lawyers, punishing *harmful* speech, *derogatory* speech, and *demeaning* speech, with the sole condition that the speech be "related to the practice of law" in some (unspecified) way.[24]

But this stands the First Amendment on its head, at least for holders of a government-issued license to practice law.[25] One of the chief features of our constitutional republic—all but unique in the world today and in the history of the world—is that governmental actors at all levels are *forbidden* from punishing or otherwise interfering with citizens for engaging in harmful, derogatory, or demeaning speech except in

---

constitutional doubt, a governmental prohibition against that kind of speech would find ready analogies in laws against defamation, intimidation, extortion, and blackmail. A pure speech-only offer to trade sex for a promotion or a pay raise would also qualify as "verbal conduct" that could be prohibited or punished without First Amendment implications. But there is no suggestion anywhere in the comments that Model Rule 8.4(g) meant to differentiate between harmful speech directed *at* a particular victim and harmful speech that was merely overheard by someone who was not its specific target. As noted in several of the contributions to this Symposium, one of the most significant changes that New York made to Model Rule 8.4(g) when adopting its own version was to specify that only *targeted* harassment is proscribed. *See* Margaret Tarkington, *"Breathing Space to Survive"—the Missing Component of Model Rule 8.4(g)*, 50 HOFSTRA L. REV. (forthcoming 2022); Ellen Yaroshefsky, *The Long Road to New York's Anti-Discrimination and Anti-Harassment Ethics Rule*, 50 HOFSTRA L. REV. (forthcoming 2022).

23. *See infra* note 48 and accompanying text.

24. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 1998); *id.* r. 8.4(d); MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020).

25. Model Rule 8.4(g) was subjected to an avalanche of criticism on First Amendment grounds specifically, both because it broadly punished speech based on viewpoint, and because its vagueness enhanced the "chilling effect" it would have on protected speech. *See* Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 138 (2022); George W. Dent, *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L., ETHICS & PUB. POL'Y 135, 158-79 (2018); *Legislative History*, *supra* note 11, at 248-56; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 255-64 (2017). Many commentators, however, regarded these First Amendment dangers as minimal or even non-existent. *See* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 46-48, 64-67 (2018); Robert N. Weiner, *"Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 125, 129-35 (2018); 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. LEGAL ETHICS 195, 234-36 (2017).

compelling and narrowly defined circumstances.[26] Instead, it is precisely because speech *is* harmful that it both requires and is entitled to protection from governmental restrictions in most situations.[27]

Largely because of the above difficulties, Model Rule 8.4(g) has been ignored or rejected essentially everywhere at the state level, having been fully adopted only by two states—Vermont and New Mexico.[28] Thus, by the time of the 2019 conference in Vancouver, it should have been clear to the ABA that its rule was a dead letter, at least in terms of

---

26. The eloquence of Justice Robert Jackson's opinion overturning the requirement that students pledge allegiance to the American flag in public school classrooms has rarely been matched and is often cited: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

27. In 1984, the City of Indianapolis adopted an ordinance that redefined non-obscene pornographic materials as a form of *conduct* that subordinated and thus discriminated against women, rather than as a form of speech. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986). Under the ordinance, a woman who was "harmed" by this discrimination—even if it was discrimination against some other woman (or women generally)—could file a complaint against a producer or seller with the local Office of Equal Opportunity, which could issue Cease and Desist orders and award damages against the perpetrators. *Id.* at 326. Judge Sarah Evans Barker of the United States District Court for the Southern District of Indiana quickly issued an injunction preventing the ordinance from going into effect, and her ruling was affirmed. Judge Frank Easterbrook's opinion for the Seventh Circuit presciently destroyed one of the chief arguments that would later be made in support of Model Rule 8.4(g)—that the rule "only" regulated "verbal conduct" that was "harmful" and had detrimental consequences. *Id.* at 328-29. Judge Easterbrook *conceded* for purposes of the analysis that pornography not falling within the Supreme Court's definition of obscenity is harmful because it tends to produce a toxic culture that in turn leads to injurious conduct and practices. He accepted, as well, the legislative findings that the "bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." *Id*. at 329 (alteration in original). But that did not save the constitutionality of the Indianapolis ordinance—it doomed it:

> Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech . . . .
>
> Racial bigotry, anti-Semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. *Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.*
>
> Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses . . . . People may be conditioned in subtle ways. *If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.*

*Id.* at 329-30 (emphasis added).

28. VT. RULES PRO. CONDUCT r. 8.4(g) (2017); N.M. RULES PRO. CONDUCT r. 16-804(g) (2019).

being a "model" that would be widely followed.[29] Model Rule 8.4(g), as it stood, could not provide *actual* assistance in addressing the problems of discrimination and harassment in the legal profession.[30] In the real world, in other words, paragraph (g) was little more than a show horse, without any ability to do its intended work.

Under these circumstances, a serious-minded discussion at a high-profile ABA event, coupled with recognition of the troubling deficiencies of Model Rule 8.4(g), might jumpstart a move towards reconsideration and redrafting.[31] As already noted at the outset, however, that much-needed discussion did not occur at the gathering in Vancouver.

## III. CURBING SEXUAL HARASSMENT AND SEX DISCRIMINATION WITHIN THE LEGAL PROFESSION THROUGH A "CULTURAL SHIFT"

### *A. Cultural Norms, Professional Norms, and the Promises and Risks of Cultural Transformation*

When the revision project that resulted in the adoption of Model Rule 8.4(g) in 2016 got underway in 2014, three main ideas animated the process. First, proponents insisted that it was unacceptable to continue to allow anti-harassment and anti-discrimination principles to languish in a

---

29. In four states, the Attorneys General had gone so far as to issue opinions asserting that Model Rule 8.4(g) could not be adopted in each respective state because that would violate lawyers' First Amendment rights. *See* Tenn. Att'y Gen., Op. No. 18-11, at 5 (Mar. 16, 2018); La. Att'y Gen., Op. No. 17–0114, at 2 (Sept. 8, 2017); S.C. Att'y Gen., Op. Letter, at 13 (May 1, 2017); Tex. Att'y Gen., Op. No. KP-0123, at 3-4 (Dec. 20, 2016).

30. This Article proceeds from the premise that discrimination and harassment—on the basis of sex for purposes of discussing the presentation in Vancouver—is a genuine and serious problem in the legal workplace and in the legal profession generally. But recognizing the problem is not the same as determining how it should be addressed and by whom. *See infra* Part III.

31. This was concededly unlikely. The ABA did not appear to be in any mood to consider the possibility that the problem was with the rule, not with the vast majority of states that had rejected it. For example, a year later, in July 2020, the Standing Committee on Ethics and Professional Responsibility issued its Formal Opinion 493, ostensibly to provide "guidance" on the "purpose, scope, and application" of Model Rule 8.4(g). ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020). However, inasmuch as the rule governed the conduct of only a tiny fraction of American lawyers, the normal function of a Formal Opinion—to explain nuances of interpretation and application—was uncalled for. Regrettably, the supposed "guidance" was instead a one-sided work of *advocacy*, designed to *validate* Model Rule 8.4(g) and to urge its adoption everywhere. The opinion ignored the most disquieting aspects of the rule, did not fairly marshal its legal arguments, badly misstated the law on the regulation of lawyer speech under the First Amendment, opted gratuitously for a broader rather than a narrower interpretation, and was generally unconvincing in its attempt to calm the waters. There is no room in a short Article on a different topic to say more, but see, William Hodes, *The American Bar Association Goes All-In on Model Rule 8.4(g): A Reply to Formal Opinion 493* (forthcoming).

comment first adopted in 1998—a comment that was responsive to a generalized concern about "the administration of justice"—to boot.[32] It was past time for the ABA to go on record with a stand-alone and enforceable Model Rule of Professional Conduct.[33]

Second, the prohibitions set out in the new rule would press beyond lawyer conduct occurring during or in connection with client representation and would apply without regard to whether the conduct was "prejudicial to the administration of justice" or otherwise impacted the legal system.[34] Third, and closely related to the second, extending the reach of the rule to situations in which lawyers are not actually engaging with clients or participating in the legal system would involve the enforcement of new *cultural* norms—including norms resetting the bounds of acceptable speech in many situations—as opposed to the professional norms that had always been the concern of lawyer codes of conduct.[35]

This is not to suggest, of course, that there is always a bright-line distinction between professional and cultural norms. Codes of lawyer conduct are crowded with provisions *requiring* lawyers to favor client interests over their own, but self-sacrifice to serve others is also a central feature of the moral code that—for most lawyers—defines what it means to be a lawyer. The best lawyers instinctively keep their mouths shut about their clients primarily because that is part of what defines them as lawyers, and only secondarily because they can be subject to professional sanctions if they do not.

But precisely because the stated goal of the proponents of Model Rule 8.4(g) was to delink a prohibition against harassment and discrimination from the core professional activities of lawyers, the

---

32. For a discussion of the 1998 Comment, see *supra* notes 8-9 and accompanying text.

33. Between 1994 and 1998, several ABA entities proposed the adoption of such a rule, but none was presented to the House of Delegates for a vote. Indeed, the adoption of the 1998 Comment was a compromise solution, the direct result of the failure to adopt a rule during those years. *See Legislative History*, *supra* note 11, at 206-11.

34. *Compare* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020), *with* MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 1998).

35. In a December 22, 2015, Memorandum accompanying the first formally submitted draft of Model Rule 8.4(g), the Standing Committee on Ethics and Professional Responsibility quoted with approval an explanation of an earlier proposal made by the Oregon New Lawyers Division: "There is a need for a *cultural shift* in understanding the inherent integrity of people . . . to be captured in the rules of professional conduct." Memorandum from the Comm. on Ethics & Pro. Resp. of Am. Bar Ass'n 2 (Dec. 22, 2015) (emphasis added). Reliance on the Oregon proposal was generally appropriate, but the document was marred by its reference to the need to ensure that "*those who seek out legal representation*" are not subjected to harassment and discrimination, which was not at all the point of Model Rule 8.4(g). *Id.* (emphasis added). The chief focus of the Model Rule as it was proposed and as it was adopted is *not* the protection of clients, although they may benefit from its protection along with others.

"culture shift" element of the revision inevitably loomed large, heightened the controversy, raised the stakes, and, in the end, contributed significantly to the failure of the reform effort to gain any traction. Of course, not all efforts to bring about changes in cultural values are inherently harmful or doomed to failure. To the contrary, as discussed in Part III, Subpart B of this Article, such efforts can hold great promise.[36]

Many factors determine whether projects designed to produce large-scale cultural shifts are wise or foolhardy to attempt, whether an attempt will be constructive or calamitous, and whether the ultimate result of the effort will be salutary or pernicious, consensus-building, or conducive to acrimony and backlash.

One important factor is the extent of the culture shift at issue. The proposition that a person should not be fired from a job simply for being homosexual or transgender is far easier for most people to accept than the idea that homosexuality or transgenderism must be extolled and actively promoted in society at large.[37] Another factor is the depth of commitment to the cultural value that is being replaced. Demanding that adherents of one religion convert to another is more likely to lead to bloodshed than consensus, whereas people who have become accustomed to telling sexist jokes or even engaging in harassing and discriminatory behavior may gripe and grouse if "the culture" no longer condones these practices, but they are unlikely to "go to mattresses."[38]

The legitimacy (and efficacy) of any campaign to change the culture is also heavily influenced by the means employed, the level of persuasion (or coercion) needed to entrench new values, and the extent to which change is effected through governmental command, as opposed to private pressure (perhaps influenced or "nudged" by officialdom). There is a world of difference between Chairman Mao's Cultural Revolution and a campaign by the American Cancer Society to convince children and young adults that smoking tobacco has become "not cool."

In the case of Model Rule 8.4(g), most of its critics thought that the proposal was both needed and well-intentioned;[39] surely *none* were supportive of lawyers who harassed or discriminated against others. No one, presumably, was opposed *in principle* to a culture that condemned

36. *See infra* Part III.B.

37. *See infra* Part III.B.

38. In the film *The Godfather*, and later in the television series *The Sopranos*, when one organized crime faction was preparing to engage in a tit-for-tat war of retaliation against another, that was often referred to as "going to mattresses." THE GODFATHER (Paramount Pictures 1972).

39. *See, e.g.*, Tarkington, *supra* note 25, at 139-40; Blackman, *supra* note 25, at 263.

such behavior rather than condoning it. But the devilish details all pointed to a too-eager overreach that doomed the ABA's initiative.

Professional regulation *by the government* was being extended (without any readily discernable limits) to matters of social and cultural concern that were traditionally regulated by the give and take of private party interaction.[40] The proposed rules not only made governmental regulation of speech possible, but actively courted it. A series of undefined terms made fair application unlikely, and increased friction almost inevitable.

Perhaps this is what caused the ABA Center for Professional Responsibility to publicize a panel discussion focusing on a government-imposed cultural shift, but to substitute—perhaps subconsciously—an appeal for concerted private action.

### *B. Top-Down Governmental Coercion Versus Bottom-Up Concerted Private Action: The Hidden Message of the ABA Panel Discussion in Vancouver?*

True to the first part of its title and brochure description,[41] the panel discussion at the 2019 ABA Conference in Vancouver began with horror stories about the most blatant forms of #MeToo sexual harassment and even sexual assault in law firms and law departments large and small, as well as in the courts.[42] When sexual harassment takes the form of quid-pro-quo "bargaining" over workplace advancement, moreover, that obviously also qualifies as terms-and-conditions-of-employment discrimination based on sex.

Early on, the discussion also incorporated a history lesson about the marginalization of women lawyers, including statistics about the relative paucity of women in leadership positions in the legal profession, which might also be seen as evidence of discrimination.[43] It is thus fair to say

---

40. *See infra* note 46 and accompanying text.

41. The title of the panel was *Harassment and Discrimination in the Rule 8.4(g) and #MeToo Era*. *See supra* note 1 and accompanying text.

42. *See supra* notes 1-2 and accompanying text.

43. The long-ago exclusion of women from the profession altogether—obviously the most extreme form of discrimination—was also discussed, starting with *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 137-39 (1872), in which the Supreme Court found that exclusion (by Illinois) did not violate the Privileges and Immunities Clause of the Fourteenth Amendment of the Federal Constitution. Today, however, when many or most law school graduating classes are more than half female, that aspect of the history lesson has been outdated for decades. *See* Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First time*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html. It should be noted that *Bradwell* was not *in terms* a sexist decision upholding discrimination in bar admissions, although that was certainly its result and effect. *Bradwell* was decided on the same day as the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), which drained

that the program at least nominally touched on the two subjects identified in the first part of its title—harassment and discrimination.

But the rest of the program title and description remained mysteriously offstage, and never came into play. When *would* the always unlawful and sometimes criminal sexual harassment described by the panelists *also* "present an issue of professional misconduct" under the Model Rules, as the brochure had posed the question?[44] What about discrimination in hiring or promotion?[45] The program brochure's promise that these issues would be "confronted" by the panelists was left unfulfilled.

To return to the question posed at the outset of this Article, why would a panel on sexual harassment and discrimination at a major ABA-sponsored event avoid discussing Model Rule 8.4(g), especially

---

the Fourteenth Amendment—especially its Privileges and Immunities Clause—of most of its meaning not long after passage. In the *Slaughterhouse Cases*, the Court found that the Privileges and Immunities Clause protected only a narrow category of rights against encroachment by the states, *not* including the right to pursue a profession free from a state-imposed monopoly of other private actors. *Id*. at 73-81. Thus, unaffiliated butchers in New Orleans had no *federal* claim against a Louisiana statute that chartered a slaughterhouse that was alone permitted to engage in the trade in the New Orleans area, ostensibly as a health measure. *Id.* at 80-81. As a result, the Court in *Bradwell* had no need to address the rights and wrongs of the monopoly of male lawyers that Illinois enforced—it simply cited to the *Slaughterhouse Cases* decision of the same day and found that admission to the bar was also *not* a privilege and immunity of *federal* citizenship. *Bradwell*, 83 U.S. at 139. The *overtly* sexist message of *Bradwell* was found in the concurring opinion of Justice Joseph Bradley, who had issued one of the Court's most memorable *dissents* in the *Slaughterhouse Cases.* In that dissent, Justice Bradley equated the privileges and immunities of *United States* citizens with the fundamental rights of liberty, among which he counted the right to "choose one's calling." *The Slaughterhouse Cases*, 83 U.S. at 116 (Bradley, J., dissenting). In his *Bradwell* concurrence, however, Justice Bradley not only refused to extend that right to women who wished to choose the law as *their* calling, but he also doubled down by asserting that a monopoly of men over women was wholly justified by norms that out-signified even those of the Constitution:

> The paramount destiny and mission of woman are [sic] to fulfil the noble and benign offices of wife and mother. *This is the law of the Creator*. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases . . . . [I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness *which are presumed to predominate in the sterner sex*.

*Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring) (emphasis added).

44. AM. BAR ASS'N, *supra* note 2, at 1.

45. In *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), the Supreme Court held that discrimination against women by law firms considering whom to admit to partnership was an "unlawful employment practice" that was actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq. (1964). Whether lawyers guilty of violating Title VII would (or should) *also* be subject to suspension from practice or other professional discipline for the same conduct has been a matter of debate and is (in microcosm) at the very heart of the debate over the wisdom of Model Rule 8.4(g), (as opposed to its constitutionality).

when both the title and the description of the program had highlighted it? What *was* the takeaway that the presenters intended?

One possibility is that the aim of the program—and the point of the opening statistical exposition and historical detour in particular—was to suggest that if there are fewer women in the legal profession, each individual target of overt sexual harassment might feel more isolated and therefore less able (and more reluctant) to demand redress. Or perhaps the intention was to suggest that if the presence of a smaller number of women in the legal workplace can lead to more prevalent sexual *harassment*, that might in turn lead to more prevalent *discrimination* against women (and easier acceptance of it).

Another possibility is that the chief goal of the program was something simpler—to raise consciousness and to develop more awareness that the situation of women in the law was problematic in general, rather than focusing on specific wrongs and specific remedies. That might then lead to the conclusion that someone should *do* something about it (and that perhaps the "someone" should be *the government*).[46]

But none of that solves the mystery of why the panelists so studiously avoided a remedy that the government, through its lawyer discipline agencies, *had* already provided (in two states) and was being asked to provide throughout the country—Model Rule 8.4(g). However, the panel may have provided an explanation in the second half of the presentation, albeit unintentionally: it is bootless to parse the subtleties of a hopelessly flawed rule of professional conduct if a superior approach to and remedy for the problems of sexual harassment and discrimination in the legal profession are readily available.[47]

In other words, the panelists may have realized—perhaps subconsciously—that ever more granular *governmental* regulation and enforcement in this challenging area was not the most productive approach.[48] The need to change a pattern of discrimination and

46. In many areas of contemporary life, "See Something; *Do* Something" has replaced the ethos, most clearly associated with the terrorist attacks of September 11, 2001, "See Something; *Say* Something." Often, moreover, the newer meme also assumes that the "something" will be done *by the government*.

47. Kelly Dermody et al., Harassment and Discrimination in the Rule 8.4(g) and #MeToo Era, Presentation at the 45th ABA Conference on Professional Responsibility (May 30, 2019).

48. When the Model Rules of Professional Conduct, promulgated by a private voluntary association of professionals, are adopted—with or without amendments—in a jurisdiction, the resulting State Rules of Professional Conduct are enforced by the courts in that jurisdiction, which are also responsible for granting or withholding licenses to practice law, and for regulating lawyers and the practice of law. That is quintessentially state action for purposes of the Fourteenth Amendment, which explains why state bar regulations can be and so often are challenged under the federal constitution. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-49 (1991) (holding

harassment against women in the law may have been clear and present, but that does not take into account the vast difference between achieving change through coercive governmental regulation on the one hand, and by the aggregated action of private individuals on the other.[49]

The ultimate message of the panelists may thus have been that although the legal profession and the legal system should indeed *do* something about the problems that they had identified, adopting Model Rule 8.4(g) was the *wrong* thing to do.[50]

In any event, intended or not, and fortuitously or not, the panel in Vancouver eventually turned to a significantly different approach to eradicating harassment and discrimination in the law. During an engaging and even inspiring discussion in the second half of the program, an unstated and perhaps unintended, but nonetheless clear, message emerged. Instead of relying on an overbroad, vague, and increasingly intrusive coercive regulatory regime, the panelists seemed to be saying, individual lawyers, acting in concert with other individual lawyers, can take deliberate, incremental steps to change a culture that does too often breed, or at least tolerate, both harassment and discrimination.[51]

Following this approach, the culture shift would not be accomplished though more rigorous enforcement of binding rules, nor even through more studies and taskforces, or more mandatory participation in reductionist and clumsy sensitivity training sessions or testing for implicit bias. Instead, change can be effected by confrontation and challenge in the legal workplace itself: *see something*; *say something*.

If an otherwise revered founding member of a law firm has harassed lawyers or staff, *that is not OK*. If a prized practice group in a law firm discriminates in work assignments based on gender, *that is not OK*. If promotions in a company's law department are withheld on the

---

that state bar regulation limiting pretrial statements by lawyers was void for vagueness as applied to criminal defense counsel); Bates v. State Bar of Arizona, 433 U.S. 350, 363-64 (1977) (holding that lawyer advertising is protected commercial speech under the First Amendment and may not be totally banned by state bar regulations); NAACP v. Button, 371 U.S. 415, 428-29 (1963) (holding that a state statute prohibiting civil rights lawyers from meeting with potential clients and discussing potential civil rights litigation violates lawyers' rights to political expression and association).

49. *See supra* Part III.

50. Most critics of Model Rule 8.4(g)—including some contributors to this Symposium—agree that there *is* a need to address both harassment and discrimination and the culture that produces them. *See, e.g.*, Tarkington, *supra* note 22. The opposition is to the ham-handed and unconstitutional rule itself, which is why another contribution to this Symposium focuses on the promise of the major rewrite recently accomplished in New York. *See generally* Yaroshefsky, *supra* note 22.

51. Kelly Dermody et al., *supra* note 47.

basis of sex, *that is not OK*. And the same goes for petty and not so petty discriminations, and words and actions that add up to a hostile workplace. Furthermore, although lawyers' main function is to serve their clients with loyalty and zeal,[52] sexist or menacing clients are *not OK* either.

*See something*; *say something*. Even when it is more comfortable to turn away in embarrassed silence from what is nominally someone else's problem. *See something*; *say something*. Even when it requires the moral courage to step out into the open to rock a stable-seeming boat. This is hard, awkward work; it means engaging in serious and honest moral dialog with colleagues, supervisors, subordinates, staff, and even clients.

The culture cannot change unless the woof and warp of law practice are infused with the understanding (by everyone) that both sexual discrimination and sexual harassment are *not OK*. But that does not mean surrendering either sound judgment or common sense. Every protest and criticism should be respected and treated seriously, but a genuine dialog—as opposed to a knee-jerk reaction—may reveal that some are more valid than others, and that some are not valid at all. And even among the most valid complaints, mature reflection and further discussion will produce varying methods and modes of redress.

This activist and participatory approach would be in marked contrast to an approach relying exclusively or heavily on Model Rule 8.4(g): file a grievance, retire from the field, and let bar regulators do the work. But appealing immediately to an outside force to impose the "right" answer short-circuits the creative problem-solving efforts suggested at the end of the program in Vancouver.[53]

It represents an unfortunate and premature "going to law," in Geoffrey Hazard's memorable expression.[54] It stunts the moral growth

---

52. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2020) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

53. Kelly Dermody et al., *supra* note 47.

54. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 65 (1978). In the referenced passage, Hazard was discussing the concept of "intermediation," which was originally embodied in the later-repealed Model Rule 2.2, and now appears in the discussion of "common representation" in Comments [29] through [33] to Model Rule 1.7. *Id.* at 64-65. Common representation, in which a lawyer equally represents more than one client with at least partially harmonious interests to help them work out remaining differences, was in turn derived from the idea of "lawyering for the situation." *Id.* at 65. Hazard asserted that lawyering for the situation—when it is feasible to do so—is often "the best service a lawyer can render to anyone." *Id.* Several brilliant and moving paragraphs later, he concluded:

> The basis of decision is mutual assent and not external compulsion. The orientation in time tends to be a hopeful view of the future rather than an angry view of the past. It

of the individual lawyers caught up in events by substituting governmental *diktat*[55] for the hard work of making judgments and persuading others. And it is likely, in the long run, to worsen rather than improve the climate in and around the legal profession, as belligerent contestants keep blank bar grievance forms handy and busily take notes.

In addition, because Model Rule 8.4(g) in its present form is vague, overbroad, and lends itself to abuse, it makes an especially poor vehicle for governmental intervention. Consider the situation posed in Section 69.16 of *The Law of Lawyering* (Illustration 69-6).[56] A male partner at a law firm announces that he has decided to identify as a woman and will (in a month's time) use only the restrooms until now reserved for "women" only. Anyone in the firm who opposes this plan will be slapped with a disciplinary complaint for discrimination under Rule 8.4(g). Immediately, a female partner announces that if the firm accedes to her colleague's demand, she will file her own grievance under the same rule, for sexual harassment.

Both partners belong to "protected" classes under Rule 8.4(g),[57] and both have presented facially plausible claims, even though no client interests have been put at risk and the legal system remains unaffected by the in-house kerfuffle. There is no satisfactory (or even principled) way in which the government could "adjudicate" these incommensurate claims and find that one lawyer or the other had violated a rule of professional conduct. But a chief deficiency of this blunderbuss rule is precisely that bar disciplinarians in the first instance, and state supreme courts in the last, have neither the ability nor the authority to make anything *other* than binary judgments about whether this or that conduct is or is not "unethical" and deserving of a professional sanction.

The Model Rules of Professional Conduct proclaim in the Preamble and Scope that they are "rules of reason," but that only helps avoid *unreasonable* determinations that a *particular* respondent has violated a

---

> avoids the loss of personal autonomy that results when each side commits his cause to his own advocate. It is the opposite of "going to law."

*Id.*

55. No matter whether a state has a voluntary or integrated bar, the ultimate judgment about whether a lawyer is or is not subject to professional discipline lies with the highest court in the jurisdiction. MODEL RULES OF PRO. CONDUCT Preamble & Scope (AM. BAR ASS'N 2020). That judgment is governmental action—"state action" for constitutional purposes.

56. GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 69.16 (4th ed. supp. 2014).

57. *Every* lawyer in the United States, without exception (including a wealthy, straight, married, White man), *could* be the victim of harassment *or* discrimination on one or more bases cataloged in Rule 8.4(g). In one of several cases argued and won by lawyer Ruth Bader Ginsburg before she was appointed to the federal bench, her client was a widower with a newborn child who was denied certain Social Security benefits that his widow would have received if he had died first. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 639-42 (1975).

*particular* rule.[58] The disciplinary system is not well-positioned to make discretionary judgments that depend upon distinctions and gradations that are themselves driven by highly contested and still evolving understandings of what is and is not acceptable in modern society.[59] And the disciplinary system could not even consider the obvious solution to the problem of Illustration 69-6, which millions of airline passengers have utilized for decades: individual unisex restrooms for anyone and everyone.

In his 1974 Storrs Lectures, *The Ages of American Law*, Grant Gilmore stated that the justness of a society is reflected in—but not determined by—the *justness* of its law.[60] He then pressed on to assert that the better the society, the *less* law there will be, presumably because there will be fewer occasions to *go to law*, rather than achieving justice through autonomous actions of the citizenry.[61] In a famous concluding passage, he stated: "In Heaven there will be no law, and the lion will lie down with the lamb . . . . In Hell there will be nothing but law, and due process will be meticulously observed."[62]

## IV. CONCLUSION: MODEL RULE 8.4(g) IS NOT OK—BUT PERHAPS IT CAN BE SAVED

In its current form, Model Rule 8.4(g) is bad policy masquerading as law, resulting in too much bad law. It is a political slogan designed to make some people feel good, while contributing nothing over the last six years to actual problem-solving that would be of actual benefit to many others. Most jurisdictions have "seen" the substantive or the process deficiencies of the rule and have "said" through their action and inaction that Model Rule 8.4(g) is *not OK*.

---

58. MODEL RULES OF PRO. CONDUCT Preamble & Scope (AM. BAR ASS'N 2020).

59. For example, Comment [5] to Model Rule 8.4 blandly asserts that it is not unethical to limit a lawyer's practice to members of "*underserved* populations," as if that is a self-defining classification, and as if a lawyer's decision to serve only a certain class of clients *would* otherwise be unethical. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2020) (emphasis added). Is the suggestion that a domestic relations law firm could safely advertise that it would serve only wives seeking a divorce, but not husbands? Or is it husbands, but not wives? (Which of those "populations" is "underserved?") According to the guidance provided by Comment [5], would it be permissible for a lawyer to announce a practice limited to representation of gay clients only, but not straight clients only? Would it be permissible to reject all white clients in order to serve only Black or other clients of color? If so, how could the reverse choice pass constitutional muster?

60. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 108-11 (1977).

61. *Id.* at 109-11.

62. *Id.* at 111. The author thanks friend and colleague Peter Jarvis for recalling and noting the salience of this famous quote.

But Professors Hazard and Gilmore should not be understood to have gone so far as to say that *less* law always means *no* law.[63] There might still be a place for a Model Rule 8.4(g), shorn of its worst features. A reconstituted rule, better drafted and more closely tailored to address the relationship between professional concerns and the culture and politics of society at large, might serve as a needed backup remedy when other avenues prove to be unavailing or insufficient in individual cases.

As the sixth anniversary of its unhappy experiment with culture-shifting approaches, the ABA should go back to the drawing board to substantially modify Model Rule 8.4(g). Certainly, any such effort should draw upon the experience of New York and other states that have adopted black-letter texts and comments that are more likely to help rather than impede progress, at a minimum because energies devoted to recrimination and repetitive debate can be directed elsewhere.

With Model Rule 8.4(g) gone from the national scene and replaced by a narrowly cabined and constitutionally sound rule, lawyers of good will and moral courage could more readily come to grips with the real #MeToo and related problems that concededly still exist in the legal workplace in contemporary America and continue to vex the legal profession.

63. *See id.* at 109-11.