

“BREATHING SPACE TO SURVIVE”—THE MISSING COMPONENT OF MODEL RULE 8.4(g)

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I. INTRODUCTION

It has been over five years since the American Bar Association (“ABA”) promulgated Model Rule of Professional Conduct 8.4(g), and it has largely fallen flat. Only two states—New Mexico and Vermont—have adopted the rule as promulgated, and a few states have adopted modified versions of the rule to avoid potential First Amendment challenges.¹ Despite the rule’s failure to obtain traction, it is not the case that state bars are somehow oblivious to the serious problems of discrimination and harassment in our nation, the growing national outcry against such, or the impediment that discrimination and harassment can be to the working of justice—as demonstrated by the number of state bars that previously enacted antidiscrimination and antiharassment rules or comments to their rules.² Instead, what is standing in the way of

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1. See VT. RULES OF PRO. CONDUCT r. 8.4(g) (2009); N.M. RULES OF PRO. CONDUCT r. 16-804(g) (2019); A.B.A. Ctr. for Pro. Resp. Pol’y Implementation Comm., *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct*, A.B.A. 2-5 (Oct. 18, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf.

2. These pre-existing rules are generally narrower than Model Rule 8.4(g). Even Stephen Gillers, an ardent defender of Model Rule 8.4(g), recognizes and catalogs the significant difference between Model Rule 8.4(g) and the existing antidiscrimination rules found in various states. He summarizes as to the existing rules:

Most contain the nexus “in the course of representing a client” or its equivalent. Most tie the forbidden conduct to a lawyer’s work in connection with the “administration of justice” or, more specifically, to a matter before a tribunal. Six jurisdictions’ rules require that forbidden conduct be done “knowingly,” “intentionally,” or “willfully.” Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws Only four jurisdictions use the word “harass” or variations

Model Rule 8.4(g)'s adoption are the substantial First Amendment concerns raised by the rule as promulgated.

I have previously analyzed Model Rule 8.4(g) under the First Amendment, as well as discussed its likely unconstitutionality.³ It behooves the ABA and advocates of Model Rule 8.4(g) to stop defending the rule as promulgated, and instead own the constitutional deficiencies in the current version and work to draft a new rule that will both protect attorney First Amendment rights and, at the same time, prohibit discrimination and harassment. The culture war that has surrounded Model Rule 8.4(g), which pits the First Amendment rights of lawyers against interests in equality, diversity, and inclusion, is largely a false dichotomy.⁴ It is possible to create a constitutionally sound anti-discrimination and anti-harassment rule. Notably, some states have recently promulgated modified versions of Rule 8.4(g) that substantially diminish the constitutional objections to the rule.⁵ Rules like those adopted in New Hampshire, Maine,⁶ Connecticut,⁷ and recently

in their rules. [And] [i]n twelve states, anti-bias language appears in a comment only

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, 208 (2017) (footnotes omitted). In other words, the existing antidiscrimination rules are simply not analogous. These rules narrowly proscribed bias by only limiting conduct which “occurs in the course of representing a client” such as in actual court proceedings, by requiring that discrimination be willful, or by tying violation to conduct that would violate federal or state antidiscrimination laws. *Id.* at 207-08. The fact that there have not been constitutional objections to these narrowly proscribed anti-bias rules is thus irrelevant to determining whether Model Rule 8.4(g) is constitutionally sound. On the other hand, the existence of these rules demonstrates that states in fact have no problem including a narrower rule of professional conduct that prohibits harassment and discrimination. *Id.*

3. See Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 121-25, 144 (2022) [hereinafter Tarkington, *Reckless Abandon*]; MARGARET TARKINGTON, *VOICE OF JUSTICE: RECLAIMING THE FIRST AMENDMENT RIGHTS OF LAWYERS* 243-278 (Cambridge Univ. Press 2018) [hereinafter TARKINGTON, *VOICE OF JUSTICE*] (analyzing antidiscrimination, antiharassment, and civility rules of professional conduct, including Model Rule 8.4(g)).

4. Tarkington, *Reckless Abandon*, *supra* note 3, at 144.

5. *Id.* at 124.

6. See *id.* at Part IV.A (examining in detail the narrowed Maine and New Hampshire rules which were adopted in 2019 and fixed several of the primary constitutional deficiencies of Model Rule 8.4(g)); N.H. RULES OF PRO. CONDUCT r. 8.4(g) (2019); ME. RULES OF PRO. CONDUCT r. 8.4(g) (2019).

7. CONN. RULES OF PRO. CONDUCT r. 8.4(7) (2022); SEC'Y OF STATE, CT., CONNECTICUT PRACTICE BOOK 64-65 (2022). Importantly, Connecticut Rule 8.4(7) contains the following differences from the Model Rule that are aimed at avoiding constitutional deficiencies. The Connecticut rule: (1) defines discrimination as having to be “directed at an individual”—thus requiring that statements target specific people and excluding statements made in the abstract that could be considered biased; (2) adds a requirement that speech or conduct be “severe or pervasive” to constitute harassment; (3) states that when conduct is also subject to state or federal antidiscrimination or antiharassment law, “a lawyer’s conduct does not violate” the Connecticut

proposed in New York,⁸ are likely to avoid serious constitutional challenge because of the modifications that have been made to the rules. At the same time, such rules will be far more likely to actually curb harassment and discrimination than Model Rule 8.4(g). The Model Rule has had virtually no impact in curbing harassment and discrimination precisely because of its lack of traction. This lack of traction is due to legitimate concerns about the rule’s constitutionality given its purported application outside of the actual practice of law, combined with the breadth of its definitions of harassment and discrimination, which readily include within the rule’s scope speech by conservatives on issues of public concern or that could be interpreted as being biased or derogatory—even if made in the abstract and not aimed at any individual.⁹ Modifying Rule 8.4(g) to avoid infringing on potential First Amendment rights will not only protect First Amendment rights, but will work to curb harassment and discrimination because the modified rule will both be more likely to be adopted by states and will avoid constitutional challenges after adoption.¹⁰

The New Hampshire, Maine, and Connecticut rules (as well as one recently proposed in New York, which may or may not be adopted as

Rule “when the conduct does not violate such law”; (4) includes an express First Amendment proviso that confirms that the lawyer does not violate the rule whenever “the conduct in question is protected under the [F]irst [A]mendment to the United States [C]onstitution”; (5) expressly states that it will not violate the Connecticut rule for a lawyer to “limit[] the scope or subject matter of the lawyer’s practice by limiting the lawyer’s practice to members of a particular segment of the population in accordance with these rules and other law”; and (6) removes “socioeconomic status” as one of the protected categories. CONN. RULES OF PRO. CONDUCT r. 8.4(7) cmt. at 64 (2022).

8. New York’s rule is currently only proposed, and it is unclear what New York will ultimately decide to do or adopt. However, the current proposal includes the following changes to the model rule that narrow it substantially to avoid constitutional infirmities: (1) only prohibiting discrimination that is otherwise unlawful under federal, state, or local law; (2) requiring that prohibited harassment be both directed at a specific individual or individuals and also be either severe or pervasive; (3) expressly protecting the rights of lawyers to accept, decline, or withdraw from representations; (4) expressly protecting the rights of lawyers “to express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution”; (5) including a First Amendment proviso; and (5) removing “socioeconomic status” from the list of protected categories. See Memorandum from the N. Y. State Bar Ass’n’s Comm. on Standards of Att’y Conduct 17 (June 4, 2021), <https://nysba.org/app/uploads/2021/03/COSAC-Report-on-Rule-8.4g-FINAL-Approved-by-HOD-June-12-2021.pdf>.

9. Tarkington, *Reckless Abandon*, *supra* note 3, at 167.

10. See *generally id.* at 165-67 (arguing that the current debate over Model Rule 8.4(g) is based on a false dichotomy that pits the First Amendment rights of lawyers against diversity and antiharassment, when the creation of a narrowed, constitutionally sound antiharassment and antidiscrimination rule is attainable, and thus the American Bar Association (“ABA”) should own the constitutional deficiencies of the Model Rule, amend it, and promulgate a rule that will both protect lawyer First Amendment rights and curb harassment and discrimination).

proposed) demonstrate some very specific steps and modifications that can alleviate constitutional concerns with the Model Rule. These modifications include, among other options, substantial narrowing of the definitions of harassment and discrimination, adding a requirement that verbal harassment be severe or pervasive, adding a requirement that violations of the rule be targeted at specific individuals, protecting all cause lawyering or limitations of one's practice to a specific clientele, making the rule inapplicable to public discourse on matters of public concern, including a First Amendment proviso, and removing "socioeconomic status" from the list of protected categories.¹¹

In this Article, rather than examining specific alterations and provisions in these various modifications of the Model Rule, I identify and briefly explore a primary principle that must serve as a guide for regulators wishing to create a constitutionally sound and workable rule of professional conduct that prohibits discrimination and harassment.¹² This principle not only provides guidance in how to draft an anti-discrimination and anti-harassment rule, but also in how any such rule should be interpreted and applied. The vital precept is to provide lawyers, those subject to this regulation, "breathing space."

The major problem with Model Rule 8.4(g) is that it does not leave breathing space—particularly as interpreted in the ABA's Formal Opinion 493 of July 15, 2020.¹³ The desire to quell any and all discrimination and harassment—terms which are defined in the Model Rule as including speech that is "derogatory or demeaning" or that "manifests bias or prejudice"—in the legal profession, though laudable, undermines both the practical workability of the rule and its constitutionality.¹⁴ We will never have a legal profession that is cleansed of expressions by its members of that which could be derogatory, demeaning, or potentially biased. It is an unattainable and unrealistic goal. It is also unconstitutional.¹⁵ Micromanagement of expressive activities—even among the legal profession—is never going to survive First Amendment scrutiny and is also entirely unworkable in practice. Additionally, such micromanagement of expression tends towards discriminatory enforcement against those who are unpopular, express unpopular views, or fail to vigilantly guard their tongues.¹⁶

11. See *supra* notes 5-8 and accompanying text.

12. See *infra* Parts II-III.

13. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 5-6 (2020) [hereinafter ABA Op. 493].

14. *Id.*; see *infra* Part III.A.

15. See *infra* Part III.D.

16. See Keith Swisher & Eugene Volokh, *A Speech Code for Lawyers?*, JUDICATURE, Spring 2017, at 70, 74.

Beyond the problems of micromanagement, breathing space is also essential for the proper functioning of the lawyer in our system of justice. Indeed, the concept of breathing space is an established precept in the recognition and scope of lawyer First Amendment rights, as will be introduced in Part II.¹⁷ In promulgating Model Rule of Professional Conduct 8.4(g), and in its interpretive Formal Opinion 493, the ABA failed to give heed to this core principle in several key contexts, discussed in Part III, thereby depriving lawyers of the requisite breathing space in the actual practice of law, in public discourse, at the workplace, and even in lawyers' personal social activities.¹⁸ Breathing space is an essential aspect of each of these facets of a lawyer's life and practice and is protected by the First Amendment—but the Model Rule, as explained in my conclusion, regulates broadly instead of with the required narrow specificity.¹⁹ By failing to provide breathing space, the Model Rule fails to serve its role as a model for states of a workable and constitutionally sound anti-discrimination and anti-harassment rule.

II. BREATHING SPACE IN THE RECOGNITION OF LAWYER FIRST AMENDMENT RIGHTS

Those versed in U.S. First Amendment jurisprudence will likely immediately associate the phrase "breathing space to survive," with the Supreme Court's seminal case, *New York Times Co. v. Sullivan*,²⁰ which quoted that phrase. The *Sullivan* case has been described as putting the First Amendment "right side up for the first time."²¹ Instead of examining exceptions to speech protection—what speech is at the outside periphery of the First Amendment—the *Sullivan* Court defined for the first time the "core of protection of speech without which democracy cannot function."²² This "central meaning" of the First Amendment was found in the "right of free public discussion of the stewardship of public officials."²³ Thus, the *Sullivan* Court famously held that "debate on public issues should be uninhibited, robust, and wide-open," that "erroneous statement is inevitable in free debate, and

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part IV.

20. 376 U.S. 254 (1964).

21. Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208.

22. *Id.*

23. *Sullivan*, 376 U.S. at 273-75.

that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’²⁴

The concept that the First Amendment needs “breathing space to survive” is quoted in and made famous by its prominence in the *Sullivan* decision, but it was initially articulated in another case: *NAACP v. Button*.²⁵ Importantly, *Button* dealt with restrictions on attorneys’ rights to speech, expression, association, and petitioning.²⁶ It was precisely in the context of declaring the importance of protecting the First Amendment rights of *lawyers* that the Supreme Court initially and insightfully declared that those First Amendment rights “need breathing space to survive.”²⁷

The *Button* case arose in the context of Southern opposition to the Supreme Court’s 1954 decision, *Brown v. Board of Education*.²⁸ In 1956, Virginia’s legislature enacted five bills “as part[] of the general plan of massive resistance to the integration of schools of the state under the Supreme Court’s decrees.”²⁹ One piece of legislation attempted to foreclose the implementation of *Brown* and the desegregation of schools by regulating attorney speech, association, and petitioning.³⁰ The legislature amended Virginia’s rules regulating lawyers to redefine prohibited “solicitation” in such a way as to prohibit the NAACP’s solicitation of plaintiffs and instigation of desegregation lawsuits.³¹ Similar statutes were enacted in Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee—all in an attempt to shut down the NAACP’s desegregation campaign.³² The Virginia Supreme Court held that the NAACP’s activities—holding meetings with parents of school children, advising them of their legal rights, offering to represent them in desegregation lawsuits, and then instigating litigation on their behalf—were prohibited by the redefined professional conduct rule and further found that the First Amendment was not a roadblock to such regulation of the legal profession.³³

In a compelling opinion, the Supreme Court reversed the Virginia Supreme Court, and held that Virginia’s statute, as interpreted to prohibit the NAACP’s attorney’s speech and activities, violated the First

24. *Id.* at 270-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

25. 371 U.S. at 433.

26. *Id.* at 423-25.

27. *Id.* at 432-33.

28. 347 U.S. 483 (1954).

29. *Button*, 371 U.S. at 445 (Douglas, J., concurring).

30. *Id.* at 446.

31. *Id.* at 446-47.

32. *See id.* at 445.

33. *See id.* at 426.

Amendment rights of “speech, petition, [and] assembly.”³⁴ Virginia had argued that its regulation of lawyers and what constituted prohibited solicitation “is wholly outside the area of freedoms protected by the First Amendment.”³⁵ The Court emphatically rejected this argument on two grounds. First, the Court flatly stated that “a State cannot foreclose the exercise of constitutional rights by mere labels.”³⁶ In other words, labeling certain speech as “solicitation” did not vanquish the First Amendment or the need for close First Amendment scrutiny of the regulation.³⁷ The Court’s second, and more poignant, retort was that “abstract discussion is not the only species of communication which the Constitution protects”; rather, the First Amendment also protects “litigation . . . [as] a means for achieving the lawful objectives of equality of treatment by all government.”³⁸ The Court explained that for the NAACP lawyers:

[L]itigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.³⁹

That is, the *Button* Court expressly recognized lawyer First Amendment rights of petitioning, “political expression,” and “association.”⁴⁰ These rights belonged to the regulated attorney, including specifically *in* the practice of law—in associating with clients, advising them, and bringing litigation on their behalf.⁴¹ Without such protection, regulators and governmental entities (often subject to majoritarian control) may be able to deprive people of access to the law’s protections, and can do so without even changing the substantive law, but simply by limiting attorney speech and association.⁴² The

34. *Id.* at 430.

35. *Id.* at 429.

36. *Id.*

37. In like manner, labeling certain speech as “harassment” or “discrimination” does not vanquish First Amendment rights or foreclose the need for close First Amendment scrutiny.

38. *Button*, 371 U.S. at 429.

39. *Id.* at 429-30 (emphasis added).

40. *Id.* at 430-31.

41. Tarkington, *Reckless Abandon*, *supra* note 3, at 127, 141.

42. *Id.* at 142-43.

Button Court thus correctly concluded about the First Amendment rights of attorneys:

These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because *First Amendment freedoms need breathing space to survive*, government may regulate in the area only with narrow specificity.⁴³

Finally, and importantly, the *Button* Court emphasized that the racial setting of the lawsuit was “irrelevant to the ground of [its] decision” and that the First Amendment protections recognized by the Court would apply equally in other circumstances—stating specifically that the First Amendment “would apply as fully to those who would arouse our society *against* the objectives of the petitioner [the NAACP].”⁴⁴

III. THE LACK OF BREATHING SPACE IN MODEL RULE 8.4(g)

Model Rule 8.4(g) is not drafted with the “narrow specificity” required by the *Button* Court and lacks the requisite breathing space. This breathing space is not only essential as a First Amendment principle, but also as a practical necessity for the proper functioning of the justice system. My prior work in the area of lawyer First Amendment rights has tied lawyer First Amendment rights to the lawyer’s role in the justice system and the proper functioning of that system.⁴⁵ If regulators can undermine lawyer First Amendment rights to association, speech (including advice and advocacy), and petitioning, they can undermine justice itself. That’s precisely because justice is achieved by lawyers as they invoke and avoid government power in protecting life, liberty, and property and as they enable the judiciary to exercise its power to interpret the law and protect constitutional and other legal rights.⁴⁶

43. *Button*, 371 U.S. at 433 (emphasis added) (citation omitted).

44. *Id.* at 444-45 (emphasis added) (“That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner.”).

45. Tarkington, *Reckless Abandon*, *supra* note 3, at 123-24, 129-31, 142-43.

46. *See generally* TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 243-278 (arguing that it is essential to the integrity of the justice system to protect and recognize lawyer First Amendment rights because justice can often only be achieved through lawyer association, advocacy, and petitioning, which safeguards client interests and invokes, avoids, and checks government power).

A. *Breadth of Definition & Scope of Harassment and Discrimination*

The *Button* Court explained that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area *only with narrow specificity*.”⁴⁷ Model Rule 8.4(g) does not even attempt to regulate with “narrow specificity.” Instead, the rule’s comments very broadly define prohibited “discrimination,” as any “harmful *verbal* or physical *conduct* that *manifests bias or prejudice*” as to “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”⁴⁸ The comments further define prohibited “harassment” to include not only “sexual harassment,” but also any “*derogatory* or *demeaning verbal* or physical *conduct*” on any one of the aforementioned enumerated bases.⁴⁹ (And the term “verbal conduct” is just a euphemism for “speech”—verbal conduct is speech, plain and simple.)⁵⁰ Commentators, including myself, have noted the extreme breadth of the rule, which readily includes within its defined scope speech on hot-button political and social issues such as marriage equality, reproductive rights, immigration, refugee assistance, and terrorism—with the prohibition generally only cutting out one side of a given debate.⁵¹ For example, lawyers in favor of marriage equality can fully voice their views without potentially running afoul of the rule, but lawyers in favor of traditional marriage may be found to be “manifest[ing] bias or prejudice” and/or engaging in “derogatory or demeaning” speech on the basis of sexual orientation or gender identity.⁵² This broad definition of prohibited speech runs contrary to the *Sullivan* Court’s insistence that debate on “the major public issues of our time”⁵³ be “uninhibited, robust, and wide-open.”⁵⁴

The drafters of the Model Rule and ABA Opinion 493 interpreting the rule eschewed methods for narrowing the rule and its interpretation.

47. *Button*, 371 U.S. at 433 (emphasis added).

48. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020); *id.* at cmt. 3 (emphasis added).

49. *Id.* (emphasis added).

50. *Id.*; TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 249.

51. Tarkington, *Reckless Abandon*, *supra* note 3, at 146-47.

52. *Id.* at 147.

53. *Sullivan*, 376 U.S. at 271.

54. *Id.* at 270. In ABA Opinion 493, the ABA did state that “[t]he [r]ule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern” See ABA Op. 493, *supra* note 13, at 14. But then the rule does not make any efforts to narrowly interpret the definition of either discrimination or harassment, and in fact broadens it by reaffirming that violations of the rule need not be targeted at individuals, but can be statements in the abstract, need not be severe or pervasive, and can consist of the use of a single epithet or derogatory comment, as discussed below. ABA Op. 493, *supra* note 13, at 14.

As noted by commentators, the rule could be substantially fixed by requiring that the discriminatory or harassing speech be aimed or targeted at a specific individual.⁵⁵ But the rule contains no such requirement, and, in Opinion 493, the ABA made it clear that while offending speech will often target a specific individual, targeting is not a required element for a violation and the rule should be interpreted to prohibit discriminatory or derogatory statements made in the abstract.⁵⁶

Further, the rule's drafters eschewed the typical "severe" or "pervasive" requirement found in prohibitions on workplace harassment.⁵⁷ The rule only requires that speech "manifest[] bias or prejudice" or be "derogatory or demeaning."⁵⁸ Non-severe and non-pervasive discrimination or harassment is a violation of the rule.⁵⁹ It would seem from the face of the rule that a single statement that was derogatory or demeaning or that manifested bias or prejudice could violate the rule. Again, in Opinion 493, the ABA reiterated rather than retracted from this aspect of the breadth of the rule both by expressly disavowing any severe or pervasive requirement for violations⁶⁰ and repeatedly emphasizing that even the single use of a racial, ethnic, or gender-based epithet or a derogatory sexual comment would violate the rule.⁶¹

55. For example, Rebecca Aviel—a defender of the Model Rule—was concerned that the Model Rule could be interpreted to foreclose political speech because it did not require that the prohibited discrimination or harassment be aimed at a specific individual but could be read to prohibit or punish the expression of biased or prejudiced views or opinions in the abstract. Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 55-61 (2018).

56. See ABA Op. 493, *supra* note 13, at 13-14. In its fifth hypothetical, the ABA gives an example of a partner making a comment about Muslims in the abstract to an associate. The opinion concludes: "[T]he fact that the comments may not have been directed at a specific individual *would not insulate the lawyer from discipline*; though, in many instances, the offending conduct will be targeted towards someone who falls within a protected category." See *id.* (emphasis added).

57. See, e.g., Josh Blackman, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS 241, 245 & n.16 (2017).

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

59. See Blackman, *supra* note 57, at 245.

60. See, e.g., ABA Op. 493, *supra* note 13, at 1 (stating that the rule "is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context").

61. See, e.g., *id.* at 1, 4, 11 ("[A] lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law."); see *id.* at 14 (giving as an example of a rule violation, "directing a racist or sexist epithet towards other"); see also *id.* at 4 ("[A] single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g).").

The combination of these refusals by the ABA to narrow the rule evinces the desire to eliminate all speech from lawyers (even speech, that when stated in the abstract, constitutes a single off-handed comment or insult, or when not even severe and pervasive) that either manifests bias or prejudice, or that is derogatory or demeaning on the bases identified in the rule. But prohibiting all such speech by lawyers in the practice of law, in the workplace, and in a number of contexts outside of the actual practice of law leaves literally no breathing space—as will be explored in each of those contexts below.⁶²

B. Breathing Space in the Actual Practice of Law—Legitimate Advice & Advocacy & Cause Lawyering

Nearly everything a lawyer does in representing a client falls under the First Amendment’s umbrella.⁶³ “The First Amendment guarantees rights to speech, association, and petition – and those three rights succinctly encapsulate the primary activities of lawyers: associating with clients, petitioning the government, and speaking, both orally and via written documents.”⁶⁴ While this fact has been seen by some as an impediment to the practice of law,⁶⁵ I have previously argued that the core of lawyer First Amendment rights that require protection are in the context of the actual practice of law.⁶⁶ Lawyers play a key role in the administration of justice. They associate with clients, they advise clients on the meaning and potential application of the law, they invoke the law on behalf of clients, they use speech and petitioning to avoid government power in the protection of client life, liberty and property, and they enable the judicial power by bringing justiciable cases and controversies. As illustrated by *Button* itself, if regulators can prohibit lawyers from associating with or giving advice to certain clients, or from making certain colorable arguments or bringing certain kinds of cases to the judiciary, then regulators can undermine the realization of legal rights and access to justice itself.⁶⁷ Thus, lawyers must have protectable First

62. See *infra* Part III.B–D.

63. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 97.

64. *Id.* at 19.

65. Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 688, 694-95 (1997). Schauer argues that “the First Amendment has (properly) never been thought to apply . . . to a vast array of lawyer and legal system activity.” *Id.* at 702. Thus, speech made as a lawyer is, and should remain, “unencumbered by either the doctrine or the discourse of the First Amendment.” *Id.* at 691.

66. See TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 19, 21-26, 58-64, 72-78, 81-85, 89, 91, 97. “[L]awyers, through their speech, association, and petitioning, play an important role in the United States justice system as defenders of due process.” *Id.* at 23.

67. NAACP v. Button, 371 U.S. 415, 429-40 (1963).

Amendment rights to associate with clients, provide full and frank advice to clients, use speech to invoke or avoid government power in the protection of client life, liberty or property, and to petition on behalf of clients.

Model Rule 8.4(g) specifically states that it “does not preclude legitimate advice or advocacy consistent with these Rules.”⁶⁸ While that is a necessary carve-out, the provision begs the question—what constitutes “legitimate advice or advocacy”? Whatever the drafters of Model Rule 8.4(g) intended to mean by the adjective “legitimate,” it cannot be interpreted in a manner that would infringe on the lawyer’s core First Amendment rights of speech, association, and petition to invoke and avoid government power in the protection of life, liberty, and property.

For example, lawyers must have a protected First Amendment right to advise their clients. The attorney must be able to fully and frankly explain the contours of the law, its purpose and function, and the potential for and extent of liability or criminal sanctions for violations thereof. As recognized in Model Rule 1.2(d), lawyers should “discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”⁶⁹ Further, client counseling can and should go beyond just legal technicalities where the client desires such advice. Again, Model Rule 2.1 explains the lawyer’s duty to render “independent professional judgment.”⁷⁰ As an independent professional, the lawyer’s advice should not be circumscribed by the bar. Indeed, the lawyer is expressly allowed to discuss “other considerations such as moral, economic, social and political factors” with the client.⁷¹

Imagine a situation where a family lawyer represents a deeply religious client in a divorce. The client’s (soon to be ex-) husband has recently declared that he is homosexual. The client is horrified and does not want her children raised by someone who is openly homosexual, which she considers sinful. Can the lawyer discuss with the client her religious concerns—concerns that shape her objectives for the representation and that she perceives as being essential to her life and liberty in raising her children consistent with her religious beliefs? Can the lawyer advocate for the wife in obtaining as full custody for the

68. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

69. *See id.* r. 1.2(d). However, Rule 1.2(d) prohibits a lawyer from engaging or assisting a client in engaging “in conduct that the lawyer knows is criminal or fraudulent.” *Id.*

70. *Id.* r. 2.1.

71. *Id.*

client as the law allows under the circumstances—even though the attorney knows that a primary reason that the wife doesn’t want the husband to have custody is his sexual orientation?

Turning the tables, assume instead the attorney represents the husband. The husband wants as full custody as possible because he is upset about his wife’s membership in a church that maintains that homosexual behavior is sinful. Can the lawyer and husband discuss his desire to undermine her custody of the children precisely because of her religion? Can the lawyer advocate for the husband in obtaining as full custody as the law allows under the circumstances—even though the attorney knows that a primary reason the husband objects to the wife having custody is her religion?

In both situations, full and frank discussion between the attorney and the client—even of discriminatory intent and bias based on religion and on sexual orientation—is essential to the attorney’s proper role in administration of justice, the client’s lawful objectives (in both, the attorney is merely seeking custody to the fullest extent the law allows), and the client’s own perception of his or her life and liberty interests.

Importantly, it would frustrate the justice system if attorneys could use their knowledge of and access to the law to advise or assist clients to engage in unlawful activities—and such advice and assistance is not protected by the First Amendment because it undermines the lawyer’s role in the justice system. Thus, should this hypothetical play out in a state that forbids discrimination on the basis of sexual orientation or religion in determining child custody, the attorney and client should still discuss the matter frankly, including the client’s concerns and objectives. The attorney should explain the contours of the law—that the client cannot obtain custody based on the spouse’s sexual orientation or religion if that is the law, and the validity, scope, and interpretation of any such law.⁷² Additionally, the attorney is still able to advocate for as full custody as possible under the law—if that is the client’s objective—but on different bases.

Moreover, the attorney must be able to discuss with any client and pursue nonfrivolous arguments for extending, modifying, or reversing existing law or for establishing new law.⁷³ It is absolutely part of the lawyer’s essential role in the system of justice to seek the extension, modification, reversal, or establishment of law. If lawyers could not pursue change in the law, then law would be entirely stagnant. Cases like

72. See *id.* r. 1.2(d); *id.* cmt. 12.

73. See FED. R. CIV. P. 11; see also MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020).

*Brown v. Board of Education*⁷⁴ and *Obergefell v. Hodges*⁷⁵ could never have happened. Moreover, lawyers must be able to discuss and pursue reversal of law in the context of an actual case for an actual client because the judiciary can only exercise its power as to cases and controversies.

In addition to being able to fully advise the client, the attorney must have the right to petition on behalf of the client. This includes the right to invoke court processes by filing cases on behalf of a client without punishment unless the claim is “objectively baseless.”⁷⁶ Attorneys must also be free to make *all* material arguments regarding a case as set out in the Supreme Court case, *Legal Services Corp. v. Velazquez*.⁷⁷ The *Velazquez* Court held that attorneys had First Amendment rights to “present *all* the *reasonable and well-grounded arguments* necessary for proper resolution of the case.”⁷⁸ Thus, for example, in pursuing arguments or even questioning a party or witness, either through discovery or in court, the attorney should be protected from discipline for engaging in questioning that is relevant to a legal issue, even if that questioning seems to express bias or prejudice on one of the bases listed in Model Rule 8.4(g). Of course, if a court determines that a certain line of questioning is not relevant or is otherwise inappropriate, the opposing side may seek a protective order—which the court has a right to impose to protect its processes from abuse as discussed below and set forth in *Seattle Times Co. v. Rhinehart*.⁷⁹

The *Velazquez* Court recognized that regulators cannot “prohibit the analysis of certain legal issues and . . . truncate presentation to the courts” because to do so would “prohibit[] speech and expression upon which the courts must depend for the proper exercise of the judicial power.”⁸⁰ Ultimately, the *Velazquez* Court recognized that the First Amendment prohibited regulators from “[r]estricting . . . attorneys in *advising their clients and in presenting arguments and analyses* to the courts” because to do so would “distort[] the legal system by altering the traditional role of the attorneys.”⁸¹

Pertinent to Rule 8.4(g), viewpoint-based restrictions are particularly problematic in the adversary system.⁸² The whole premise of

74. 347 U.S. 483 (1954).

75. 135 S. Ct. 2584 (2015).

76. *Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

77. 531 U.S. 533, 545 (2001).

78. *Id.* (emphasis added).

79. 467 U.S. 20, 35-37 (1984).

80. *Velazquez*, 531 U.S. at 545.

81. *Id.* at 544.

82. TARKINGTON, *VOICE OF JUSTICE*, *supra* note 3, at 147-48.

the adversary system is that both sides of an issue will be heard by a court (or a jury) in search of a just result.⁸³ If a rule like 8.4(g) is ever interpreted to forbid attorneys from raising relevant arguments in judicial processes where the opposing side is able to argue the contrary view, that would undermine a basic premise of the adversary system. Thus, as an essential component of the justice system, regulators should not impose viewpoint-based restrictions in limiting arguments made by parties. If one side is able to argue in favor of a nonbinary person’s rights in a case dealing with bathroom or other policies, then opposing arguments should be afforded equal audience.

Attorneys have robust First Amendment rights to counsel their clients and to petition the judiciary under the First Amendment—even if such advice or advocacy could be considered to contain speech that could be viewed as prejudicial against others on one of the bases listed in Model Rule 8.4(g).⁸⁴ Thus, for example, attorney and client can discuss going after a “deep pocket” defendant rather than a poor (but perhaps more culpable) defendant in order to maximize recovery—even though that conversation would involve bias on the basis of socioeconomic status. Further, if there is a colorable basis for the lawsuit against the less-culpable, deep-pocket defendant, the attorney is protected by the First Amendment right to petition against punishment for filing that case.⁸⁵

Nevertheless, the state can limit *abuse* by the lawyer of people over whom the state has given the attorney power—even if only temporarily. Lawyers are enabled by their licenses to depose people, for example, and the state can forbid the lawyer from personally abusing the witness who is forced through state compulsory processes to attend and answer the lawyer’s questioning.⁸⁶ Thus, in the use of compulsory state processes, the state can prohibit lawyers from treating witnesses, parties, and even clients with incivility, bias, or prejudice.⁸⁷ Even though controversial in many other contexts, Model Rule 8.4(g)’s prohibitions are largely justified in the context of deposing or examining a witness or party. The attorney can be prohibited from belittling or harassing a witness based on the witness’s sex, socioeconomic status, gender identity, race, ethnicity, religion, or any of the other bases spelled out in Rule 8.4(g).⁸⁸

83. *Id.*

84. *See id.* at 140-41; *see also* Tarkington, *Reckless Abandon*, *supra* note 3, at 140-42.

85. *See* TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 141.

86. *See id.* at 253; *see also* Blackman, *supra* note 57, at 262 (collecting cases in which attorneys were disciplined for abusive behavior during depositions).

87. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 253-54.

88. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

As the Supreme Court recognized in *Seattle Times Co. v. Rhinehart*, the government, in creating court processes essential for the just adjudication of cases, can prevent “abuse of [their] processes.”⁸⁹

Because the state provides attorneys with the ability to exert power over such people as part of the judicial process, the state can keep that process untainted and fair by requiring the attorney to treat participants with respect and civility.⁹⁰ Further, the state can also require that the attorney not taint the proceeding with prejudice and bias.⁹¹ Similarly, the bar can preserve the integrity of fair trials, hearings, and proceedings, by prohibiting attorney incivility and prejudice in such proceedings.⁹²

The judiciary can prohibit lawyers from using the powers granted to them through their license to abuse parties or clients, yet to fully represent their client’s interests, lawyers often should “strike hard blows,”⁹³ or raise issues that are embarrassing to witnesses or parties, or even that may implicate stereotypes or seem biased on one of the factors raised in Model Rule 8.4(g). If civility standards or anti-bias rules are interpreted strictly, attorneys may feel compelled to limit their advocacy on behalf of a client or “pull their punches.” Thus, to fulfill their role in the system of justice as agents who protect their client’s rights to life, liberty, and property, the scope of protected attorney advice and advocacy needs “breathing space to survive”—as the *Button* Court recognized in the precise context of attorney advocacy and petitioning.⁹⁴

Thus, attorneys should not be punished every time an attorney makes too strenuous a statement or argument, invokes hyperbole to make a point, or makes an offhand or ill-conceived comment that

89. 467 U.S. 20, 35 (1984). *Rhinehart* is not about the First Amendment rights of lawyers at all. *Id.* at 32. The case involved the rights of the parties (not the attorneys, specifically) to disseminate information obtained through discovery in contravention of a court protective order prohibiting dissemination. *Id.* However, *Rhinehart* is about the relationship of the First Amendment to court processes. *Id.* at 34. Relevant to the issue of attorney confidentiality is the *Rhinehart* Court’s recognition that the government in creating a process like discovery that allows for compelled disclosure of information—a process essential for the proper adjudication of cases—can limit the use of that information to that purpose. *Id.* at 35-36 The courts can prevent “abuse of its processes.” *Id.*

90. TARKINGTON, VOICE OF JUSTICE, *supra* note 82, at 254. Under my access-to-justice theory of lawyer First Amendment rights, while lawyers enjoy core protection of their speech, association, and petitioning that is essential to their role in the justice system to enable the judicial power and to invoke and avoid government power in the protection of client life, liberty, and property, nevertheless, they lack First Amendment rights to frustrate the justice system or are contrary to their role therein. *Id.* at 25.

91. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 254.

92. *Id.*

93. *Id.* at 254; *Berger v. United States*, 295 U.S. 78, 88 (1935).

94. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).

offends or could be deemed derogatory to a case participant. Such stringent state control over lawyer advocacy will either cause cautious lawyers to retrench their advocacy to ensure never crossing that line, or will result in punishment or even disbarment of devoted lawyers who were in fact working diligently to protect their clients’ interests. Thus, in order to punish attorneys for incivility or expression of bias in the actual practice of law, the speech should rise to an “abuse” of the attorney’s power and license to practice law—abuse that is incompatible with proper functioning of the justice system and the use of the lawyer’s license. A requirement that incivility or verbal expressions of bias be either “severe” or “pervasive” as required in the employment discrimination context would in large part alleviate punishment of devoted attorneys who are working to protect their client’s interests.

Lawyers’ First Amendment rights in the practice of law are attuned to their role in the justice system.⁹⁵ They have robust First Amendment rights for advice and advocacy that is essential to their role in the justice system.⁹⁶ Nevertheless, they lack First Amendment rights to frustrate the justice system or their role therein.⁹⁷ Thus, lawyers lack a First Amendment right to use their license to practice law in abusive ways, including abusing government processes. They also lack a First Amendment right to file cases or bring claims that are “objectively baseless,” or to make frivolous arguments in court proceedings.⁹⁸ In any of the above hypotheticals, if it would be frivolous—meaning lacking a basis in law or fact—to make a certain argument, then the attorney can be prohibited from making it.⁹⁹ Attorneys also have no right to advise or assist a client to engage in crime or fraud.¹⁰⁰ But these are very narrow exceptions. Outside of them and on the whole, the attorney is not circumscribed in either her advising of clients or her court advocacy.¹⁰¹ In pursuing the client’s objectives, in securing client life, liberty, and property, in enabling the exercise of the judicial power through bringing claims and making arguments, the lawyer requires robust First Amendment rights.

Further, as again illustrated by *Button* itself, lawyers have a First Amendment right to engage in cause lawyering, even though they are limiting their clientele to a specific group of people (which may be based

95. See TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 90, 93.

96. *Id.* at 91-92.

97. *Id.* at 92-93.

98. *Id.* at 258.

99. *Id.*

100. *Id.* at 255, 258.

101. *Id.* at 258.

on one of the protected categories set out in Model Rule 8.4(g)).¹⁰² Notably, most lawyers freely discriminate against clients on the purported prohibited basis of “socioeconomic status” in the rule—they refuse to take on meritorious cases of clients who cannot afford rates of \$200 or \$500 or \$800 an hour (depending on the lawyer and the locality).¹⁰³ But beyond socioeconomic status, attorney specialization and cause lawyering have played a major and beneficial role in the system of justice. It is not uncommon to have lawyers who specialize in women’s rights, or LGBTQ rights, or fathers’ rights, or immigrant rights, and so forth.¹⁰⁴ Comment [5] to Model Rule 8.4(g) appears to only expressly allow lawyers to “limit[] the lawyer’s practice to members of underserved populations.”¹⁰⁵ While some bases for cause lawyering would fall within the allowance made by Comment [5], other forms of cause lawyering—like a focus on fathers’ rights, or women’s issues—would not appear to fall within the carve out.¹⁰⁶

Lawyers have a freedom of association right (as well as speech and petitioning as needed in the representation) to specialize their practice to protect or litigate on behalf of specific groups of people or legal rights—even if not directed at an “underserved population.”¹⁰⁷ If a battered woman decides to go to law school specifically to start a practice assisting and advocating for other battered women, she should have an association right to do so. If a divorced man feels like fathers have gotten a raw deal in custody battles and wants to focus his practice on preserving fathers’ rights, he should be able to do so. If a nonbinary individual wants to devote their practice to nonbinary, gender fluid, or

102. *Id.* at 272-73; see also *Button*, 371 U.S. at 438-39, 443-44.

103. See TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 276 (noting that “[p]rivate attorneys can engage in discriminatory declining of cases either because of their devotion to helping and focusing on assisting a particular cause or clientele or because a specific representation is so morally abhorrent to the attorney that it will impair the attorney-client relationship”).

104. *Id.* at 272.

105. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020); *Id.* cmt. 5. (emphasis added). Notably, the Model Rule is unclear on this point because the rule and Comment [5] appear to conflict with each other. The rule states that it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.” *Id.* r. 8.4(g). Rule 1.16 says nothing about the lawyer’s ability to decline a case, and so, one could argue, that the rule does not appear to affect lawyer autonomy to decline cases. But at the same time, Comment [5] to Rule 8.4(g) explains that “[a] lawyer does not violate paragraph (g) . . . by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.” *Id.* cmt. 5. Stephen Gillers reads Comment [5] to mean that a lawyer is in violation of the rule if she declines representations on one of the enumerated bases set out in Rule 8.4(g)—for example by declining to represent someone based on race, sex, ethnicity, gender identity, sexual orientation, religion, etc.—unless the lawyer is limiting her practice to members of “underserved populations.” See Gillers, *supra* note 2, at 227-29.

106. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 272.

107. *Id.*

transgender rights—to the exclusion of assisting cisgender clients, they should be able to. Allowing this type of focused practice—where attorneys are personally committed to or have identified a particular contingency of people or rights that they wish to focus on in protecting client life, liberty, and property, should continue to be fully protected by the attorney’s First Amendment right to association.

The core idea underlying the historical right of association is that people should have a right to associate for political ends. Jason Mazzone explains that the “constitutional significance” of freedom of association is not so much the protection of speakers, but instead, “lie[s] in enabling people to influence government.”¹⁰⁸ The lawyer’s ability to associate with specific clients for the purpose of pursuing specific political ends and goals is and has been an important aspect of the lawyer’s role in the system of justice in the United States. It is precisely the type of associational right the *Button* Court recognized and upheld as to NAACP lawyers—namely, “association for litigation,” which “may be the most effective form of political association.”¹⁰⁹

Importantly, the lawyer cannot engage in such advocacy without the client. No matter how strongly a lawyer wants to effect change through litigation, the lawyer cannot do it without associating with a client whose situation raises the precise issue for a court to adjudicate.¹¹⁰ The NAACP didn’t want to take on just anyone’s cause of injustice; they didn’t want to take on the criminal cases of Caucasians who were innocent but criminally charged, despite taking on such cases for Black Americans.¹¹¹ They had a political mission.¹¹²

Association with a specific clientele or type of client is essential to the political advocacy of lawyers devoted to using their license to protect the rights of a particular class of persons or to secure specific social or political change. Further, the client cannot effectively invoke judicial power without the aid of the lawyer. Attorneys have First Amendment rights to associate with specific clients, to speak with them and on their behalf, and to petition on their behalf—and thus to pursue and achieve the political ends of both the attorney and client.¹¹³

Yet again, the Model Rule does not afford this crucial right to association (and attendant advocacy) sufficient breathing space. Instead,

108. *Id.*; see also Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 647, 711-12, 743 (2002).

109. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 272-73 (quoting NAACP v. Button, 371 U.S. 415, 431 (1963)).

110. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 273.

111. *Id.*

112. *Id.*

113. *Id.*

the Model Rule appears to only authorize engaging in cause lawyering for “underserved populations”—as if lawyers lack such a right in general, outside of “preapproved” or bar-sanctioned association and political advocacy.¹¹⁴ But these core rights to association and advocacy cannot be curtailed in such a way by the state. The *Button* Court emphasized that the fact that the NAACP “happens to be engaged in activities of expression and association on behalf of the rights of Black American children” was “constitutionally *irrelevant* to the ground of our decision.”¹¹⁵

The Court expressly held that *lawyers representing the opposite viewpoints* would be equally protected in their First Amendment rights of expression, association, and petitioning. Lawyers have First Amendment rights of expression, association, and petitioning to focus and specialize their practice in protection of the rights and causes of specific clients or causes—even if that results in declining representation of others who do not fall within that specified clientele.¹¹⁶

C. *Realities of Law Practice and Office Culture*

Newsflash for anyone who has not been in practice—lawyers swear and curse. A lot. An actual unbelievable amount. Additionally, lawyers get angry and frustrated at work, and call other lawyers, opposing counsel, parties, and judges (at the office—not generally to the judge’s face or in court) names. Often those names could be deemed epithets that are “derogatory or demeaning,” especially on sexual or gender-based grounds. That’s not because the lawyer even means it in a sexual or gender-based way, but because in English, and in American culture, many cuss words have gendered and sexual connotations and/or origins. For example, I would anticipate that the authors of Opinion 493 indicating that a single use of a gender-based epithet towards someone is a violation of the rule would consider calling someone a bitch (or an even worse sexual epithet that begins with the letter “c”) a violation. But what about calling someone a son of a bitch? What if someone calls a man a dick? What about an asshole? What about a fucker or a mother-fucker? What about a cock-sucker? I am not being facetious. Before I practiced law in New York and Indianapolis, I was very unaccustomed to cursing and profanity and often winced during movies with such language. But after I began practicing, I quickly found myself

114. *Id.* at 270, 273 (quoting Gillers, *supra* note 2, at 227).

115. TARKINGTON, VOICE OF JUSTICE, *supra* note 3, at 273 (quoting NAACP v. Button, 371 U.S. 415, 444 (1963)).

116. *Id.*

barraged by (and occasionally even using) that same language at the office every day. I am not saying that such debase language is a desirable state of affairs in the legal profession. But it is absolutely the reality of a very large number of law offices in the country.

Under Model Rule 8.4(g), as interpreted in Opinion 493, the use (and even the single use) of racial, ethnic, and gender-based epithets can be a violation of the rule.¹¹⁷ Given the realities of language use at the law office, the fact of the matter is that enforcement would inevitably be discriminatory. Someone who is unpopular at work (for whatever reason) could find themselves stuck with a disciplinary complaint for using an epithet that other, more popular folks at the office use regularly. Moreover, just as a matter of fair notice, if one-off epithets can be a basis for discipline, then each state bar should make a list of cuss words, insults, and epithets that could be the basis for discipline if used in the workplace.

This problem demonstrates one practical reason why workplace harassment law has incorporated a “severe or pervasive” requirement. Law practice is stressful enough without having to walk on eggshells about the precise language that you use and with fear that if the wrong insult slips from your lips in a moment of anger or frustration, you could be disciplined by the bar. This is another example of the need for breathing space—this time in the office. While toxic, discriminatory, and harassing work environments are horrible and can be regulated, they also would generally fall within the “severe” or “pervasive” requirement found in workplace harassment and discrimination law.¹¹⁸ Rather than trying to excise every sexual or gendered epithet from the workplace, the Model Rule should be drafted in such a way to curb discriminatory and hostile work environments, while leaving breathing space (or in this case, cursing space) to survive the stress of practice.

In the classic Supreme Court case, *Cohen v. California*,¹¹⁹ the Supreme Court reversed Cohen’s conviction for wearing a jacket (at a courthouse no less) that had the words “Fuck the Draft” on it.¹²⁰ The *Cohen* Court explained that the state cannot excise from public discourse a particularly offensive word.¹²¹ The reasoning in the *Cohen* case is apropos. The Court noted first that “the principle contended for by the State seems inherently boundless. How is one to distinguish this from

117. ABA Op. 493, *supra* note 13, at 11.

118. See Blackman, *supra* note 57, at 245.

119. 403 U.S. 15 (1971).

120. *Id.* at 16.

121. *Id.* at 26.

any other offensive word?”¹²² That is precisely my point above. If saying a woman is a bitch is off the table, then why can we call a man a dick or an asshole? Or is that also prohibited? The *Cohen* Court elaborated that “government officials cannot make principled distinctions in this area.”¹²³ Exactly. And when people cannot make principled distinctions when applying rules, then the predictable result will be arbitrary and capricious enforcement—often discriminatory enforcement against the unpopular. Even if the State could come up with a list of “prohibited” words for lawyers at the office, the *Cohen* Court poignantly noted that it could not “indulge [in] the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”¹²⁴ And that’s a real problem. Certain expletives—because of their connotations, because of the ideas they express—would be prohibited, while other expletives (just as uncharitable) would be allowed. In fact, once that path is trod, “governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”¹²⁵

Moreover, the *Cohen* Court stated that “[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”¹²⁶ As noted above, the state can indeed prohibit abuse by lawyers in the use of court processes, as established by *Rhinehart*.¹²⁷ Thus an attorney can be prohibited from or punished for calling a witness or opposing counsel derogatory names during a deposition or other court-related process or in court itself.¹²⁸ But where does the state bar get the right to cleanse the legal workplace (not court processes, but the office where lawyers work) from expletives that have a gendered or sexual connotation or origin—which, again, includes a large number of common curse words in English, including the one used by Cohen on the back of his jacket. When working at the office, lawyers are just like every other worker in America who blows off steam during a bad day at the office. Like other workers, they can and should be prohibited from creating a hostile work environment; and in the use of court processes, they can be required to speak with civility. But the First Amendment gives them the breathing space to survive the realities of office life and stress.

122. *Id.* at 25.

123. *Id.*

124. *Id.* at 26.

125. *Id.*

126. *Id.* at 25.

127. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984).

128. *See supra* notes 58-61 and accompanying text.

D. *Breathing Space Outside of Law Practice*

Unfortunately, Model Rule 8.4(g) did not stop at limiting speech made in court proceedings, or even in the practice of law—limitations that are properly contained in most of the existing anti-bias rules in American jurisdictions.¹²⁹ Instead, the Model Rule expressly extended to “conduct related to the practice of law,” which was expansively defined in the comments to include “participating in bar association, business or social activities in connection with the practice of law.”¹³⁰ Moreover, the ABA’s Report indicates the rule would additionally reach “lobbyists” and “settings []such as law schools.”¹³¹ This breadth of the purported application of the Rule outside the actual practice of law is confirmed by the ABA in Opinion 493.¹³² The hypotheticals listed in the end include contexts such as Continuing Legal Education (“CLE”) programs and adjunct law professors advising law students.¹³³

Given the breadth of the definition of prohibited speech under Model Rule 8.4(g)—encompassing that which “manifests bias or prejudice” or is derogatory or demeaning—the rule clearly sweeps within its scope speech regarding many of “the major public issues of our day,”¹³⁴ including such matters as gender identity, abortion, surrogacies, immigration, and marriage equality, to give a few examples. And if one takes “socioeconomic status” seriously, this would also foreclose speech that manifests bias as to the rich or the poor—covering issues from decrying a welfare state to decrying wealth-hoarding. In general, the prohibitions in Rule 8.4(g) are politically imbalanced, with exclusion heavily weighted against conservative views. Rule 8.4(g) stops such arguments before they are even made—it is a viewpoint-based prior restraint that disproportionately forecloses arguments and expressions of opinion on one side of issues of public concern.

These issues are of acute importance to millions of Americans—issues that drive people to vote for particular candidates or to belong to certain political parties. Ultimately these issues will be resolved by laws, regulations, and policies, which will be determined and enforced through legislation, court cases, and executive action—all of which are entirely dependent on lawyers. Lawyers will write the legislation, litigate the court cases, draft policies, evaluate constitutionality, and execute the

129. See Gillers, *supra* note 2, at 208.

130. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020) (emphasis added); *id.* cmt. 4.

131. AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 109, at 2 (2016).

132. ABA Op. 493, *supra* note 13, at 6.

133. *Id.* at 12-13.

134. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

law. To cut lawyers on one side of these issues out of the conversation is wildly unconstitutional and completely undermines the role of the lawyer in the system of justice. Lawyers are the very people who have the knowledge, skills, and ability to articulate and implement legal policies, accommodations, and options—as well as air and evaluate grievances and to propose legal remedies. Silencing lawyers from expressing their opinions on these issues—especially to other lawyers at law-related functions, CLEs, law school presentations, conferences, etc.—will forestall the wheels of political change; it will halt accommodation and conversation across the aisle of political divergence among lawyers. Such conversations and accommodations are desperately needed. Rule 8.4(g) constitutes viewpoint discrimination of political speech on the great issues of our times as to the very people who are necessary to consider and implement political change.

Notably, Opinion 493 did state that the Model Rule “does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern.”¹³⁵ But at the same time, Opinion 493 reaffirmed the breadth of the definitions of discrimination and harassment in the rule—and reaffirmed the rule’s application to presentations at CLEs, law school advising of students, and statements made in the abstract that express bias.¹³⁶ It is hard to comprehend how, without amending or narrowing the breadth of the rule at all, the opinion’s interpretation can be taken at face value. Again, as *Button* explained—and one of the primary reasons we need breathing space—is that even “[t]he threat of sanctions may deter the[] exercise” of First Amendment rights “almost as potently as the actual application of sanctions.”¹³⁷ Given that Opinion 493 reaffirmed the ABA’s view that Model Rule 8.4(g) applies in public discourse such as what a speaker says at a CLE, the threat of sanctions will silence viewpoints.¹³⁸ Lawyers will steer clear of expressing their views if there is any specter of discipline for so doing. Most lawyers do

135. ABA Op. 493, *supra* note 13, at 1.

136. *Id.* at 12-13. Hypothetical two of the opinion involves a lawyer who participated as a speaker at a Continuing Legal Education (“CLE”) program. *Id.* at 12. While the opinion determines that what was said is not a violation of the rule, the hypothetical states that the “CLE Program would fall within” conduct related to the practice of law. *Id.* Similarly, Hypothetical four involves sexual harassment by an adjunct professor of a student being advised. *Id.* at 13. While the conduct described is criminal in nature, it is important to remember that the opinion indicated that all of the prohibitions of Model Rule 8.4(g)—not just nonconsensual sexual touching—would apparently apply in the law school context. *Id.* Finally, Hypothetical five describes a conversation between a partner and an associate at a law firm where the partner makes anti-Muslim comments (which are not aimed at anyone specifically but stated in the abstract). *Id.* The opinion states that this would violate the rule. *Id.*

137. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

138. ABA Op. 493, *supra* note 13, at 12-13.

not go anywhere near the line of risking discipline because being a lawyer is their livelihood for which they have undertaken extensive schooling and cost. They will not risk it; they will acquiesce instead.

Additionally, to forbid or chill speech on one side of these issues in law schools, at CLEs, and at bar-sponsored discussions will undermine a healthy, robust dialogue among lawyers as to how to represent and accommodate divergent viewpoints and interests. Again, it is lawyers who generally spearhead changes in law and policy, and they must collectively—precisely at CLEs, dinners, law school panels, and conferences—fully discuss these issues. As the *Sullivan* Court emphasized, debate on public issues must be “uninhibited, robust, and wide open.”¹³⁹ By chilling speech on one side of these public issues, we would instead have inhibited, myopic, and enclosed debate.¹⁴⁰ Political myopia—the inability to see, countenance, or even give a hearing to—another party’s viewpoints seriously undermines the dialogue that is necessary to successful self-government.¹⁴¹ It was precisely in the context of punishment of lawyer speech, that the Supreme Court asserted that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹⁴²

And even for those who appear to be on the winning side of 8.4(g)—because only your opponent’s speech is suppressed while you remain free to articulate your views—remember Justice Brandeis’s warning: “repression breeds hate.”¹⁴³ It just does. And “hate menaces stable government.”¹⁴⁴ That—maintaining a stable system of self-government where each citizen, including lawyers, retains the “freedom to think as you will and to speak as you think” as to public issues—is the importance of allowing people who hold these views to express them.¹⁴⁵ It is the *only* path of safety—to allow people “the opportunity to discuss freely supposed grievances and proposed remedies” and accommodations.¹⁴⁶

Unfortunately, although Rule 8.4(g) did not facially purport to regulate speech completely unrelated to law practice, it does define “related to the practice of law” to include “social activities” related to a law function—which in some circumstances would in actuality be

139. *Sullivan*, 376 U.S. at 270.

140. *See id.*

141. *See* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

142. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

143. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

144. *Id.*

145. *Id.*

146. *Id.*

speech completely unrelated to the practice of law, such as going out to dinner or for drinks with colleagues from work.¹⁴⁷

Can regulation of lawyers reach into a lawyer's personal and non-professional activities? For example, the Florida Creed of Professionalism requires lawyers to affirm that they "will *at all times* in my professional *and private lives* uphold the dignity and esteem" of the judicial system and the legal profession and "will *at all times* act with dignity, decency, and courtesy."¹⁴⁸ In an earlier proposed version of Model Rule 8.4(g), the rule included a First Amendment proviso, explaining that the rule was subject to the First Amendment.¹⁴⁹ In the accompanying draft report, the committee included language that did not end up in the final rule or report—a very unfortunate exclusion because it accurately indicated the state's lack of power over attorneys in speech unrelated to their law practice.¹⁵⁰ The draft report clarified "that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to the Rule."¹⁵¹ Not only is such speech not subject to Rule 8.4(g), it is not subject to regulation by the judiciary or state bar.

One's personal views on sexual orientation, on gender identity, on marriage equality do not decidedly disqualify an attorney from being fit to practice law. The lawyer can still practice law. As long as the lawyer's biases are not used in the lawyer's law practice to prejudice the administration of justice, the bar has no business forcing lawyers to either acquiesce in the ABA's view of those issues or lose their license. Although not stated in terms of First Amendment protection, the Montana legislature's rejection of Model Rule 8.4(g) is based on this basic dichotomy: the power of the judiciary and state bar to regulate lawyers is limited to attorneys' practice of law—their use of state power—and basic fitness to practice law.¹⁵²

Notably, most of the existing anti-bias rules contain a limitation that the bias must in some way prejudice the administration of justice. That qualifier is an essential First Amendment component to a rule that prohibits a lawyer's expression of bias. Because the bar has no business regulating a lawyer's private expression, that qualifier needs to be

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

148. FLA. STATE BAR, THE CREED OF PROFESSIONALISM, <https://www.floridabar.org/wp-content/uploads/2017/04/creed-of-professionalism-ada.pdf> (last visited Apr. 23, 2022) (emphasis added).

149. Blackman, *supra* note 57, at 248 (quoting the December 2015 draft of Model Rule 8.4(g)).

150. *Id.* at 249.

151. *See id.* at 248-49 (quoting AM. BAR ASS'N, NOTICE OF PUBLIC HEARING 6 (2015)).

152. *See* S.J. Res. 15 (Mont. 2017), <http://leg.mt.gov/bills/2017/billhtml/SJ0015.htm>.

interpreted to mean that the bias is used in a court proceeding or in another law practice context. The phrase cannot be interpreted to mean that it is somehow prejudicial to justice for lawyers to express certain unpopular opinions publicly because such views reflect adversely on the profession as a whole. However, there are parts of Opinion 493 that can be read as making that very argument. Although emphasizing that only "harmful" speech is prohibited by the rule,¹⁵³ the opinion flatly asserts that "[t]he conduct addressed by Rule 8.4(g) harms the legal system and the administration of justice."¹⁵⁴ In footnote six, the opinion quotes the District Court of Puerto Rico as stating, "When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice."¹⁵⁵ Further, the opinion asserts that "[h]arassment and discrimination damage the public's confidence in the legal system and its trust in the profession."¹⁵⁶ Notably, again, the opinion embraces the broad definition of harassment and discrimination that prohibits speech that is "derogatory or demeaning" or that "manifests bias or prejudice" on one of the prohibited bases.¹⁵⁷ The opinion thus appears to be asserting that lawyers, by the very fact of expressing such speech, harm the public image of the profession and thus can be disciplined.

In September 1950, during the height of the second Red Scare, the ABA Assembly and House of Delegates adopted a resolution requesting that states enact a regulation to require each attorney to swear an anti-Communism loyalty oath and to file an affidavit periodically thereafter attesting as to whether the attorney was or ever had been a member of the Communist Party or other subversive organizations.¹⁵⁸ States were then to investigate and disbar any communist attorneys.¹⁵⁹ As Zechariah Chafee recounted in *The Blessings of Liberty*, written five years later, *not a single state* adopted the ABA's proposed regulation.¹⁶⁰ Indeed, the New York City Bar Association in December 1950 adopted a resolution opposing the loyalty oath and affidavit requirement, and asserting that the only oath that should be required of lawyers is to

153. ABA Op. 493, *supra* note 13, at 1 ("[O]nly conduct that is found harmful will be grounds for discipline.").

154. *Id.* at 2.

155. *Id.* at 2 n.6.

156. *Id.* at 5.

157. *Id.* at 6, 8.

158. See Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1856 (2009).

159. *Id.*

160. ZECHARIAH CHAFEE, *THE BLESSINGS OF LIBERTY* 159 (J.B. Lippincott Co. 1956).

uphold the U.S. Constitution—the traditional oath of the American lawyer.¹⁶¹

It was in this context—in discussing regulations of the ilk of the ABA’s 1950 loyalty oath—that Chafee chastised regulators for undermining liberty “in the very process of purporting to defend” it.¹⁶² In a similar vein there is significant irony that the ABA is attempting to promote diversity and eliminate bias through the means of silencing divergent and dissenting views. The ABA certainly can and should promote diversity—but it should do so by means that do not themselves undermine diversity (as well as Constitutional rights) by silencing a contingent of people with unpopular viewpoints. In retrospect, it seems clear (and Chafee argued at the time) that rather than trying to improve loyalty among lawyers, “the true aim of the loyalty oaths was *to purge unpopular opinions or sympathies* among members of the bar.”¹⁶³ The ABA wanted to sanitize the bar of any with communist ties, views, or sympathies.¹⁶⁴ Eugene Volokh has come to a similar conclusion about Model Rule 8.4(g): “My inference is that the ABA wants to do exactly what the text calls for: limit lawyers’ expression of viewpoints that it disapproves of.”¹⁶⁵ As Chafee asserted, as a nation, “we are more especially called upon to maintain the principles of free discussion in case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed.”¹⁶⁶ The state has no more right to purge the bar of lawyers who personally hold socialist views than it does to purge the bar of lawyers who hold views that can be considered biased, such as support for traditional marriage or for binary genders. Those who argue otherwise should also keep in mind that political wheels turn and power changes hands. If those expressing right-leaning sentiments can be disciplined today, then those expressing left-leaning sentiments can be disciplined in the proverbial tomorrow under a differing political majority.

161. See Editorial, *The Lawyer’s Loyalty Oath*, 37 A.B.A. J. 128 (Feb. 1951).

162. TARKINGTON, *VOICE OF JUSTICE*, *supra* note 3, at 68 (quoting CHAFEE, *supra* note 160, at 156). Chafee eloquently explained:

The only way to preserve ‘the existence of free American institutions’ is *to make free institutions a living force*. To ignore them in the very process of purporting to defend them, as frightened men urge, will leave us little worth defending. We must choose between freedom and fear—we cannot have both.

Id.

163. Basile, *supra* note 158, at 1850 (emphasis added).

164. *Id.* at 1856-57.

165. See Volokh & Swisher, *supra* note 16, at 74.

166. ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* 3 (1920).

Overarchingly, lawyers have full First Amendment rights to speech when acting outside of their law practice—including speech that manifests bias or prejudice, is demeaning or derogatory, is undignified, discourteous, rude, offensive, or even hateful.¹⁶⁷ The fact that it embarrasses members of the bar that their colleagues have allegedly backwards or bigoted opinions is not a sufficient justification to undermine lawyers’ First Amendment rights outside of their law practice. Breathing space means the breathing space to be able to express whatever views you hold in your private life. Breathing space to live—to have your own private persona that is not dictated or pushed by the state bar and to maintain the “freedom to think as you will and to speak as you think”¹⁶⁸ in your personal life outside of law practice—is an essential component of the First Amendment for everyone, including lawyers.

IV. CONCLUSION

Harassment, discrimination, and inequality are dire problems in the U.S. and should be addressed and remedied. One can understand the laudable motive of eradicating anything that can be considered such in the legal profession. But broad prohibitions on speech are never going to comport with the First Amendment, are unlikely to be adopted, and, even if adopted, will be subjected to constitutional challenge and likely invalidated. And they should be challenged and stricken. First Amendment freedoms need breathing space, and that’s because people need breathing space. Lawyers need breathing space—in their private lives, in their public discourse, and in their law practice. Moreover, clients need their lawyers to have breathing space—to be able to engage in cause lawyering, to be able to fully and frankly discuss the objectives of the representation and the issues involved even if such may involve discussion of matters that are derogatory or demeaning or manifest bias on one of the protected bases. Because these “First Amendment freedoms need breathing space to survive,” as *Button* declares, “government may regulate in the area only with narrow specificity.”¹⁶⁹

Consequently, giving lawyers breathing space is an essential principle in drafting, interpreting, and enforcing anti-harassment and anti-discrimination rules of professional conduct. Nevertheless, the ABA continues to promote Model Rule 8.4(g)—a rule that lacks the breathing space required by the First Amendment. The Model Rule lacks breathing

167. *NAACP v. Button*, 371 U.S. 415, 429-31 (1964).

168. *Id.* at 432-33.

169. *Id.* at 433.

space in the breadth of its definition of prohibited discrimination and harassment. It lacks breathing space in the breadth of the contexts in which it purports to apply. Further, the ABA has mostly made matters worse by doubling down in Formal Opinion 493 on the constitutionality of the rule as promulgated,¹⁷⁰ as well as by confirming the Model Rule's breadth and its application in contexts outside of actual law practice.¹⁷¹

Recent rules in New Hampshire, Maine, and Connecticut, and the proposal in New York, all make strides to regulate “with narrow specificity,” as *Button* requires, and can serve as “models” to states that want to enact an anti-harassment or anti-discrimination rule that is drafted with an eye to protecting lawyers’ First Amendment rights and providing breathing space, while also working to curb harassment and discrimination in the legal profession. Model Rule 8.4(g), in contrast, would deprive lawyers of breathing space in law practice, in public discourse, and in personal social interactions as required by the First Amendment, and thus the rule as promulgated lacks the “breathing space to survive” constitutional scrutiny.

170. ABA Op. 493, *supra* note 13, at 9-12 (arguing that the rule is constitutionally sound, primarily by arguing that lawyers lack the same protection under the First Amendment as non-lawyers because of their status in the bar). I am currently working on a paper that scrutinizes the First Amendment analysis of the ABA’s Standing Committee on Ethics and Professional Responsibility in Formal Opinion 493.

171. See *supra* notes 39, 40, 80 and accompanying text.