STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2020-055

July 14, 2021

The Honorable Bob Ballinger
State Senator
508 Dr. Spurlin Circle
Berryville, AR 72616-3825

Dear Senator Ballinger:

This letter is in response to your request for an opinion regarding the constitutionality of the American Bar Association's ("ABA") Model Rule of Professional Conduct 8.4(g). That Rule provides:

> 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.[1]

The Rule's Comments 3, 4, and 5 provide:

> [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

[1] Rule 8.4: Misconduct, *Am. Bar Ass'n*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

> 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).
>
> [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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
>
> [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).[2]

In light of this Rule and its Comments, you ask the following questions:

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[2] Rule 8.4 Misconduct – Comment, *Am. Bar Ass'n*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/.

1) If adopted in Arkansas, could ABA Model Rule 8.4(g) constitute a violation of an Arkansas attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

2) Could ABA Model Rule 8.4(g) be interpreted as violating our Religious Freedom Restoration Act (RFRA)?

RESPONSE

The answer to both your questions is yes. First, if adopted in Arkansas, ABA Model Rule 8.4(g) could infringe an Arkansas attorney's rights to free speech, free exercise, expressive association, and due process. Second, it could also substantially burden an attorney's exercise of religion and thereby violate Arkansas's Religious Freedom Restoration Act.

DISCUSSION

The vast majority of states to consider adopting ABA Model Rule 8.4(g) have not done so,[3] and that Rule has provoked a great deal of judicial and scholarly criticism.[4] In Arkansas, as elsewhere, the principal difficulty is the Rule's considerable expansion of what constitutes professional misconduct.

Amendment 28 to the Arkansas Constitution empowers the Arkansas Supreme Court to make rules regulating attorneys' professional conduct. Accordingly, the Court has approved the Arkansas Rules of Professional Conduct.[5] All persons

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[3] *See* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 Cath. U.L. Rev. 629 (2019).

[4] *See, e.g.*, *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 33 (E.D. Pa. 2020) (preliminarily enjoining Pennsylvania Rule of Professional Conduct 8.4(g)); Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173 (2019); Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41 (2019); George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018); Josh Blackman, *Reply: 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 (2017); 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 Pro. 201 (2017); C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?* ABA Section of Litig. (Apr. 3, 2019).

[5] *See In re Ark. Bar Ass'n*, 361 Ark. App'x 451 (2005) (per curiam).

admitted to practice law in the State of Arkansas must swear a solemn oath to abide by those Rules[6] and are subject to disciplinary authority.[7] "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."[8] Discipline may include probation, non-public warning, public caution, reprimand, suspension, and disbarment.[9]

Arkansas Rule 8.4(d) provides that it is "professional misconduct" for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[10] Comment 3 to that Rule explains that subdivision (d) proscribes "discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law," saliently including "discriminatory conduct . . . directed toward litigants, jurors, witnesses, other lawyers, or the court."

Adopting ABA Model Rule 8.4(g) would expand the scope of professional misconduct in a variety of ways. First, the Revised Resolution and Report to the ABA House of Delegates[11] explains that the Model Rule is designed to expand the Rules' regulatory reach beyond "situations where the lawyer is representing clients"[12] to conduct and expression that is merely "*related to* the practice of law."[13] Thus, the Model Rule's Comment 4 explains that it regulates not only lawyers' conduct in "representing clients" and "interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law," but also their conduct in "operating or managing a law firm or law practice" and "participating in

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[6] Ark. R. Governing Admission to the Bar, § 7(G).

[7] Ark. R. Pro. Conduct 8.5(a).

[8] Ark. R. Pro. Conduct, Scope, ¶ 19; Procedures of the Ark. Sup. Ct. Regulating Pro. Conduct of Attorneys at Law, § 17(A)(1) (an attorney's violation of the Rules is "grounds for discipline").

[9] Procedures of the Ark. Sup. Ct. Regulating Pro. Conduct of Attorneys at Law, § 17(D).

[10] Other conduct may qualify as professional misconduct under Arkansas Rule 8.4(a)–(c), (e), & (f).

[11] Revised Resolution and Report to the House of Delegates, *Am. Bar Ass'n* (August 2016), 2, 4, 9–10, 14, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.pdf.

[12] Revised Resolution and Report to the House of Delegates, 9.

[13] ABA Model Rule 8.4(g) (emphasis added).

bar association, business or social activities in connection with the practice of law." In short, ABA Model Rule 8.4(g) is written expansively to reach all "conduct lawyers are *permitted or required* to engage in because of their work as a lawyer,"[14] which "includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."[15]

Second, ABA Model Rule 8.4(g) markedly lowers the threshold for conduct to qualify as "professional misconduct." Whereas the Arkansas Rules prohibit discriminatory conduct that is "prejudicial to the administration of justice,"[16] the Model Rule's Comment 3 explains that merely "harmful" conduct that "manifests bias or prejudice towards others" qualifies as prohibited discrimination.

Third, ABA Model Rule 8.4(g) introduces the concept of "harassment" as prohibited conduct distinct from "discrimination."[17] Comment 3 explains that "harassment" includes not only "sexual harassment" but also any conduct that someone believes is "derogatory or demeaning."

Fourth, prohibited conduct under Comment 3 to existing Arkansas Rule 8.4 includes discrimination on the basis of "race, sex, religion, national origin, or any other similar factor[]" that "is not relevant to the proof of any legal or factual issue in dispute." Adopting ABA Model Rule 8.4(g) would eliminate the prohibition's connection to the context of a legal proceeding, move the list of prohibited bases to its blackletter text, and expand those bases to include "ethnicity, disability, age, sexual orientation, gender identity, marital status[,] [and] socioeconomic status."

Fifth and finally, ABA Model Rule 8.4(g) contains no requirement that conduct must be otherwise prohibited by law to qualify as "discrimination" or

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[14] Revised Resolution and Report to the House of Delegates, 9. By contrast, Comment 3 to Arkansas Rule 8.4 clarifies that the Rule prohibits "discriminatory conduct committed by a lawyer *while performing duties* in connection with the practice of law" (emphasis added).

[15] Revised Resolution and Report to the House of Delegates, 11.

[16] Ark. R. Pro. Conduct 8.4(d) & cmt 3.

[17] ABA Model Rule 8.4(g). By contrast, paragraph 5 of the Arkansas Rules' Preamble provides that a lawyer should not "use the law's procedures . . . to harass or intimidate others."

"harassment."[18] It forbids conduct that would not be actionable under federal or state antidiscrimination laws in at least three respects. The Rule defines prohibited conduct with respect to classes not contained in federal or state antidiscrimination statutes.[19] Further, unlike federal law prohibiting workplace discrimination, for example, the Rule reaches conduct that is neither "severe [n]or pervasive."[20] It also incorporates a negligence standard, forbidding not only intentional conduct or expression but also any conduct that an attorney "reasonably should know" is prohibited.[21]

Question 1: If adopted in Arkansas, could ABA Model Rule 8.4(g) constitute a violation of an Arkansas attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

If adopted in Arkansas, ABA Model Rule 8.4(g) could infringe an Arkansas attorney's rights to free speech, free exercise, expressive association, and due

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[18] Under existing Arkansas Rule 8.4, even many criminal offenses would not constitute professional misconduct. *See* Ark. R. Pro. Conduct 8.4 cmt 2 ("Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.").

[19] Federal civil rights law generally prohibits discrimination only on the basis of race, color, religion, sex, national origin, age, and disability. *See, e.g.*, 42 U.S.C. § 12112 (Americans with Disabilities Act); 29 U.S.C. § 623 (Age Discrimination in Employment Act); 42 U.S.C. § 2000e-2 (Title VII) (prohibiting discrimination on the basis of "race, color, religion, sex, or national origin"). Arkansas prohibits discrimination on the basis of "race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability." Ark. Code Ann. § 16-123-107(a) (Arkansas Civil Rights Act); *see* Ark. Code Ann. §§ 16-123-401 et seq. (Religious Freedom Restoration Act).

[20] *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."). The ABA has recognized this in a formal opinion. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 14 (2020) (the Rule "is not restricted to conduct that is severe or pervasive, a standard utilized in the employment context.").

[21] ABA Model Rule 8.4(g) conceivably could be construed to prohibit conduct manifesting mere "implicit bias." *See, e.g.*, Halaby and Long, *New Model Rule of Professional Conduct 8.4(g)*, 41 J. Legal Pro. 201, 216 17, 243–45.

process under the First and Fourteenth Amendments and the Arkansas Constitution.[22]

a. Free Speech and Overbreadth

"[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment[.]"[23] Comment 3 to ABA Model Rule 8.4(g) explains that the Rule reaches "verbal . . . conduct." The Rule thus implicates the First Amendment, which protects speech and inherently expressive conduct from content-based regulations that are not narrowly tailored to further a compelling government interest.[24] Further, because the Rule's definition of "professional misconduct" prohibits the expression of certain viewpoints[25]—those deemed to discriminate or harass on the basis of protected classes[26]—strict scrutiny applies.[27]

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[22] The Arkansas Constitution protects the freedoms of speech and religion. Ark. Const. art. 2, § 6 (freedom of speech); *id.* § 24 (freedom of religion). There is no indication that these provisions are interpreted differently than those of the federal First Amendment. *McDaniel v. Spencer*, 2015 Ark. 94, at 8, 457 S.W.3d 641, 649 (2015) (freedom of speech); Op. Att'y Gen. No. 1999-422 (Mar. 28, 2000) (citing *Lendall v. Cook*, 432 F. Supp. 971, 976 (E.D. Ark. 1977); *Cortez v. Independence County*, 287 Ark. 279, 698 S.W.2d 291 (1985)) (freedom of religion).

[23] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991).

[24] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011).

[25] "Viewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

[26] Attorneys' speech is subject to less-demanding scrutiny in narrow circumstances, such as when that speech is in the courtroom, pertains to a pending judicial proceeding, or solicits business. *Gentile*, 501 U.S. at 1071–73. But because ABA Model Rule 8.4(g) applies to speech that is in any way "related to the practice of law," it reaches far beyond these narrow circumstances to prohibit speech that is entitled to robust First Amendment protection.

[27] *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (rejecting lower court decisions that incorrectly held "professional speech" to be exempt from the rule that content-based regulations of speech are subject to strict scrutiny). Even before *Becerra*, the Tennessee Attorney General noted that ABA Model Rule 8.4(g) "wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech, even when the speech is related to the practice of law[.]" *See* Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g), at 2 (March 16, 2018) ("Tenn. Att'y Gen. Cmt. Letter"); *see also* Tenn. Att'y Gen. Op. No. 18-11 (March 16, 2018) (incorporating comment letter).

Other than a few narrow, historical exceptions (namely, for obscenity, libel, incitement, and fighting words), the First Amendment robustly protects the expression of disfavored viewpoints.[28] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[29] In fact, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."[30] There is, therefore, "no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."[31] "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[32]

ABA Model Rule 8.4(g) discriminates on the basis of viewpoint because it prohibits the expression only of views considered "derogatory or demeaning" or "harmful" and "manifest[ing] bias or prejudice."[33] Further, although the Rule is stated as a categorical prohibition of discrimination, Comment 4 explains that the Rule selectively forbids discrimination based on viewpoint: It provides an exemption for lawyers to discriminate on the basis of the protected classes *in favor of* "promot[ing] diversity and inclusion." The Rule, therefore, impermissibly "mandate[s] positivity"[34] by silencing perspectives that assign lesser weight to the goals of

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[28] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[29] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (collecting authorities).

[30] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995).

[31] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.).

[32] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[33] *See id.* at 1757–59 (majority) (government prohibition of disparaging speech is impermissible viewpoint discrimination); *id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting the argument that a "law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends," and explaining that "[a] subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral").

[34] *Id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

"diversity and inclusion" than to other incompatible or competing values.[35] Such "attempts to suppress" particular points of view "are presumptively unconstitutional,"[36] and because the Rule targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[37]

Further, even if it were assumed that government has a compelling interest in regulating the practice of law, ABA Model Rule 8.4(g) is not narrowly tailored because it reaches beyond speech uttered *in* the practice of law to speech that is in any way "*related to* the practice of law."[38] The Rule fails the tailoring requirement because business and social activities not explicitly associated with an attorney's practice of law are still "related to the practice of law" in various ways, for example, as opportunities for business development.[39] Indeed, "statements made by an attorney as a political candidate or a member of the General Assembly could be

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[35] "One commentator has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer's statement, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime,' could be subject to discipline under Model Rule 8.4(g)." Tex. Att'y Gen. Op. No. KP-0123, 2016 WL 7433186, at *3 (Dec. 20, 2016) (quoting Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Foundation Legal Memorandum 4 (2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought).

[36] *Rosenberger*, 515 U.S. at 830.

[37] *Id.* at 829. "[C]andid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and it will therefore suppress thoughtful and complete exchanges about these complex issues." Tex. Att'y Gen. Op. No. KP-0123, 2016 WL 7433186, at *3.

[38] ABA Model Rule 8.4(g) (emphasis added). The Rule includes carve outs for attorneys' "ability . . . to accept, decline or withdraw from a representation" of a client; "legitimate advice or advocacy"; "conduct undertaken to promote diversity and inclusion"; limiting the "scope or subject matter" of their practice; limiting their "practice to members of underserved populations"; and "charg[ing] and collect[ing] reasonable fees and expenses for a representation." ABA Model Rule 8.4(g) & cmts 3–5. Given the Rule's expansiveness, these limited carve outs are insufficient to mitigate its unconstitutional breadth or vagueness.

[39] *Cf.* Nick Thompson, C*omments from Nick Thompson, Partner Mitchell, Williams, Selig, Gates & Woodyard*, Ark. Lawyer, at 31 (Winter 1994) ("Everyone in our organization is on the constant look-out for business development opportunities. . . . And, most importantly, we recognize that every person we meet represents an opportunity for business development if not now then later.").

deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g). So too could statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization."[40] Indeed, relations "stop nowhere" because "everything is related to everything else."[41] Accordingly, the Rule regulates a vast array of speech, subjecting attorneys to professional discipline for speech that has only the most insubstantial, indirect, or coincidental relationship to the legal profession.[42]

Finally, "[e]ven if the [disciplinary authority] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place."[43] This sweeping threat would influence attorneys to "choose not to speak because of uncertainty whether [their] claim of privilege would prevail if challenged."[44] As such, the Rule is unconstitutionally overbroad and, therefore, subject to facial invalidation under the First Amendment.[45]

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[40] Tenn. Att'y Gen. Cmt. Letter at 8; *cf.* District of Columbia Bar Op. No. 222 (1991) (deferring a decision on whether an attorney could be disciplined for participation and concurrence in hiring decisions made by a church and a religious human rights organization that discriminate on the basis of sexual orientation).

[41] *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quotations omitted).

[42] Comment 4 to ABA Model Rule 8.4(g) explains that the Rule's phrase "related to the practice of law" is interpreted to "include," among other things, "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."

[43] Tenn. Att'y Gen. Cmt. Letter at 8.

[44] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). "[A]n attorney operating under Model Rule 8.4(g) may feel restricted from taking a legally supportable position due to fear of reprimand for violating the rule. Such restrictions would infringe upon the free speech rights of the State Bar, and a court would likely conclude that Model rule 8.4(g) is unconstitutional." Tex. Att'y Gen. Op. No. KP-0123, 2016 WL 7433186, at *3.

[45] *United States v. Stevens*, 559 U.S. 460, 473 (2010) (a law is facially invalid if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (quotation omitted)).

b. Due Process

Disciplinary proceedings are "quasi-criminal" in nature and due-process protections apply.[46] Even if ABA Model Rule 8.4(g) would not reach the totality of an attorney's conduct, it is still constitutionally infirm under the Due Process Clause because the scope of conduct "related to the practice of law" is impermissibly vague. The Rule thus "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[47]

The Rule's other terms suffer from vagueness as well.[48] For example, determining whether conduct "is harassment or discrimination on the basis of" any of the eleven categories listed in ABA Model Rule 8.4(g)—and hence, whether an attorney "knows or reasonably should know" that's what their conduct is—"would require speculating about whether someone might view that speech as 'harmful' or 'derogatory or demeaning.'"[49] But these value-laden terms lack settled definitions and are sharply contested. Thus, "[f]ar from providing explicit standards, the definitions [of discrimination and harassment] in Comment 3 further complicate and muddle the meanings of the words . . . such that a person of common intelligence does not know what is prohibited."[50] Troubling questions arise:

> Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the 'one percent'? How about an attorney who comments at a CLE on immigration law that illegal

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[46] *In re Ruffalo*, 390 U.S. 544, 551 (1968).

[47] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (quotation omitted).

[48] Tenn. Att'y Gen. Cmt. Letter at 8 (highlighting the vagueness of "harassment," "discrimination," "knows," "reasonably should know," "related to the practice of law," and "legitimate advice or advocacy").

[49] *Id.* Section 1.0(f) and (j) of the Arkansas Rules provide definitions of "knows" and "reasonably should know." But even assuming those definitions would apply to the terms in ABA Model Rule 8.4(g), the vagueness persists because it remains unclear what counts as "harassment or discrimination on the basis of" the enumerated categories. ABA Model Rule 8.4(g).

[50] La. Att'y Gen. Op. No. 17-0114, 2017 WL 4466513, at *6 (September 8, 2017).

> immigration is draining public resources? Is that attorney discriminating on the basis of national origin?[51]

The United States Supreme Court's explanation of the shortcomings of an ordinance that prohibits "annoying" conduct applies equally to ABA Model Rule 8.4(g)'s prohibition of conduct that is "harmful," "derogatory," or "demeaning": "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[52] The Rule's vagueness thus "creates a substantial risk that determinations about whether expression is prohibited will be guided by the 'personal predilections' of enforcement authorities rather than the text of the rule."[53] And where, as here, "a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[54]

Finally, ABA Model Rule 8.4(g) purports to delimit what counts as "professional misconduct" while not prohibiting conduct that is professionally acceptable. Thus, the Rule provides that "[t]his paragraph does not preclude legitimate advice or advocacy consistent with these Rules." But that self-referential language does not helpfully identify the bounds of "professional misconduct." Merely referring in the abstract to conduct that is "legitimate" or "consistent with the[] Rules" provides no discernible standard when the legitimacy or consistency of particular conduct is precisely the issue in question. The issue necessarily reasserts itself: What counts as "professional misconduct" under ABA Model Rule 8.4(g)? Because it is unclear, the Rule is unconstitutionally vague under the Due Process Clause.

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[51] Tenn. Att'y Gen. Cmt. Letter at 9.

[52] *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). ABA Model Rule 8.4(g) contains no requirement that any harm caused by an attorney's conduct must suffice to establish an injury-in-fact under federal or state antidiscrimination law.

[53] Tenn. Att'y Gen. Cmt. Letter at 9 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

[54] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotation, alteration, and footnotes omitted).

c. Expressive Association and Free Exercise

By its terms, ABA Model Rule 8.4(g) prohibits all non-exempt expressive conduct[55] that is incompatible with the Rule's blackletter nondiscrimination principle even if that expression is undertaken to promote some other value that is worthy of approval. Thus, the Rule prohibits even non-invidious discrimination that promotes values like those protected by the First Amendment rights to free exercise and expressive association. "Indeed, by expressly prohibiting harassment or discrimination based on 'sexual orientation' and 'gender identity,' the proposed rule appears designed to target those holding traditional views on controversial matters such as sexuality and gender—views that are often 'based on decent and honorable religious or philosophical premises.'"[56] True, some may find such views and accompanying expressive conduct offensive. But "it is not, as the [United States Supreme] Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."[57] And States have a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint,"[58] whether that hostility is "masked" or "overt."[59]

Further, the Constitution protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural

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[55] As discussed above, Comment 4 includes an exemption that attorneys may discriminate by "engag[ing] in conduct undertaken to promote diversity and inclusion." The Rule thus recognizes that some expression incompatible with nondiscrimination promotes values that are worthy of approval. But, of those values, it singles out only "diversity and inclusion" for a special exemption. With no other values exempted, then, the Rule problematically prohibits all other non-invidious discrimination resulting from legitimate expression.

[56] Tenn. Att'y Gen. Cmt. Letter at 9 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015)); *see Obergefell*, 576 U.S. at 679–80 ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

[57] *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (reversing a decision that "elevate[d] one view of what is offensive over another and . . . sen[t] a signal of official disapproval of [a business owner's] religious beliefs").

[58] *Id.*

[59] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

ends."[60] But given ABA Model Rule 8.4(g)'s expansive application to "business or social activities in connection with the practice of law,"[61] it is difficult to see how groups or networking events designed to benefit attorneys who are, for example, young, single, women, Hispanic, gay, or Christian, could escape scrutiny as discrimination on the basis of age, marital status, sex, ethnicity, sexual orientation, or religion.

Freedom of association "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[62] Legal and advocacy organizations promote various, frequently controversial, political or social positions bearing on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and socioeconomic status. Membership in, or participation in a program sponsored by, an organization that promotes views some deem "harmful," "derogatory," or "demeaning" could provide grounds for attorney discipline, in violation of the First Amendment. And "serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney"[63] may well be deemed "related to the practice of law."[64] Therefore, ABA Model Rule 8.4(g) could be applied to infringe an attorney's rights to free exercise and expressive association.

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[60] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quotation omitted).

[61] ABA Model Rule 8.4(g) cmt. 4.

[62] *Boy Scouts of Am.*, 530 U.S. at 647–48.

[63] *See* Tenn. Att'y Gen. Cmt. Letter at 10 (quoting ABA Model Rule 8.4(g)).

[64] The Louisiana Attorney General suggests that ABA Model Rule 8.4(g) would prohibit "those who adhere to religious doctrines" from "continu[ing] to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," despite the U.S. Supreme Court's affirmation that such advocacy remains legitimate. *Obergefell*, 576 U.S. at 679, *cited by* La. Att'y Gen Op. No. 17-01114, 2017 WL 4466513, at *5. Similarly, "[u]nder Rule 8.4(g) a lawyer who acts as a legal adviser on the board of their church would be engaging in professional misconduct if they participated in a march against same-sex marriage or taught a class at their religious institution against divorce (*i.e.*, marital status)." La. Att'y Gen Op. No. 17-01114, 2017 WL 4466513, at *5.

Last, it cannot be simply assumed that enforcement authorities will resolve the Rule's language "in favor of adequate protection of First Amendment rights."[65] Therefore, ABA Model Rule 8.4(g) conflicts with the First Amendment rights to free exercise and expressive association.

Question 2: Could ABA Model Rule 8.4(g) be interpreted as violating our Religious Freedom Restoration Act (RFRA)?

Arkansas's Religious Freedom Restoration Act (RFRA) prohibits the government from "substantially burden[ing] a person's exercise of religion" unless "it demonstrates that application of the burden to the person is: (1) In furtherance of a compelling governmental interest; and (2) The least restrictive means of furthering that compelling governmental interest." [66]

RFRA "applies to all state law, and the implementation of state law, whether statutory or otherwise."[67] Although the legal status of rules of professional conduct generally remains "a matter of controversy,"[68] they carry the force of law in disciplinary proceedings.[69] Therefore, RFRA's protections would extend to attorneys whose exercise of religion is substantially burdened by such proceedings.

Given ABA Model Rule 8.4(g)'s expansive character and the many problems identified above, the Rule could be applied to substantially burden attorneys' exercise of religion by prohibiting expression that RFRA protects. An attorney

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[65] *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

[66] Ark. Code Ann. § 16-123-404(a). Government is generally prohibited from substantially burdening a person's exercise of religion "even if the burden results from a rule of general applicability." *Id.*

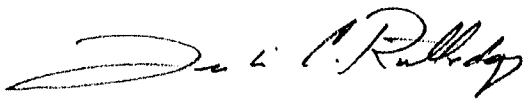
[67] Ark. Code Ann. § 16-23-405(a).

[68] Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules As Substantive Law and the Public Policy Exception in Contract Law*, 35 Cardozo L. Rev. 267, 272 (2013) (quoting Richard K. Greenstein, *Against Professionalism*, 22 Geo. J. Legal Ethics 327, 348 n.129 (2009)).

[69] *Id.* (citing, *inter alia*, Geoffrey C. Hazard, *State Supreme Court Regulatory Authority Over the Legal Profession*, 72 Notre Dame L. Rev. 1177, 1179 (1997) ("The Code and the Model Rules of Professional Conduct were adopted and have the force of law by action of the highest courts of the states.")).

"whose religious exercise has been burdened in violation of [RFRA]" could "assert that violation as a claim or defense in a judicial proceeding."[70]

Sincerely,



LESLIE RUTLEDGE
Attorney General

[70] Ark. Code Ann. § 16-123-404(b)(1).