

**ANTIDISCRIMINATION IN THE LEGAL PROFESSION AND THE  
FIRST AMENDMENT: A PARTIAL DEFENSE OF MODEL RULE  
8.4(G)**

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*The American Bar Association has added an antidiscrimination provision to the Model Rules of Professional Conduct, making it professional misconduct for a lawyer to engage in harassment or discrimination on several bases “in conduct related to the practice of law.” But critics argue that Model Rule 8.4(g) raises serious First Amendment concerns. This Essay provides a partial defense of Model Rule 8.4(g) from a First Amendment perspective.*

*Using a conceptual framework of professional knowledge communities, this Essay examines the normative justifications underlying speech protection and the corresponding extent of permissible regulation in different contexts. So doing, it distinguishes “conduct related to the practice of law” from public discourse. When lawyers communicate with each other in “the practice of law,” they do not typically engage in public discourse. The regulatory efforts here occur in the space between the professional-client relationship and public discourse. This space is dominated by the interests of the knowledge community. Thus, outside of public discourse, the justifications underlying First Amendment protection are generally compatible with a rule prohibiting discrimination in the practice of law. In public discourse, however, the interests underlying speech protection prohibit an expansive interpretation of “conduct related to the practice of law.”*

INTRODUCTION

The American Bar Association (ABA) at its Annual Meeting in August 2016 adopted a new addition to the Model Rules of Professional Conduct (Model Rules). The House of Delegates approved Model Rule 8.4(g),<sup>1</sup> making it professional misconduct to “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.”<sup>2</sup> The change received a notable amount

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1 Lorelei Laird, *Discrimination and Harassment will be Legal Ethics Violations Under ABA Model Rule*, ABA JOURNAL, Aug. 8, 2016, [http://www.abajournal.com/news/article/house\\_of\\_delegates\\_strongly\\_agrees\\_to\\_rule\\_making\\_discrimination\\_and\\_harass](http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass).

2 ABA MODEL RULE 8.4(G). The remainder of the new Model Rule states: “This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accord-

of popular press coverage.<sup>3</sup> But critics argue that Model Rule 8.4(g) raises serious First Amendment concerns.

This Essay offers a partial defense of Model Rule 8.4(g) from a First Amendment perspective. The analysis lies at the undertheorized intersection of professional speech protection, regulation of the professions, and antidiscrimination law. The professions, as I have previously suggested, are best conceptualized as knowledge communities whose main reason for existence is the generation and dissemination of knowledge.<sup>4</sup> The First Amendment should provide robust protection for professional speech—that is, speech between a professional and a client, within a professional-client relationship, and for the purpose of giving professional advice—against state interference that seeks to prescribe or alter the content of professional advice.<sup>5</sup> At the same time, the professions are self-regulating.<sup>6</sup> The power to regulate the way in which professionals communicate with each other and their clients in pursuit of their professional activities, I suggest, is properly allocated to the professional knowledge community.

Applying the conceptual framework of professional knowledge communities allows us to analyze Model Rule 8.4(g) from a First Amendment perspective that puts the role of professionals front and center. The normative justifications for First Amendment protection operate in a distinct way within professional knowledge communities—distinct in particular from the way in which they operate in public discourse.<sup>7</sup> The regulatory efforts concerning the way in which lawyers communicate with their clients and with each other are occurring in the space between the professional-client relationship and public discourse, closer to the internal discourse of the knowledge community; I argue that this space is dominated by the interests

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ance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”

<sup>3</sup> See, e.g., Elizabeth Olson, *Bar Association Considers Striking ‘Honeys’ From the Courtroom*, N.Y. TIMES, (Aug. 4, 2016), <http://nyti.ms/2aE3Wkc> (discussing the effort to add a model rule prohibiting harassment); Elizabeth Olson, *Goodbye to ‘Honeys’ in Court, By Vote of American Bar Association*, N.Y. TIMES, (Aug. 9, 2016), <http://nyti.ms/2b4oiq7> (announcing the passing of 8.4(g) by vote of the ABA); Ashley May, *Lawyers, Stop Saying ‘Honey,’ ‘Sweetheart’ in Court*, USA TODAY, (Aug. 10, 2016), <http://usat.ly/2bgXumW> (same).

<sup>4</sup> Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1241 (2016).

<sup>5</sup> *Id.* For an example of such interference, see *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (upholding state law requiring doctors to inform patients seeking an abortion of an increased risk of suicide to obtain informed consent). For an example of attempted state interference that was rejected on First Amendment grounds, see *Wollschlaeger v. Governor of Fla.*, 2017 WL 632740 (11th Cir. Feb. 16, 2017) (holding unconstitutional as violating the First Amendment the record-keeping, inquiry, and anti-harassment provisions of the Florida Firearms Owners’ Privacy Act).

<sup>6</sup> Haupt, *supra* note 4, at 1277-80 & n. 205 (citing MODEL RULES OF PROF’L CONDUCT pmbl. para. 10-11).

<sup>7</sup> See *id.* at 1269-77 (examining professional speech and its relation to, and reliance upon, the continued integrity of the knowledge community).

of the knowledge community. That is to say, when lawyers communicate with each other in “the practice of law,” they do not typically engage in public discourse. They speak as professionals in the course of professional practice.<sup>8</sup> Thus, even beyond the confines of the lawyer-client relationship, the normative justifications underlying First Amendment protection of professional speech on the one hand, and speech in public discourse on the other hand, are generally compatible with a rule prohibiting discrimination in the practice of law.

This Essay proceeds in three Parts. Part I outlines the necessity and justifications for including an antidiscrimination provision in the Model Rules in light of increasing diversity in the legal profession, and gives a brief overview of past ABA and state bar activity in this area. Part II addresses First Amendment free exercise and free speech concerns regarding the new Model Rule. It situates these critiques within the contexts of current religion-based claims for exemptions from generally applicable antidiscrimination legislation, and of earlier discussions concerning First Amendment objections to Title VII workplace harassment law. Part III applies the conceptual framework of professional knowledge communities to the legal profession and provides a partial defense of Model Rule 8.4(g) from a First Amendment perspective. I suggest that in light of the interests underlying speech protection outside of public discourse, the First Amendment does not generally pose an obstacle to prohibiting discrimination within the legal profession by means of an antidiscrimination provision in the Model Rules. But in public discourse, the interests underlying speech protection do not justify the same limits as are permissible within the professional-client relationship. This counsels against an expansive interpretation of “conduct related to the practice of law.”

## I. ABA AND STATE BAR ANTIDISCRIMINATION MEASURES

The composition of the legal profession is changing.<sup>9</sup> Women now constitute nearly half of the law student population.<sup>10</sup> A third of the justic-

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<sup>8</sup> Cf. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 843 (1999) (“The threshold determination for enforcement of professional norms will therefore be whether the speech is uttered in the course of professional practice and not merely whether the speech was uttered by a professional.”); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 (adhering to Halberstam’s definition). I adopt this definition. See Haupt, *supra* note 4, at 1240 n.1.

<sup>9</sup> See, e.g., Ruth Bader Ginsburg, *Ruth Bader Ginsburg’s Advice for Living*, N. Y. TIMES, (Oct. 1, 2016) <http://nyti.ms/2dtHcrW> (discussing women in the legal profession and concluding, “[i]n my long life, I have seen great changes”).

<sup>10</sup> *Commission on Women in the Profession, A Current Glance at Women in the Law*, AMERICAN BAR ASSOCIATION 4 (May 2016)

es on the U.S. Supreme Court are women, as are roughly 30% of judges on the federal appellate and federal district courts.<sup>11</sup> And yet, women and minorities are still not adequately represented<sup>12</sup> and the slowly shifting demographics of the legal profession all too often still meet significant obstacles. As Deborah Rhode noted, “[o]ne irony of this nation’s continuing struggle for diversity and gender equity in employment is that the profession leading the struggle has failed to set an example in its own workplaces. In principle, the bar is deeply committed to equal opportunity and social justice. In practice, it lags behind other occupations in leveling the playing field.”<sup>13</sup>

In 1998, the ABA initially introduced some antidiscrimination language in its Comments to Model Rule 8.4, but not in the Model Rules themselves.<sup>14</sup> Because upon adoption the comments are not designed to be binding,<sup>15</sup> this was deemed insufficient. In 2008, the ABA adopted the goal to “eliminate bias and enhance diversity.”<sup>16</sup>

The two objectives of that goal are: “1. Promote full and equal participation in the association, our profession, and the justice system by all persons,” and, “2. Eliminate bias in the legal profession and the justice system.”<sup>17</sup> However, the scope of the Comment and goals was considered to leave uncovered important areas of professional activity beyond legal representation of a client, such as “attorneys as advisors, counselors, and lobbyists,” as well as attorneys working in various settings “such as law schools, corporate law departments, and employer-employee relationships within law firms.”<sup>18</sup> Finally, the framework was not understood to “address harassment at all.”<sup>19</sup>

By the time the ABA proposed the new Model Rule in the summer of 2016, several state bars had already adopted similar rules. In 25 jurisdic-

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[http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_may2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf).

11 *Id.* at 5.

12 *See, e.g.*, Elizabeth Olson, *Women and Blacks Make Little Progress at Big Law Firms*, N. Y. TIMES, (Nov. 19, 2015) <http://nyti.ms/1O5EnbW> (outlining the pattern of “flat to declining representation” of women and minorities in law firms).

13 Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011).

14 *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ETHICS, Revised Resolution 109 (Report pp. 4-5), *available online at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_revised\\_resolution\\_and\\_report\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf) [hereinafter: Res. 109 Report] (discussing the need for amendment to Model Rule 8.4, to include an antidiscrimination provision in black letter law, not just the comments).

15 MODEL RULES OF PROF’L CONDUCT, Preamble & Scope para. 21.

16 Res. 109 Report, *supra* note 14, at 1.

17 *Id.*

18 *Id.* at 2.

19 *Id.* at 2.

tions, there are antidiscrimination rules,<sup>20</sup> and in 13 jurisdictions, there are comments to rules similar to the previous ABA regime.<sup>21</sup> Only 14 states have neither form of antidiscrimination provision.<sup>22</sup> Moreover, Rule 2.3(C) of the ABA Model Code of Judicial Conduct already contains the following provision:

A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Against this backdrop, the ABA has now added a nondiscrimination provision to the rules governing lawyer conduct as a floor for the states to adopt. One prominent legal ethics scholar has stated—perhaps somewhat optimistically—his expectation “that everyone would stipulate that such a rule’s objective is sound and probably long overdue,” before also noting “that deciding how to articulate such a standard is harder than it looks.”<sup>23</sup> The remainder of this Essay will evaluate the newly adopted Model Rule from a First Amendment perspective.

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20 *Id.* at 5 (citing California Rule of Prof’l Conduct 2-400; Colorado Rule of Prof’l Conduct 8.4(g); Florida Rule of Prof’l Conduct 4-8.4(d); Idaho Rule of Prof’l Conduct 4.4(a); Illinois Rule of Prof’l Conduct 8.4(j); Indiana Rule of Prof’l Conduct 8.4(g); Iowa Rule of Prof’l Conduct 8.4(g); Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e); Massachusetts Rule of Prof’l Conduct 3.4(i); Michigan Rule of Prof’l Conduct 6.5; Minnesota Rule of Prof’l Conduct 8.4(h); Missouri Rule of Prof’l Conduct 4-8.4(g); Nebraska Rule of Prof’l Conduct 8.4(d); New Jersey Rule of Prof’l Conduct 8.4(g); New Mexico Rule of Prof’l Conduct 16-300; New York Rule of Prof’l Conduct 8.4(g); North Dakota Rule of Prof’l Conduct 8.4(f); Ohio Rule of Prof’l Conduct 8.4(g); Oregon Rule of Prof’l Conduct 8.4(a)(7); Rhode Island Rule of Prof’l Conduct 8.4(d); Texas Rule of Prof’l Conduct 5.08; Vermont Rule of Prof’l Conduct 8.4(g); Washington Rule of Prof’l Conduct 8.4(g); Wisconsin Rule of Prof’l Conduct 8.4(i); D.C. Rule of Prof’l Conduct 9.1.).

21 *Id.* at 6 n. 12 (citing Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].).

22 *Id.* at 6 n. 13 (“The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.”).

23 Thomas D. Morgan, *The Challenge of Writing Rules to Regulate Lawyer Conduct*, 49 CREIGHTON L. REV. 807, 821 (2016).

## II. FIRST AMENDMENT CONCERNS

The First Amendment has arguably acquired a deregulatory character.<sup>24</sup> Its deregulatory thrust in this context is employed against a rule established by a self-regulating profession for members of the profession, governing their own communications with their clients and other professionals in the exercise of their profession. Scholars and practitioners have raised First Amendment objections to Model Rule 8.4(g) that to a significant extent track arguments articulated in favor of religious exemptions from general antidiscrimination laws, and those articulated against Title VII workplace harassment law. This Part presents and contextualizes those objections in turn.

### A. *Freedom of Religion*

Within parts of the legal profession, recent developments—in particular, the advent of marriage equality<sup>25</sup>—have led to some anxiety. One commentator has concluded that professional rules could force divorce attorneys to handle same-sex divorces over their religious objections and argued for accommodation of these professionals.<sup>26</sup> The argument hinges on legal services being a form of public accommodation.<sup>27</sup> If legal services are in fact public accommodations, the argument goes, lawyers—like wedding photographers,<sup>28</sup> cake bakers,<sup>29</sup> and florists<sup>30</sup>—may be compelled to render their services despite their religious objections.<sup>31</sup> It is in this larger

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<sup>24</sup> See, e.g., Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. FORUM 165 (2015); Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133; Elizabeth Soper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

<sup>25</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the right to marry is fundamental).

<sup>26</sup> Bill Piatt, *Opting Out in the Name of God: Will Lawyers Be Compelled to Handle Same-Sex Divorces?*, 79 ALB. L. REV. 683 (2016).

<sup>27</sup> *Id.* at 697 (arguing that although there are “no cases which directly hold that legal services are a form of public accommodations” such a finding is likely in light of the treatment of other professions and a trend of “inclusion . . . of businesses under those statutes.”).

<sup>28</sup> *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* 134 S. Ct. 1787 (2014) (holding that a company refusing to photograph a same-sex commitment ceremony discriminated on the basis of sexual orientation in violation of the New Mexico Human Rights Act).

<sup>29</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. petition pending* (holding that a cake shop owner’s refusal to create a same-sex couple’s wedding cake violated the Colorado Anti-Discrimination Act).

<sup>30</sup> *State v. Arlene Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 94248 (Wash. Super. Jan. 7, 2015) (holding that the defendant must provide full wedding support for same-sex ceremonies regardless of personal beliefs).

<sup>31</sup> See Piatt, *supra* note 26, at 685; see also Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting “Diversity” But Not Diversity of Thought*, Heritage Foundation Legal Memorandum No. 191, Oct. 6, 2016, at 5, available at <http://www.heritage.org/research/reports/2016/10/the-aba-decision-to-control-what-lawyers-say-supporting-diversity-but-not-diversity-of-thought> (“The existence of Rule 8.4(g) makes it easier

context that First Amendment objections are raised against general antidiscrimination legislation.<sup>32</sup> And, importantly, Comment 3 to Model Rule 8.4 refers to substantive antidiscrimination law as providing guidance in the application of Model Rule 8.4(g).

Representative of the religious freedom objections to Model Rule 8.4(g), the Christian Legal Society<sup>33</sup> and the United States Conference of Catholic Bishops<sup>34</sup> raised numerous concerns in their comments on the draft of the proposed Model Rule. They can be roughly divided into intra-organizational concerns, that is, the relationship of the individual professional to the organization (in this case, the religious organization) into which he is embedded; and inter-professional concerns, that is, the relationship of one professional to another, outside of the organizational structure.

Intra-organizational concerns, which can affect many professionals,<sup>35</sup> raise a fundamental question: is the professional within a religious organization primarily bound by the rules of the profession or by religious doctrine? The objection here is to interference by the professional rules with the inner workings of the organization. A conflict can potentially pit the religious identity of the organization against the professional identity of the employee.<sup>36</sup> Objections to the Model Rule in this category include: allowing continued preference for coreligionists in hiring; providing advice on religion-based employee conduct standards; and allowing the organizational employer to enforce religion-based standards with respect to grooming and garb as well as bathroom and locker room access.<sup>37</sup>

A related set of concerns goes to the role of lawyers as members of religious organizations, where they may serve on “boards of their churches, religious schools and colleges, and other religious non-profits.”<sup>38</sup> These organizations “regularly turn to the lawyers serving as volunteers on their

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for a state court to find that refusing to represent a client or refusing to draft certain papers for a client violates that state’s general antidiscrimination laws.”).

32 See generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

33 Letter of Christian Legal Society to ABA Ethics Committee, (March 10, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/nammo\\_3\\_10\\_16.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf) [hereinafter: CLS Letter].

34 Letter of United States Conference of Catholic Bishops, Office of the General Counsel, to ABA Standing Committee on Ethics and Professional Responsibility, (March 10, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/moses\\_3\\_11\\_16.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moses_3_11_16.authcheckdam.pdf) [hereinafter: USCCB Letter].

35 See, e.g., Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. \_\_\_, 11-16 (forthcoming 2017) draft available at <https://ssrn.com/abstract=2827762> (discussing various institutional settings in which professionals operate).

36 Cf. Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1502 (2012) (discussing religious hospitals).

37 USCCB Letter, *supra* note 34.

38 CLS Letter, *supra* note 33, at 7.

boards for pro bono guidance.”<sup>39</sup> Here, too, the concern is that the new antidiscrimination Model Rule will result in disciplinary actions against professionals serving in such capacities.

With respect to the inter-professional as well as lawyer-client relationships, the USCCB and CLS letters emphasize that lawyers should be able to decline representation. This is already regulated in Model Rule 1.16, and the final version of Model Rule 8.4(g) clarifies that “[t]his paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.” With respect to general anti-discrimination legislation, the USCCB letter states that taking particular religion-based positions in advocacy (i.e., representing the cake baker or declining to draft a prenup for a same-sex couple) is problematic unless the new Model Rule clarifies that doing so is not professional misconduct. Here, too, the final version of the Model Rule states that it “does not preclude legitimate advice or advocacy consistent with these Rules.”

### B. Freedom of Speech

Critics of Model Rule 8.4(g) also raised a range of free speech concerns. Ronald Rotunda, for example, contends that, with the new Model Rule, “the [ABA] decides to discipline lawyers who say something that is politically incorrect.”<sup>40</sup> Similarly, Eugene Volokh articulates some of the key First Amendment-based critiques. He asserts that the ABA has created a “lawyer speech code,” and questions in particular the inclusion of discrimination based on socioeconomic status.<sup>41</sup>

The “lawyer speech code”-critique encompasses viewpoint discrimination and overbreadth concerns. Volokh suggests that a lawyer who articulates anti-marriage equality views, or argues in favor of “limits on immigration from Muslim countries,” or who doubts “whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex” in the context of a debate at a CLE event could be disciplined by the state bar if the new Model Rule were adopted.<sup>42</sup> He as-

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<sup>39</sup> *Id.*

<sup>40</sup> Rotunda, *supra* note 31, at 2.

<sup>41</sup> Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities*, The Volokh Conspiracy, WASHINGTON POST, (Aug. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm\\_term=.3431edcfba91](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.3431edcfba91) [hereinafter: Volokh, *Speech Code*]; Eugene Volokh, *Banning lawyers from discriminating based on ‘socioeconomic status’ in choosing partners, employees or experts*, The Volokh Conspiracy, WASHINGTON POST, (Aug. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/banning-lawyers-from-discriminating-based-on-socioeconomic-status-in-choosing-partners-employees-or-experts-2/?utm\\_term=.0964096f87dd](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/banning-lawyers-from-discriminating-based-on-socioeconomic-status-in-choosing-partners-employees-or-experts-2/?utm_term=.0964096f87dd) [hereinafter: Volokh, *Socioeconomic Status*].

<sup>42</sup> Volokh, *Speech Code*, *supra* note 41.



serts “that the ABA wants to . . . limit lawyers’ expression of viewpoints that it disapproves of.”<sup>43</sup> Similarly, Rotunda claims, “The ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA’s particular view of sex discrimination or marriage.”<sup>44</sup>

With respect to overbreadth, Volokh notes that the new Model Rule “goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes,” which, he points out, “in most states . . . doesn’t include sexual orientation, gender identity, marital status or socioeconomic status.”<sup>45</sup> He concludes that “there’s no reason for state bars or state courts to go beyond the existing state and federal anti-discrimination categories when it comes to employment and similar matters.”<sup>46</sup>

Finally, he criticizes the vagueness of the provision with respect to “socioeconomic status,” a term not defined in the Model Rule or Comments. Activities that “might well lead to discipline” in his assessment include: “A law firm preferring more-educated employees . . . over less-educated ones,” or preferring those “who went to high-’status’ institutions, such as Ivy League schools.” Similarly, disciplinary action may loom when choosing a partner for the firm, “preferring a wealthier would-be partner over a poorer one.” Beyond the firm’s employees, the provision may lead to disciplinary action for “contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.”<sup>47</sup>

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These free speech clause-based critiques reflect and invoke arguments made in earlier debates surrounding First Amendment objections to Title VII workplace harassment law. This is particularly relevant because Comment 3 to Model Rule 8.4 states that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” It is therefore useful briefly to contextualize these

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43 *Id.*

44 Rotunda, *supra* note 31, at 7.

45 Volokh, *Speech Code*; see also Rotunda, *supra* note 31, at 6 (“Many states have no law banning gender identification [sic] discrimination. Some states require that individuals use public restrooms that correspond to the sex on their birth certificates. Congress has not enacted a statute banning discrimination based on gender identification.”).

46 Volokh, *Socioeconomic Status*, *supra* note 41.

47 *Id.*

arguments by revisiting, in Richard Fallon's words, "the First Amendment dog that didn't bark."<sup>48</sup>

Fallon noted that the absence of a First Amendment discussion in the landmark workplace harassment decision *Harris v. Forklift Systems, Inc.*<sup>49</sup> may "implicitly acknowledge[] that distinctive principles should apply to sexually harassing speech in the workplace."<sup>50</sup> After *Harris*, he concluded, "it is highly unlikely that workplace expressions of gender-based hostility and communications of explicitly sexual messages will receive categorical protection."<sup>51</sup> The upshot of that larger debate is that, some assertions to the contrary notwithstanding,<sup>52</sup> Title VII workplace harassment law is generally not considered to violate the First Amendment. Volokh, however, expressed some skepticism and cautioned that, in his assessment, at least some areas of workplace harassment law may be susceptible to First Amendment challenge.<sup>53</sup> Thus, he suggested that "the Court ought to create a new First Amendment exception that would allow much of harassment law to stand."<sup>54</sup>

Jack Balkin identified three categories of arguments critics have made to assert "more radical First Amendment objections" to harassment law: "First, the courts' standard of abusive conduct is unduly vague. Second, sexual harassment doctrines are overbroad because they prohibit speech that would clearly be protected outside the workplace. Third, sexual harassment doctrines make distinctions on the basis of content and viewpoint."<sup>55</sup> Using the framework of captive audience doctrine, Balkin concluded that "none of these objections prove fatal."<sup>56</sup> The vagueness objection, he asserted, "applies equally to most judge-made communications torts", while the overbreadth objection fails because different First Amendment protection attaches to speech in different contexts: "Often speech that would be protected in the public square becomes unprotected

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48 Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 56.

49 510 U.S. 17 (1993) (defining hostile work environment under Title VII to include all circumstances with psychological harm not being a requirement for finding an abusive environment).

50 Fallon, *supra* note 48, at 2.

51 *Id.* at 9.

52 See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481 (1991) (arguing that workplace harassment law is generally unconstitutional under the First Amendment).

53 Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that some forms of workplace harassment law may be unconstitutional as a First Amendment matter and introducing a directed/undirected speech framework to distinguish the two).

54 *Id.* at 1819.

55 Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2306-07 (1999).

56 *Id.* at 2307.

when it occurs in special social situations involving special social roles.”<sup>57</sup> And finally, the content and viewpoint discrimination objection fails because of the very reason that workplace harassment law exists in the first place: “Title VII appropriately protects workers from a limited class of status-based harms because protecting workers from these harms is essential to guaranteeing equality in the workplace.”<sup>58</sup> But these conclusions only follow if the interests underlying employment discrimination law are fully considered in context.<sup>59</sup> Likewise, Fallon endorsed the captive audience argument in the context of the workplace.<sup>60</sup> Drawing on Robert Post’s theory of public discourse, he, too, emphasized different spheres of First Amendment activity.<sup>61</sup>

But, as the next Part will show, the interests underlying workplace harassment law do not always map onto the interests underlying Model Rule 8.4(g). Therefore, it is useful to untangle the two, and interrogate how First Amendment speech protection operates in relation to the new Model Rule. Doing so also sheds light on the extent to which drawing on substantive antidiscrimination law for guidance, as Comment 3 expressly permits, will be useful. Accordingly, the underlying justifications for speech protection must be evaluated in a context-specific manner.

### III. REGULATING A PROFESSIONAL KNOWLEDGE COMMUNITY

Taking the concept of the professions as knowledge communities as a starting point, this Part provides a partial defense of Model Rule 8.4(g) against some of the First Amendment concerns just outlined. Conceptualizing the professions as knowledge communities emphasizes their knowledge-based character.<sup>62</sup> I have argued that “members of knowledge communities have shared notions of validity and a common way of knowing and reasoning (consider the old adage of thinking like a lawyer).”<sup>63</sup> In addition to their shared knowledge basis, “the knowledge community shares certain norms and values: professional norms. This is not to say that knowledge communities are monolithic. But their shared notions of validity limit the range of acceptable opinions found within them.”<sup>64</sup> This

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2318 (“Thus, it makes perfect sense that a sign saying ‘Sarah is Employee of the Month’ should not give rise to liability, while a sign reading ‘Sarah is a dumb-ass woman’ could form part of a hostile environment case.”).

<sup>59</sup> *Id.* at 2307-08.

<sup>60</sup> Fallon, *supra* note 48, at 43.

<sup>61</sup> *Id.* at 48 (“As Robert Post has argued, political democracy requires a broad space for unrestricted ‘public discourse,’ but that space need not be boundless. Not all contexts are equal from the perspective of the First Amendment.”).

<sup>62</sup> Haupt, *supra* note 4, at 1249.

<sup>63</sup> *Id.* at 1251.

<sup>64</sup> *Id.*

Part first explores the basis of professional advice before considering its scope.

This Part then turns to the extent of permissible regulation of the profession. The rules for professional communication in the legal profession can take various forms, including the Model Rules of Professional Conduct, among others:<sup>65</sup> “Lawyers’ freedom of speech is constrained in many ways that no one would challenge seriously under the First Amendment.”<sup>66</sup> As Kathleen Sullivan has observed: “Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice.”<sup>67</sup>

It is important to distinguish the various contexts in which lawyers typically operate, because each context may have a different set of implications regarding the normative basis of First Amendment protection. The respective justifications for speech protection determine whether regulation is permissible at all and, if so, how it ought to be configured. Thus, in order to determine whether the antidiscrimination Model Rule is compatible with the First Amendment in each context, it is important first to fully understand the interests at stake. And because these interests may be different from the interests underlying workplace harassment and other forms of substantive antidiscrimination law, those areas, notwithstanding Comment 3, may only provide limited guidance.

#### A. *The Basis of Professional Advice*

Conceptualizing the professions as knowledge communities provides a framework to assess the basis upon which professional advice may be rendered. This informs the treatment of religious freedom concerns. Personal beliefs—religious, political, or philosophical—can be either those of the professional or those of the client. As I have argued more extensively elsewhere, professionals who base their advice on exogenous justifications place themselves outside of the knowledge community.<sup>68</sup> The knowledge

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<sup>65</sup> *Cf.* *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (“It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”).

<sup>66</sup> Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 569 (1998).

<sup>67</sup> *Id.*

<sup>68</sup> Claudia E. Haupt, *Religious Outliers: Professional Knowledge Communities, Individual Conscience Claims, and the Availability of Professional Services to the Public*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds. forthcoming 2017) (draft available at <http://ssrn.com/abstract=2809832>).

community can appropriately circumscribe departures from professional knowledge to accommodate the professional's personal beliefs.<sup>69</sup>

The basis upon which valid legal arguments are made is limited to arguments based on professional knowledge and shared ways of knowing and reasoning. A legal realist might instinctively protest; yet, even the legal realist likely will concede that there is a difference between these two statements: (a) your client is engaging in sinful behavior by doing X and needs to stop because a higher power says so, and (b) your client is seeking my client's assistance in doing something the law recognizes as a burden on my client's religious freedom. The first is not a legally cognizable claim. It is not based on the accepted methodology of the knowledge community, that is, in this case, legal doctrine. The second is a legally cognizable claim for a religious exemption on statutory or constitutional grounds. It is based in legal doctrine, and thus based on the shared methodology of the knowledge community. (Whether it will ultimately be a successful claim on the merits, however, is another matter.) This is consistent with sentence 3 of Model Rule 8.4(g) : "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." The terms "advice" and "advocacy" presuppose a basis in legal doctrine, that is, the shared methodology of the profession, rather than exogenous factors such as the religious, political, or philosophical beliefs of the professional.

A critic might object that this privileges professional identity over religious identity. As the CLS letter explains, "Christians are enjoined by Scripture to bring their religious beliefs and practices to bear in their professions – indeed, to see their professions as their ministries of service to others – and to apply their Christian principles to the practice of their professions."<sup>70</sup> Indeed, a professional may be deeply motivated by her religious beliefs to practice her profession. Nevertheless, under a theory that conceptualizes the professions as knowledge communities, the justification for professional advice—irrespective of the professional's motivation—ought to be based on the shared knowledge and methods of the profession. Within the lawyer-client relationship, correspondingly, the client's expectation will be that legal advice will be rendered based on the insights of the legal profession.<sup>71</sup>

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69 See, e.g., Claudia E. Haupt, *Professional Ethics, Personal Conscience, and Public Expectations*, 27 J. CLINICAL ETHICS 233 (2016) (commentary on American Medical Association Opinion 1.1.7, Physician Exercise of Conscience).

70 CLS letter, *supra* note 33, at 10.

71 See Haupt, *supra* note 35, at 22-25 (distinguishing motivations and justifications).

### B. *The Range of Professional Advice*

Turning to the range of professional advice, the conceptual framework of the professions as knowledge communities likewise limits what may be rendered as valid legal advice. And, indeed, the range of good professional advice is equally limited by the tort regime which imposes professional malpractice liability for bad advice.<sup>72</sup>

Professional knowledge, moreover, evolves in the legal profession as it does in other professions. What once was good professional advice may become outdated.<sup>73</sup> If we think about legal doctrine as the profession's shared methodology, there are doctrinal arguments that once were accepted but no longer are. Put in the language of the Federal Rules of Civil Procedure, what once cleared the Rule 12(b)(6) bar may no longer clear the Rule 11 bar. (And it is unlikely that the First Amendment provides a defense against Rule 11 sanctions.<sup>74</sup>)

My claim here is not one of "political correctness," as illustrated for example by Rotunda's contention that "[a] few years ago, it was politically incorrect to support gay marriage; now it is politically incorrect to oppose gay marriage."<sup>75</sup> Rather, it is one that concerns changes in legal doctrine over time. There are cases that, if brought now, would play out much differently than they might have just a half-decade (or less) ago. For example, a lower court deciding whether a surviving same-sex spouse is entitled to the federal estate tax exemption for surviving spouses will now come to a different conclusion than what might have been doctrinally defensible in the past.<sup>76</sup>

Quite apart from that, it may be problematic that major law firms are weary of representing clients with unpopular views.<sup>77</sup> This is the type of scenario envisioned by Model Rule 1.2(b), which states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." This is also reiterated in Comment 5 to Model Rule 8.4. But an unpopular view may still be based on good law, and there may be a non-frivolous argument based in legal doctrine to be made to support it.<sup>78</sup>

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<sup>72</sup> See *id.* at 4.

<sup>73</sup> See *id.* at 7.

<sup>74</sup> See Sullivan, *supra* note 66, at 569.

<sup>75</sup> Rotunda, *supra* note 31, at 7.

<sup>76</sup> See *United States v. Windsor*, 133 S.Ct. 2675 (2013).

<sup>77</sup> Adam Liptak, *The Case Against Gay Marriage: Law Firms Won't Touch It*, N.Y. TIMES, (Apr. 11, 2015), <http://nyti.ms/1z71R5k>.

<sup>78</sup> Cf. MODEL RULES OF PROF'L CONDUCT, r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

C. *(Partially) Reconciling Speech Protection and the Antidiscrimination Model Rule*

What, then, are the First Amendment interests at stake, and how do they interact with Model Rule 8.4(g)? Answering this question requires an examination of the different contexts in which lawyers communicate. Comment 4 states: “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.” The following discussion breaks down the prototypical contexts into, first, the lawyer-client relationship where the lawyer acts as the client’s advisor; second, the lawyer as advocate in the courtroom, in negotiations with another lawyer, or as advocate or lobbyist outside the courtroom, interacting with other lawyers; and, third, the lawyer in public discourse.

1. *Professional-Client Relationship*

When considering the lawyer-client relationship, two constellations have to be distinguished: formation of the lawyer-client relationship, and professional advice-giving within the lawyer-client relationship. The underlying interests diverge at these two distinct points in time, with implications for speech protection and the extent of permissible regulation.

At the formation stage, the Model Rules provide that the lawyer may generally refuse representation, as is recognized in Model Rule 1.16 and reiterated in the second sentence of Model Rule 8.4(g). Prohibiting discrimination at the formation stage potentially puts the lawyer’s interests in tension with the client’s. This tension is usually resolved once the lawyer-client relationship has been formed. (Of course, potential conflicts can arise again during the course of the representation, and Model Rule 1.16 also provides for that scenario.)

Once formed, for purposes of this discussion, the client’s and the lawyer’s interests align. The lawyer-client relationship gives rise to fiduciary duties; the lawyer has to act in the client’s best interest. The client’s key interest lies in proper representation. That the lawyer serves this client interest is also ensured by the imposition of professional malpractice liability.<sup>79</sup> The fundamental concern here, however, is that the advice-giving attorney will refrain from advising the client in a way that would subject her to sanctions for violating Model Rule 8.4(g). For example, the client wants

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<sup>79</sup> See Haupt, *supra* note 4, at 1286-87 (conceptualizing First Amendment protection for professional speech as coextensive with professional malpractice liability).

to make an anti-marriage equality argument and the lawyer is concerned she will be sanctioned for doing so.

What if the Model Rule prohibits the lawyer from properly representing the client? This seems to be at the heart of the religious freedom objections to the Model Rule. Within the lawyer-client relationship, the First Amendment should provide robust protection against state interference. Yet, the interests underlying professional advice-giving are constrained by the duty to give good professional advice.<sup>80</sup> In the context of giving legal advice, that means advice based on legal doctrine. And so the third sentence of Model Rule 8.4(g) states that it “does not preclude legitimate advice or advocacy consistent with these Rules.” Moreover, the ABA Report explicitly states that the new Model Rule “does not limit the scope of the legal advice a lawyer may render to clients.”<sup>81</sup> And “legal advice” means advice based on the insights of the knowledge community. All of this is generally consistent with a provision prohibiting discrimination in the practice of law. So understood, the antidiscrimination provision does not proscribe offering doctrinally defensible arguments, even if those arguments might be colloquially described as “discriminatory.”

## 2. *Professional-Professional Communications Related to the Practice of Law*

The potential target of discrimination in this context is opposing counsel in the courtroom or other lawyers the professional encounters in the practice of law. Here, it is again useful to divide the concerns into inter-professional concerns and intra-organizational ones.

The category of inter-professional concerns that has received the most attention in the press is that of courtroom interactions.<sup>82</sup> Regulation of these interactions seems to be relatively uncontroversial; even critics of the new Model Rule agree that “State bars and state courts may reasonably impose special rules on behavior in court, behavior with respect to witnesses, and the like.”<sup>83</sup>

Another set of concerns raised by critics concerns CLE panels on controversial issues. Recall the program envisioned by Volokh “that included a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side said something that was critical of gays, Muslims or transgender peo-

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<sup>80</sup> See Haupt, *supra* note 35, at 3-4.

<sup>81</sup> Res. 109 Report, *supra* note 14, at 8.

<sup>82</sup> See *supra* note 3.

<sup>83</sup> Volokh, *Socioeconomic Status*, *supra* note 41.



ple.”<sup>84</sup> In his assessment, under the new Model Rule, “the debater could well be disciplined by the state bar.”<sup>85</sup> Likewise, Rotunda is concerned about religious organizations, such as the St. Thomas More Society, as sponsors of CLE programs.<sup>86</sup>

The interests at stake are guided by the purpose of such panels. Unlike general political debates, CLE programs are designed to ensure that lawyers “maintain the requisite knowledge and skill” to serve their clients competently.<sup>87</sup> They are designed to ensure that lawyers base their professional advice on the methodological basis of their knowledge community: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>88</sup> Their primary purpose is not, however, for an individual lawyer to speak his own mind, which would be a key autonomy interest in public discourse.<sup>89</sup>

So suppose the debaters at a CLE panel articulated the arguments expressed in the Chief Justice’s dissent in *Obergefell*,<sup>90</sup> or in Justice Alito’s dissent from denial of certiorari in *Stormans v. Wiesman*, a case concerning the Washington law requiring pharmacies to stock medications some pharmacists consider abortifacients,<sup>91</sup> or Judge Niemeyer’s partial concurrence and dissent in *G.G. v. Gloucester County School Board*, a case concerning transgender bathroom access.<sup>92</sup> These arguments would be squarely based on legal doctrine. The range of competent professional advice is limited by the requirement of basing advice on a shared methodology—that is, legal doctrine—and making non-frivolous arguments. Within the framework of the professions as knowledge communities, the CLE scenario is not a hard case.

Intra-organizational concerns will likely be those within the lawyer’s firm. Here, workplace harassment law is most salient. Communication within the firm or the workplace indeed will continue to be governed by applicable workplace harassment law.<sup>93</sup> “If state law bans, say, sexual orientation discrimination in employment generally, that would normally ap-

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84 See *supra* note 42 and accompanying text.

85 Volokh, *Speech Code*, *supra* note 411.

86 Rotunda, *supra* note 31, at 4-5.

87 MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).

88 MODEL RULES OF PROF’L CONDUCT r. 1.1.

89 *Cf.* Haupt, *supra* note 4, at 1272–73 (distinguishing professional autonomy interests in the professional speech context from autonomy interests in public discourse).

90 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

91 136 S. Ct. 2433 (Alito, J., dissenting from denial of certiorari).

92 822 F.3d 709, 730 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part).

93 See generally Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. ILL. L. REV. 445.

ply to law firms as well as to other firms.”<sup>94</sup> The ABA Report, accordingly, notes that Model Rule 8.4(g) “is not intended to replace employment discrimination law.”<sup>95</sup>

The question, however, is whether the Model Rule can go beyond the categories recognized in applicable federal or state antidiscrimination law. The critics say no.<sup>96</sup> With respect to new categories, “there’s no reason for state bars or state courts to go beyond the existing state and federal anti-discrimination categories when it comes to employment and similar matters.”<sup>97</sup>

But in a self-regulating profession,<sup>98</sup> the interests cut exactly the other way. If the power to regulate the profession is properly allocated to the profession itself, there is no reason to tether the categories of prohibited discrimination to the state. This is especially true in the areas of sexual orientation and gender identity where antidiscrimination legislation is lacking in most states,<sup>99</sup> but the ABA has long ago adopted “policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.”<sup>100</sup>

Consider also that municipalities do the same in going beyond the state in antidiscrimination law. (This, of course, has caused some states to preempt local activities, such as most recently H.B. 2 in North Carolina where a Charlotte ordinance that included discrimination based on gender identity was preempted by the state.<sup>101</sup>) If a city—on the standard justifications of being closer to those affected and more directly accountable—may go beyond the state in expanding protection, it is not obvious why the state bar should not be able to do so, on even stronger theoretical footing, with respect to a self-regulating profession.

The “socioeconomic status” category appears to be the least commonly adopted elsewhere.<sup>102</sup> As mentioned earlier, it appears in Rule 2.3 (C) of the Model Code of Judicial Conduct.<sup>103</sup> The ABA Report cites a disciplinary case in which “a lawyer was reprimanded for disparaging references

94 Volokh, *Socioeconomic Status*, *supra* note 41.

95 Res. 109 Report, *supra* note 14, at 11.

96 Volokh, *Socioeconomic Status*, *supra* note 41 (stating that state bars and courts shouldn’t overstep state and federal categories); Rotunda, *supra* note 31, at 6 (discussing that the rule applies even without state or federal law bans).

97 Volokh, *Socioeconomic Status*, *supra* note 41.

98 MODEL RULES OF PROF’L CONDUCT pmb. para. 10-11.

99 *Non-Discrimination Laws: State by State Information—Map*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Mar. 18, 2017, 6:24 PM).

100 Res. 109 Report, *supra* note 14, at 12.

101 Act of March 23, 2016, 2016 N.C. Adv. Legis. Serv. (LexisNexis).

102 Volokh, *Socioeconomic Status*, *supra* note 41 (“To my knowledge, no state anti-discrimination law prohibits such discrimination.”).

103 See *supra* Part I.

he made at trial about a litigant's socioeconomic status" as providing guidance.<sup>104</sup> Volokh notes that courts have defined the term as it is used in the Sentencing Guidelines as "an individual's status in society as determined by objective criteria such as education, income, and employment."<sup>105</sup> Moreover, commentators have previously suggested introducing this category into the legal ethics rules.<sup>106</sup> Ultimately, the question is not whether adding a new category is impermissible; it is whether the profession considers doing so wise. It will generally be possible for courts to adjudicate claims based on a (more or less) new category. But, by the same reasoning which applied to sexual orientation and gender identity discrimination, it should be up to the profession to decide which categories to include beyond the ones recognized by state or federal antidiscrimination law.

### 3. *Social Interactions and Public Discourse*

The final, and most problematic, area covered by the Model Rule concerns social interactions of lawyers. Comment 4 identifies "participating in bar association, business, or social activities in connection with the practice of law."<sup>107</sup> The ABA Report describes lawyers as "public citizens"<sup>108</sup> who are bound by the disciplinary rules when participating in such activities. These include "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."<sup>109</sup> From a First Amendment perspective, this is thorny. The ABA Report is cognizant of the problem, stating that "[t]he proposed rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer's practice of law."<sup>110</sup> The Report contends that "[t]he nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer."<sup>111</sup> But despite these attempts to clarify, the boundary between "social activities" and public discourse remains fuzzy.

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<sup>104</sup> Res. 109 Report, *supra* note 14, at 13 (citing *In re Campiti*, 937 N.E.2d 340 (2009)).

<sup>105</sup> Volokh, *Socioeconomic Status*, *supra* note 41 (citing *United States v. Peltier*, 505 F.3d 389, 393, n.14 (5th Cir. 2007); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (quoting *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991)).

<sup>106</sup> See, e.g., Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1113-16 (2011) (noting that Model Rule 8.4 does not prohibit discrimination on the basis of, *inter alia*, socioeconomic status and calling for its revision based on state models).

<sup>107</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4.

<sup>108</sup> Res. 109 Report, *supra* note 14, at 10.

<sup>109</sup> *Id.* at 11.

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *Id.* at 9.

Whereas professionals are bound to communicate the knowledge community's insights within the professional-client relationship, they are free to challenge those insights in public discourse.<sup>112</sup> The line here is the presence or absence of a professional-client relationship.<sup>113</sup> And while the underlying interests may permit regulation of a professional's speech in the practice of their profession, those interests are likely absent in public discourse. As Robert Post noted,

There are circumstances in which speech ought to be regulated according to principles quite distinct from those that underlie public discourse. To offer only an obvious example, speech that is appropriately protected when it occurs within public discourse is also appropriately regulated as racial or sexual harassment when it occurs within the context of an employment relationship. This is true because there are good reasons for the law to regard persons as autonomous within the context of political deliberation, but there are equally good reasons for the law to regard persons as dependent within the workplace.<sup>114</sup>

Imagine a lawyer attending a bar dinner reiterating, and agreeing with, the then-GOP presidential nominee's view that judges of Mexican heritage are unable to serve impartially in cases involving the nominee's business ventures. This is core political speech; moreover, assessing the fairness of the judicial process is at the core of discussions among members of the legal profession. But whereas the professional speaker is constrained by the standards of the profession in the context of the professional-client relationship, such constraints are absent in public discourse. To take only the professional's autonomy interests as an example, in the professional context, "the professional speaker has a unique autonomy interest in communicating her message according to the standards of the profession to which she belongs;" the interest of the individual professional in public discourse is to speak her own mind.<sup>115</sup> Thus, from a First Amendment perspective, regulation at this point is on constitutionally weak footing.

#### CONCLUSION

A contextual analysis that untangles the distinctive interests underlying workplace discrimination, general antidiscrimination legislation, and the interests of the legal profession in ending discrimination in the practice of law allows a more nuanced assessment of whether, and to what extent, Model Rule 8.4(g) is compatible with the First Amendment. Considering these interests also reveals that guidance of general antidiscrimination law pursuant to Comment 3 is likely limited.

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<sup>112</sup> See Haupt, *supra* note 4, at 1255-57.

<sup>113</sup> *Id.* at 1254-55.

<sup>114</sup> Robert C. Post, *The Perils of Conceptualism: A Response to Professor Fallon*, 103 HARV. L. REV. 1744, 1746 (1990).

<sup>115</sup> See Haupt, *supra* note 4, at 1272-73.

The narrow, but important, insight this analysis offers is that, conceptually, the First Amendment is not a roadblock to regulation of professionals' speech by the profession via an antidiscrimination provision. At the same time, "conduct related to the practice of law" must be more clearly distinguished from public discourse. One prominent scholar of the legal profession predicted with respect to Model Rule 8.4(g) that "whatever proposal is actually adopted likely will be further amended."<sup>116</sup> From a First Amendment perspective, outside of public discourse, no principled objection to the antidiscrimination provision emerges. Within public discourse, however, the interests underlying speech protection counsel against an expansive interpretation of "conduct related to the practice of law."

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<sup>116</sup> Morgan, *supra* note 233, at 823.