ABA Model Rule 8.4(g): Straddling the line between Attorney misconduct and free speech rights

Our panel comprised of legal scholars and experts in the fields of professional ethics, Constitutional Law, and First Amendment litigation will present the legal issues ABA’s proposed Model Rule 8.4(g) will raise, as well as the rule’s practical impact on the practice of law in Kansas. After presenting opening statements, the panelists will respond to their colleagues opening statements, then take questions from the attendees.

The purpose of this panel is to discuss (1) whether the current rules ban illegal harassment and discrimination in the practice of law, (2) whether additional measures are needed, either through a moderated approach or adoption of Model Rule 8.4(g), and (3) how the proposed rule will impact attorneys’ First Amendment freedoms of speech, religion, and association. The panelists will also discuss the rule’s impact on attorneys’ duty to zealously represent clients.

I. Following is a brief outline of the issues the panelists will consider during the discussion.

Current Rule 8.4(d) and Comment [3]:

A. In Kansas, “It is professional misconduct for a lawyer to…(d) engage in conduct that is prejudicial to the administration of justice…and] (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.”

ABA Comment [3] to Rule 8.4(d) “proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute.
Such discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public’s confidence in our system of justice, as well as notions of equality.”

* Kansas has not adopted Comment 3 in its rules.

B. Cases applying current Rule 8.4(d) and other rules to lawyer misconduct:

i. Law professor who physically touched employees in sexually suggestive ways violated professional rules of conduct even though targets weren’t clients. Court specifically observed that even though a civil case or workplace harassment hadn’t been filed, the prima facie evidence that the respondent’s behavior violated federal and state employment laws was enough to constitute a violation of the rules of conduct, and that the rules require professional behavior whether or not someone is acting in a professional capacity. *In re Peters*, 428 N.W.2d 375 (Mn. S. Ct. 1988).

ii. Lawyer took inappropriate pictures of his client claiming they’d help in her defense. Not only did the Court find such conduct prejudicial to the administration of justice, but “reflect[ed] adversely on the fitness of attorney to practice law,” which is equivalent to current Kansas Rule 8.4(g), and the provision that expressly prohibited sexual harassment. *Iowa S.Ct. Bd. Of Professional Conduct and Ethics v. Steffes*, 588 N.W.2d 121 (1999).

iii. Demeaning words directed at a member of the opposite sex constitutes discrimination. Moreover, such behavior directed toward anyone on the
basis of “religion, sexual orientation, physical condition, race, nationality or any other difference would also result in a violation of the rule.”


iv. A Kansas judge engaged in systemic harassment by telling offensive jokes to female court personnel and prosecutors. The Kansas Supreme Court applied a judicial rule that closely mirrors current model rule 8.4(d) and Comment [3], and suspended the judge for 90 days without pay. Unlike current Kansas rule 8.4, the cited judicial rule includes the protected classes listed in Comment 3 and proposed Model Rule 8.4(g). *In re Henderson*, 301 Kan. 412, 343 P.3d 518 (2015).

## II. Versions of State Rules of Professional Conduct Comparable to ABA Rule 8.4(g)

<table>
<thead>
<tr>
<th>Rules of Professional Conduct</th>
<th>Actionable conduct</th>
<th>State of Mind Standard</th>
<th>Protected Classes</th>
<th>Domain of conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Rule 8.4(g)</td>
<td>harassment or discrimination</td>
<td>knows or reasonably should know</td>
<td>race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status</td>
<td>practice of law</td>
</tr>
<tr>
<td>California Rule 2-400</td>
<td>unlawful discrimination</td>
<td>knowingly</td>
<td>race, national origin, sex, sexual orientation, religion, age, or disability</td>
<td>management or operation of a law practice</td>
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<tr>
<td>Colorado Rule 8.4 (g)</td>
<td>biased conduct</td>
<td>manifest or intended</td>
<td>race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status</td>
<td>in representation of a client against other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process</td>
</tr>
<tr>
<td>District of</td>
<td>discrimination</td>
<td>none</td>
<td>race, color, religion,</td>
<td>conditions of</td>
</tr>
<tr>
<td>State</td>
<td>Rule</td>
<td>Description</td>
<td>Protected Characteristics</td>
<td>Context</td>
</tr>
<tr>
<td>---------------</td>
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<td>-----------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------</td>
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<tr>
<td>Columbia</td>
<td>Rule 9.1</td>
<td>national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap</td>
<td>employment</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>Rule 4-8.4(d)</td>
<td>disparage, humiliate, or discriminate</td>
<td>race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic</td>
<td>conduct in connection with the practice of law against litigants, jurors, witnesses, court personnel, or other lawyers</td>
</tr>
<tr>
<td>Idaho</td>
<td>Rule 4.4(a)</td>
<td>embarrass, delay, or burden a third person, including biased conduct</td>
<td>gender, race, religion, national origin, or sexual preference</td>
<td>in representation of a client directed against other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants</td>
</tr>
<tr>
<td>Indiana</td>
<td>Rule 8.4(g)</td>
<td>bias or prejudice manifesting by words or conduct</td>
<td>race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors</td>
<td>in a professional capacity</td>
</tr>
<tr>
<td>Iowa</td>
<td>Rule 32-8.4(g)</td>
<td>sexual harassment or other unlawful discrimination</td>
<td>none</td>
<td>practice of law</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Rule 3.4(i)</td>
<td>bias or prejudice manifesting</td>
<td>race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person</td>
<td>in a professional capacity before a tribunal</td>
</tr>
<tr>
<td>Michigan</td>
<td>Rule 6.5(a)</td>
<td>discourteous and disrespectful treatment</td>
<td>race, gender, or other protected personal characteristic</td>
<td>in the legal process</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Rule 8.4(g)</td>
<td>discrimination (except employment)</td>
<td>race, color, religion, age, sex, sexual orientation, national</td>
<td>in a professional capacity</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>State</th>
<th>Rule</th>
<th>Bias or Prejudice</th>
<th>Intentionally Manifesting, by Words or Conduct</th>
<th>Race, Gender, Religion, National Origin, Disability, Age or Sexual Orientation</th>
<th>In Any Judicial or Quasi-Judicial Proceeding Before a Tribunal</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Mexico</td>
<td>Rule 16-300</td>
<td>bias or prejudice</td>
<td>intentionally manifesting, by words or conduct</td>
<td>race, gender, religion, national origin, disability, age or sexual orientation</td>
<td>in any judicial or quasi-judicial proceeding before a tribunal</td>
</tr>
<tr>
<td>New York</td>
<td>Rule 8.4(g)</td>
<td>unlawful discrimination</td>
<td>none</td>
<td>age, race, creed, color, national origin, sex, disability, marital status or sexual orientation</td>
<td>practice of law</td>
</tr>
<tr>
<td>Ohio</td>
<td>Rule 8.4(g)</td>
<td>unlawful discrimination</td>
<td>none</td>
<td>race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability</td>
<td>in a professional capacity</td>
</tr>
<tr>
<td>Oregon</td>
<td>Rule 8.4(a)(7)</td>
<td>intimidation or harassment</td>
<td>knowingly</td>
<td>race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability</td>
<td>in the course of representing a client</td>
</tr>
<tr>
<td>Texas</td>
<td>Rule 5.08</td>
<td>bias or prejudice</td>
<td>willfully by words or conduct</td>
<td>race, color, national origin, religion, disability, age, sex, or sexual orientation</td>
<td>in connection with an adjudicatory proceeding</td>
</tr>
<tr>
<td>Vermont</td>
<td>Rule 8.4(g)</td>
<td>discrimination</td>
<td>race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual,</td>
<td>in hiring, promoting or otherwise determining the conditions of employment</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>Rule 8.4(g)</td>
<td>discriminatory act prohibited by state law</td>
<td>none</td>
<td>sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status,</td>
<td>the lawyer's professional activities</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Rule 20:8.4(i)</td>
<td>harassment</td>
<td>none</td>
<td>sex, race, age, creed, religion,</td>
<td>the lawyer's professional</td>
</tr>
</tbody>
</table>


III. Federal Employment Anti-Discrimination Laws:

- Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin;
- The Equal Pay Act of 1963 protects men and women from sex-based wage discrimination;
- Age Discrimination in Employment Act of 1967 protects individuals who are 40 years of age or older;
- Title I and Title V of the Americans with Disabilities Act of 1990 prohibit employment discrimination against disabled people in the private sector, and in state and local governments;
- Sections 501 and 505 of the Rehabilitation Act of 1973 prohibit discrimination against disabled people who work in the federal government;
- The Civil Rights Act of 1991 provides monetary damages in cases of intentional employment discrimination.

IV. Proposed Model Rule 8.4(g):

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.

V. Do lawyers forego First Amendment protections as a consequence of being licensed to practice law?

A. U.S. Supreme Court says “no”:

i. In Bates v. State Bar of Ariz., 433 U.S. 350, 97 S. Ct. 2691 (1977), the Court considered whether the Arizona bar’s ban on lawyer advertising violated the First Amendment’s free speech protections. The Court held that blanket restraints on attorney advertising were violative, however, “[a]dvertising that is false, deceptive, or misleading of course is subject to restraint.” Moreover, “[a]s with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising….Advertising concerning transactions that are themselves illegal obviously may be suppressed….And the special problems of advertising on the electronic broadcast media will warrant special consideration.

ii. In Republican Party of Minn. v. White, 536 U.S. 765, 122 S. Ct. 2528 (2002), the Court considered whether Minnesota’s “announce” clause, which barred judicial candidates from commenting on political issues and criticizing the state appellate courts’ prior holdings, violated the First Amendment. Since the clause “both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office,” the strict scrutiny test applied, mandating that the clause be “(1) narrowly tailored, to
serve (2) a compelling state interest…. In order for respondents to show that
the announce clause is narrowly tailored, they must demonstrate that it does
not ‘unnecessarily circumscrib[e] protected expression.’” Respondent’s
argued that the primary interest being served was to preserve “open
mindedness” of the judiciary and that the ban ensured that candidates
wouldn’t be held to campaign statements that might compromise this
principle. The Court held that the clause was not narrowly tailored to serve
this purpose because it “prohibit[ed] candidates … from announcing their
views on [all] disputed legal and political issues.”

B. Question boils down to whether proposed Model Rule 8.4(g) is directed toward a
(1) compelling governmental interest in the (2) least restrictive means necessary
to accomplish that interest.

C. What rights does the proposed rule implicate?
   • Speech
   • Religion
   • Association

D. Is the Rule unconstitutionally vague and overbroad?
   i. The Rule prohibits “conduct that . . . is harassment or discrimination” –
      without defining those terms, except in language that is even more vague and
even more expansive.
   ii. The Rule prohibits any “verbal or physical conduct” that is “harmful” and that
      “manifests bias or prejudice towards others.”
   iii. The Rule prohibits any “derogatory or demeaning verbal or physical conduct.”
iv. Will attorneys be able to determine whether or not any particular verbal or other conduct fits within the proscription?

v. Does the rule sweep within its ambit not only possibly unprotected speech, but also constitutionally protected speech?

vi. Many practitioners and prominent scholars believe that these provisions are unconstitutional:

a. The ABA’s own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, warned the ABA that the new Rule may violate attorneys’ First Amendment speech rights and be subject to constitutional challenge.

b. Professor Eugene Volokh, who teaches free speech and religious freedom law at UCLA Law School, as well as former U. S. Attorney General Edwin Meese, III, have also opined that the new Rule is constitutionally infirm.

c. Attorney General Meese wrote that the new Rule constituted “a clear and extraordinary threat to free speech and religious liberty” and “an unprecedented violation of the First Amendment.”

University of Alabama School of Law Journal of the Legal Profession –
Dorothy Williams, Attorney Association: Balancing Autonomy and Anti-Discrimination (40 J.Leg.Prof. 271 (Spring 2016). Argued that these sorts of Rules of Professional Conduct violated attorneys’ Free Association rights.

vii. States that have already adopted similar Rules are enforcing the rule like free-standing speech codes.

a. Indiana has rule very similar to 8.4(g).

b. Indiana has experienced 5 reported disciplinary prosecutions under the non-discrimination rule, and the attorneys were found in violation of the Rule in all but 1.

c. In the Matter of Stacy L. Kelley (Indiana Supreme Court 2010). An Indiana attorney was professionally disciplined merely for asking someone whether they were “gay.”

d. In the Matter of Daniel C. McCarthy, 938 N.E.2d 698 (Indiana 2010). An attorney had his license suspended after applying a racially derogatory term to himself.

VI. Does the Rule conflict with other Rules of Professional Conduct?

A. Rule 1.7 Conflicts of Interest:

i. Rule 1.7 provides that: “(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities
to another client, a former client or a third person or by a personal interest of the lawyer.”

ii. Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: “A conflict under this Section need not be created by a financial interest. Such a conflict may also result from a lawyer’s deeply held religious, philosophical, political, or public-policy beliefs.”

iii. The Rule appears to require an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney’s deeply held religious, philosophical, political, or public policy principles; while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to the attorney’s beliefs – would violate Rule 1.7’s Conflict of Interest prohibitions.

B. Rule 1.3 – Diligence.

i. Rule 1.3 provides that “A lawyer shall act with reasonable diligence and promptness in representing a client.”

ii. Comment [1] to Rule 1.3 provides that “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

iii. “Zeal” means “a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something.” Synonyms are “passion” and “fervor”.

11
iv. How would an attorney be able to zealously represent a client whose case runs counter to the attorney’s deeply held religious, political, philosophical, or public policy beliefs?

v. Under the Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney’s personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

vi. Prior to this Rule, the Rules allowed an attorney to refuse to accept a case for any reason—even a discriminatory one—to ensure that an attorney can zealously represent her client. See, for example, Modern Legal Ethics, Charles W. Wolfram, p. 573 (1986) (“a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer’s demanded fee; because the client is not of the lawyer’s race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.”).

vii. The paramount issue is the CLIENT’s best interests! And the client’s best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

C. Rule 6.2 - Accepting Appointments:

i. Rule 6.2 provides that “A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”
ii. Rule 6.2 technically only applies to court appointments, but it contains a principle that should be equally – if not more – applicable to an attorney’s voluntary client-selection decisions.

iii. Rule 6.2 recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer’s ability to represent the client be adversely affected.

iv. Comment [1] to Rule 6.2 sets forth this general principle – without restriction to court appointment scenarios. It states: “A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.”

v. Rule 6.2 does not concern itself with WHY the attorney finds the client or cause repugnant – because that’s irrelevant. The only relevant issue is whether the attorney – for whatever reason – cannot provide the client with zealous representation. If not, the attorney must not – for the client’s sake – take the case.

D. Rule 1.16: Declining or Terminating Representation:

i. Rule 1.16(a)(4) provides that: (a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law.

ii. Interestingly, the amended Rule 8.4 specifically references this Rule 1.16: “This Rule 8.4(g) does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with this Rule 1.16.”
iii. But, as discussed above, both Rule 1.3 and Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer’s personal beliefs – the lawyer could not zealously represent or could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct.

iv. So, Rule 1.16 is in conflict with the new Rule.

E. Rule 8.4(g)’s conflicts with other Professional Rules reveals and highlights a basic problem with the new Rule: the new Rule is an attempt to impose upon the legal profession a non-discrimination construct that is – in its basic premises – inconsistent with who attorneys are and what they professionally do.

i. The non-discrimination template is taken from the context of public accommodation law – non-discrimination laws that are imposed in the context of merchants and customers – where a merchant sells a product or service to a customer, who the merchant does not know and will probably never see again – a transient and impersonal commercial transaction.

ii. But attorneys are not mere merchants, and clients are not mere customers. The attorney-client relationship differs in significant ways:

a. Attorneys have fiduciary relationships with their clients.

b. Attorneys are made privy to the most confidential of their client’s information, and are bound to protect those confidentialities.

c. Attorneys are bound to take no action that would harm their clients
d. An attorney’s relationship with his or her clients is often a long-term relationship, oftentimes lasting months, or even years – Rarely true between a merchant and a customer!

iii. So it’s one thing to say a merchant may not pick and choose his customers. It’s entirely another to say a lawyer may not pick and choose her clients.

iv. No lawyer should be required – for any reason – to enter into what is, by definition, a fiduciary, and what could turn out to be a long-term, relationship with a client the attorney does not want – whatever the reason.

VII. Does the Rule serve a legitimate professional purpose?

A. The legal profession has a legitimate interest in proscribing attorney conduct that would either (i) render an attorney unfit to practice law or (ii) that would prejudice the administration of justice.

B. The previous Misconduct Rule recognized this principle by prohibiting attorneys from engaging in six types of conduct, all of which clearly served one or the other of these two purposes.

C. The new Rule, however, for the first time proscribes attorney conduct that neither renders an attorney unfit to practice law nor prejudices the administration of justice.

D. Instead, the new Rule essentially creates a free-floating speech code that subjects attorneys to professional discipline for merely using language or engaging in conduct, even in contexts only remotely related to an attorneys’ professional activities, that disciplinary authorities deem politically incorrect.