

# LEGAL MEMORANDUM

No. 191 | OCTOBER 6, 2016

## The ABA Decision to Control What Lawyers Say: Supporting “Diversity” But Not Diversity of Thought

Ronald D. Rotunda

### Abstract

*At its August 2016 annual convention, the American Bar Association approved a significant change in its Rule 8.4(g) that will affect all lawyers. Shortly before that, in June, the ABA Board of Governors had approved a major change regulating ABA-sponsored Continuing Legal Education (CLE) programs. The ABA has announced that lawyers may not engage in “verbal conduct” that “manifests bias” concerning a litany of protected categories, and in June, the Board of Governors announced that it would not sponsor any CLE program unless the panel has the proper proportion of women, gays, transgender individuals, and so forth. The ABA sponsors a number of CLE programs, and most states require lawyers to participate for a certain number of hours each year as a condition of keeping their licenses to practice law. These changes show that the ABA is very much concerned with what lawyers say and who teaches them. The only thing that does not concern the ABA is diversity of thought.*

We live in an era when America’s elites are anxious to control what we say, because language both reflects and molds how we think.<sup>1</sup> Hence, they are falling all over themselves to become politically correct.

In higher education, universities are banning “triggers” that might offend someone. College administrators at Ivy League schools like Cornell and Yale agreed to rip up copies of the U.S. Constitution,<sup>2</sup> which were distributed off campus, after a person posing as a student described the document as “triggering” and “oppressive.”<sup>3</sup>

### KEY POINTS

- The American Bar Association’s changes in rules to increase “diversity” are concerned with anything but intellectual diversity.
- Under Rule 8.4(g), it is “professional misconduct” to engage in discrimination (including “verbal conduct”) based on “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.”
- The ABA’s rules prohibiting political speech related to gender identification contrasts dramatically with its narrow rule regarding conduct involving racial discrimination and peremptory challenges.
- Rule 8.4(g) specifically approves of reverse discrimination: It 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 views.
- The new rule to implement “Goal III: Eliminate Bias and Enhance Diversity” in Continuing Legal Education programs fails to promote equal opportunity.

This paper, in its entirety, can be found at <http://report.heritage.org/lm191>

**The Heritage Foundation**  
214 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 546-4400 | [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Go to YouTube and you can see and hear Carol Lasser,<sup>4</sup> Professor of History and Director of Gender, Sexuality, and Feminist Studies at Oberlin College, tell us that “[t]he Constitution is an oppressive document.” The Chair of Comparative Studies at Oberlin, Professor Wendy Kozol, agrees: “The Constitution in everyday life causes people pain.”<sup>5</sup> It also protects Kozol’s right to attack the Constitution—something she forgot to mention.

Students at Harvard’s School of Public Health “demand” that the university “address race and inequity through education by instituting mandatory training on race and privilege for all students, post-docs, staff, and faculty, developing case studies that challenge social injustice, and increasing practicum opportunities on themes of racism and health.” They further “demand” that “[t]his process should begin by the spring semester and incorporate student input.”<sup>6</sup>

The State University of New York (SUNY) at Binghamton is now offering a course called “#StopWhitePeople2K16.”<sup>7</sup> In August, a university administrator defended this course, designed to “cultivate an environment where our students listen to one another, learn from one another and do so in a manner that doesn’t cause unnecessary harm.”<sup>8</sup> Shortly after that, it became national news when the University of Chicago announced to its students that “we do not support so-called ‘trigger warnings’” and “do not condone the creation of ‘safe spaces’ where individuals can retreat from ideas and perspectives at odds with [their] own.”<sup>9</sup>

What a strange world it is when a university’s announcement that it supports free speech is major news. And what a strange world it is when the American Bar Association (ABA) decides to discipline lawyers who say something that is politically incorrect. But with political correctness all the rage, it should not be a surprise that the ABA has joined the party, even if belatedly.

At its August 2016 annual convention, held in San Francisco, the ABA approved a significant change in its Rule 8.4(g) that will affect all lawyers. Shortly before that, in June, the ABA Board of Governors had approved a major change regulating Continuing Legal Education (CLE) programs that the ABA sponsors.

The ABA has announced that lawyers may not engage in “verbal conduct” that “manifests bias” concerning a litany of protected categories. (It is

still all right to make short jokes or bald jokes, but be careful about anything related to, for example, gender identity, marital status, or socioeconomic status.)

The ABA also decided that men could use the ladies’ room at a law firm (no bias based on gender identity) and that it would not sponsor any CLE programs unless the panel has the proper proportion of women, gays, transgender individuals, and so forth. The ABA sponsors many CLE programs, and most states require lawyers to participate in a certain number of hours each year as a condition of keeping their licenses to practice law.

These changes show that the ABA is very much concerned with what lawyers say and who teaches them. The only thing that does not concern the ABA is diversity of thought. The language that the ABA uses to promote its latest foray into political correctness makes this all too clear. Moreover, what the ABA does affects all of us, even if we are not lawyers, because of its governmental power.

### **The ABA’s Governmental Power**

The ABA is a private trade association with about 400,000 lawyers as members. However, it is much more than a trade association because it also has some governmental power, which it uses to impose political correctness. That is exactly what the ABA did at its 2016 annual convention.

States give the ABA power to accredit law schools: You cannot take the bar examination in many states unless you graduate from an ABA-accredited law school.<sup>10</sup> The accreditation rules require that an accredited law school must teach the ABA Model Rules of Professional Conduct and that its students must pass a special Multistate Professional Responsibility Exam (MPRE) on those ABA rules.<sup>11</sup>

The ABA lobbies state courts to adopt these rules, and many state courts almost routinely follow the ABA’s lead and often approve what the ABA supports. The ABA Model Rules have a presumption of support that is lacking for any proposed change that someone might offer.

The ABA Model Rules then become real law governing how and whether lawyers can practice law. They are real law, just like the Rules of Evidence or Rules of Civil Procedure, but unlike the Rules of Evidence or Rules of Civil Procedure, the rules governing lawyers apply even when lawyers are not before a court. They govern, for example, how lawyers find

business; how they deal with clients, each other, and third parties; how they handle client funds; and how they advertise, make representations to others, organize their law firms, and set fees.

Whenever the ABA changes its Model Rules, the MPRE *automatically* follows suit and changes its examination to test the new rules. It does that about one year later.<sup>12</sup> In August, the ABA House of Delegates approved a significant and controversial change in Rule 8.4, and in about a year, law students throughout the country will have to know this new rule and respond correctly on the MPRE or risk not being admitted to the bar. Even California, which has not yet adopted the format of the Model Rules (although it has adopted some of their substance), requires that anyone seeking admission to the California bar must pass the MPRE.<sup>13</sup>

### **The New Rule 8.4(g)**

The exact wording of new Rule 8.4(g) is available on the Web<sup>14</sup> along with the “Comments” to that rule.<sup>15</sup> The comments provide guidance to interpreting the rule.<sup>16</sup> The ABA’s official legislative history and its justification for the change are also on the Web.<sup>17</sup>

Before this new rule, there was a rather vague comment in Rule 8.4 advising that “in the course of representing a client,” a lawyer should not knowingly manifest bias based on various categories “when such actions are prejudicial to the administration of justice.”<sup>18</sup> The comment was not a black-letter rule. The comments do not impose discipline; only the rules do that.<sup>19</sup> The ABA adopted this vague comment in 1998 after six years of debate and several failed attempts.<sup>20</sup>

Fast-forward nearly two decades, and we see that the new rule and comment go well beyond the 1998 change. The ABA has elevated the new prohibition into a black-letter rule, added to the listing of protected categories and significantly broadening its coverage. The ABA explained that the problem with this mere comment is that:

[It] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. [The limitation] fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate

law departments, and employer-employee relationships within law firms).<sup>21</sup>

When the ABA proposed this new rule, it did not offer any examples in its report of the failure of the old comment.<sup>22</sup> That is not why it wanted to create this new rule. The reason for the change, the ABA says, is not so modest:

*There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.*<sup>23</sup>

We must change the Model Rules not to protect clients, not to protect the courts and the system of justice, and not to protect the role of lawyers as officers of the court. No, the purpose is much more grandiose: to create “a cultural shift.”

The ABA report explaining the reasons for this controversial change starts by quoting then-ABA President Paulette Brown, who boastfully tells us that lawyers are “responsible for making our society better,” and because of our “power,” we “are the standard by [*sic*] which all should aspire.”<sup>24</sup>

This new Rule 8.4(g) provides that it is “professional misconduct” to engage in discrimination based on “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.” If lawyers do not follow this proposed rule, they risk discipline (e.g., disbarment or suspension from the practice of law). In addition, courts enforce the rules in the course of litigation (e.g., through sanctions or disqualification) and routinely imply private rights of action from violation of the rules (malpractice and tort suits by non-client third parties). Violations of the rules matter: They are more than Law Day rhetoric.

Lawyers should be expert at drafting rules, especially rules about the practice of law. What exactly does Rule 8.4(g) proscribe?

Discrimination includes “verbal or physical conduct that manifests bias.” The First Amendment applies to speech, but the ABA tries to get around that by labeling speech as “verbal conduct,” but “verbal conduct” is an oxymoron. Rule 8.4(g) prohibits mere speech divorced from discriminatory action.

If one holds a gun and says, “Give me your money or your life,” he is engaging in conduct (robbery) accompanied by words. If one says, “I wish I had Bill Gates’s money,” he is just engaging in speech.

Consider “socioeconomic status,” one of the protected categories. Rule 8.4, Comment 4 makes clear that it covers any “bar association, business or social activities in connection with the practice of law.” The rule covers any “law firm dinners and other nominally social events” at which lawyers are present because they are lawyers.<sup>25</sup> If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, “I abhor the idle rich. We should raise capital gains taxes,” he has just violated the ABA rule by manifesting bias based on socioeconomic status.

If the other lawyer responds, “You’re just saying that because you’re a short, fat, hillbilly, neo-Nazi,” he’s in the clear, because those epithets are not in the sacred litany. Of course, that cannot be what the ABA means, because it is always in good taste to attack the rich. Yet that is what the rule says.

The Equal Employment Opportunity Commission (EEOC) has already said that there can be racism and a “hostile work environment” if the U.S. Postal Service allows a coworker to wear a cap that says “Don’t tread on me” along with a drawing of a coiled snake. The EEOC admitted that the “Don’t tread on me” flag “originated in the Revolutionary War in a non-racial context.”<sup>26</sup> But some people might think it racist, and that is enough to launch a full-scale investigation. The fellow just wore a cap; there was not even a finding that the person who wore the cap ever said anything offensive to the person complaining.<sup>27</sup>

The First Amendment even limits the EEOC. What is “harassment”? In the context of Title IX sexual harassment, the Supreme Court held in *Davis Next Friend LaShonda D. v. Monroe City Board of Education* that “an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>28</sup> *LaShonda* insisted on a narrow definition to avoid a free speech violation. The EEOC was not listening to *LaShonda* when it decided the “Don’t tread on me” case.

*LaShonda* cited with approval other cases that invalidated actions that were not sensitive to free speech. For example, *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*<sup>29</sup>

invalidated a university speech code that prohibited “discriminatory comments” directed at an individual that “intentionally...demean” the “sex...of the individual” and “[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.”<sup>30</sup>

One would think that the ABA, which exists to promote the rule of law (including the case law that interprets and applies the Constitution), would follow the holding in *LaShonda*, but the ABA nowhere embraces the limiting definition of *LaShonda*. It proudly goes far beyond even the EEOC’s “Don’t tread on me” case because the ABA rule bans a broader category of speech that is divorced from any action. The new list includes gender identity, marital status, and socioeconomic status. It also includes social activities at which no coworkers are present. Even “a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by another law firm.”<sup>31</sup>

At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, “Black lives matter.” Another responds, “Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.” A third says, “All lives matter.” Finally, another lawyer says (perhaps for comic relief), “To make a proper martini, olives matter.” The first lawyer is in the clear; all of the others risk discipline.

Even when a court does not enforce this rule by disbaring or otherwise disciplining the lawyer, the effect will still be to chill lawyers’ speech, because good lawyers do not want to face any nonfrivolous accusation that they are violating the rules. The ABA as well as state and local bar associations routinely issue ethics opinions advising lawyers what to do or avoid, and most lawyers follow this advice.

Consider this example. The St. Thomas More Society is an organization of “Catholic lawyers and judges” who strengthen their “faith through education, fellowship, and prayer.”<sup>32</sup> Therefore, since Rule 8.4(g) covers any “law firm dinners and other nominally social events” at which lawyers are present because they are lawyers,<sup>33</sup> any St. Thomas More Society event, including a Red Mass, CLE program, or similar event, would be subject to the rule. Assume further that at a St. Thomas More–sponsored CLE program, some (and perhaps all) of the lawyers on a

panel discuss and object to the Supreme Court's gay marriage rulings. The state bar may draft an ethics opinion advising that lawyers risk violating Rule 8.4(g) if they belong to a law-related organization that is not "inclusive" and opposes gay marriage.

As a result, many lawyers may decide that it is better to be safe than sorry, better to leave the St. Thomas More Society than to ignore the ethics opinion and risk a battle. If they belong to an organization that opposes gay marriage, they can face problems. If they belong to one that favors gay marriage, then they are home free.

Judges, law professors, and lawyers (even if they are not Catholic) often attend the Red Mass. That simple action raises issues because the Catholic Church, like many other churches, does not recognize gay marriage. Like many other religious organizations, it does not embrace the right to abortion found in U.S. Supreme Court decisions. It limits its priesthood to males. All of those religious practices raise questions under the new, vaguely worded Rule 8.4(g).

Consider another example involving marriage. ABA Rule 2.1 provides that the lawyer must offer candid advice and may refer to "moral" considerations. What if the lawyer's conscientious view of what is "moral" conflicts with the "cultural shift" that Rule 8.4(g) seeks to impose?

For example, assume that the client (worried about a "palimony"<sup>34</sup> suit) tells the lawyer that he would like to create a prenuptial agreement with the woman he does not intend to marry. Absent the new Rule 8.4(g), the lawyer can advise the individual that he might be taking advantage of the woman, that it might not be right to live with the woman, use her, and then drop her without fear of financial consequences. Indeed, the lawyer can say that he or she refuses to draft palimony prenuptials.

But what is the law after Rule 8.4(g)? That rule says that a lawyer is subject to discipline if he or she discriminates in speech or conduct related to the practice of law (drafting the palimony papers) based on "marital status" (the lawyer does not normally like to draft palimony prenuptials). What if the person who refuses to draft the palimony papers objects on religious grounds? The prospective client can walk next door and hire another lawyer, but the ABA's proposed rule says that this may not be good enough. The bar may discipline the first lawyer, who exercised his or her religious objections to participating in palimony prenuptials. What if the lawyer

objects to drafting palimony papers on nonreligious but moral grounds: It treats women like sex objects? The result is the same: The bar may discipline the lawyer because of the "need for a cultural shift" in the United States.

It is true that the new Rule 8.4(g) says that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16," but Comment 5 to Rule 8.4 appears to interpret this right to refuse representation narrowly. It says that the lawyer does not violate Rule 8.4(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."

Moreover, case law tells lawyers that they cannot refuse to take a case because the prospective client is a member of the litany of protected classes. In *Stropnick v. Nathanson*,<sup>35</sup> for example, the Massachusetts Commission Against Discrimination found that a law firm that specialized in representing women in divorce cases violated the state's anti-discrimination law by refusing to represent a man in such a case. The firm was known for securing large awards for women who had put their husbands through professional school, and the prospective male client had done the same thing for his wife. The existence of Rule 8.4(g) makes it easier 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.

Or consider "gender identity," another category that Rule 8.4(g) protects. Assume that a law firm does not hire a job applicant who seeks a position as a messenger. The firm's decision to hire or terminate messengers is conduct related to "operation and management of a law firm or law practice."<sup>36</sup> The disgruntled messenger may complain to the disciplinary authorities that he is transgender and the firm did not hire him because of that. If the disgruntled applicant identifies with the opposite sex (or claims to), he or she can argue that it is evidence of the law firm's bias that its restrooms discriminate based on "gender identity."

The law firm may claim that it did not know the disgruntled applicant is transgender. That is an issue on the merits, and its assertion does not preclude a full hearing. Rule 8.4(g) does say that the lawyer must know "or reasonably should know" that his "verbal conduct" is harassment or discrimination, but that requirement is easily met. Lawyers

“reasonably should know” that the federal government now contends that preventing someone from using the restroom they prefer to use is discrimination based on gender identity.

The lawyer hauled before the state’s discipline board will find that it is not like a court: It does not typically open its proceedings to the public, it follows relaxed rules of evidence, and there is no jury. For the law firm, it is simpler and safer to avoid all of these problems by removing the restroom signs that protect the privacy of men and women.

Problems extend beyond the weak procedural protections of state disciplinary authorities. The risk to the law firm also includes civil liability, because the disgruntled employee may sue. That could be expected to happen here, because courts often imply causes of action from violation of the Rules of Professional Conduct. The law firm will face expensive discovery, a gauntlet of motions, and possibly years of litigation and a trial—particularly if the disgruntled applicant files a class action.

The ABA’s proposed Rule 8.4(g) will apply even if no state statute bans the “verbal conduct” that the ABA’s rule will prohibit. No matter what the EEOC or the state legislature does, the ABA rule still applies because it makes clear that the “substantive law of antidiscrimination and anti-harassment statutes” is not “dispositive.”<sup>37</sup>

Many states have no law banning gender identification 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. The EEOC did not announce until recently that it regards workplace sexual orientation and transgender discrimination as illegal. The EEOC announcement<sup>38</sup> (it is not a rule) may not be valid under the federal statute, a matter now being litigated in the courts, and even if its new announcement is valid, the EEOC can always change its mind.

Nonetheless, the ABA rule explicitly applies even if no state or federal law bans “verbal conduct” dealing with gender identification. Even if the government does ban gender identification discrimination but no court has found any violation, the disciplinary authorities can still find a violation. If the complainant decides not to complain to the EEOC, the state can still discipline the lawyer. The ABA made that point repeatedly in explaining the significance of its new rule. To require an allegedly injured party

to invoke the civil legal system first “would send the wrong message to the public.”<sup>39</sup>

### **Peremptory Challenges and “Legitimate” versus Illegitimate Advice or Advocacy**

Rule 8.4(g), Comment 5 appears to give lawyers freedom to engage in peremptory challenges on racial grounds. It says, “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).” An earlier comment had a similar safe harbor. The ABA report on the new Rule 8.4(g) does not explain the reason.

We know now that it violates the Constitution for a lawyer (whether government or private) to exercise a peremptory challenge in either a civil case or a criminal one to exclude a juror on grounds of race.<sup>40</sup> One might think that this would be a case where the disciplinary authorities might want to take action. After all, a judge had made a specific finding that the lawyer has engaged in racial discrimination. Yet the comment is clear that the judge’s ruling that the lawyer engaged in racist behavior does not alone prove anything.

If the judge sits the juror anyway, the lawyer who exercised the improper peremptory challenge is home free. The judge merely refuses to exclude the juror. If the lawyer exercises the racist peremptory challenge but gets away with it, he is equally home free. It is as if one says, with respect to income taxes, “catch me and I’ll pay what I owe.”

The ABA’s broad rules prohibiting political *speech* that relates to gender identification contrasts dramatically with the ABA’s narrow rule regarding *conduct* involving racial discrimination. The ABA’s report does not explain its rationale. Rule 8.4(g) does say that it “does not preclude legitimate advice or advocacy consistent with these Rules.” It does not tell us what is “legitimate” advice or advocacy. As noted, a racially motivated peremptory challenge apparently may be legitimate.

We should be very concerned about prohibiting legitimate advice or advocacy without defining those terms carefully. In Rule 8.4(g), the ABA blessed the concept that the disciplinary authority has the right to determine what is or is not legitimate advocacy. The idea that advocacy is “illegitimate” invites criticism of lawyers who represent unpopular clients. The neighbors of Atticus Finch in *To Kill a Mockingbird* no doubt believed that his advocacy was illegitimate

and that Finch should not have fought that zealously for his client, a poor black man.

If the ABA meant only to prohibit advocacy or advice that violates the ABA rules, it could have said that. Instead, it said that the advice or advocacy must be (1) “consistent with these Rules” and (2) legitimate. We have gone down this road before, and the results were not pretty. In the 1950s and 1960s, some states used the legal discipline process to punish lawyers who were too energetic (in the view of some lawyers) in defending Communist sympathizers or draft protestors. The recent movie *Bridge of Spies* recalls an earlier era when the public and many lawyers did not applaud James B. Donovan, the lawyer who defended Soviet spy Rudolf Abel.

Granted, we are not like the supposedly narrow-minded people of the 1950s and 1960s. We all say that. Remember, however, that every generation says that it is not like the narrow-minded earlier generation. We do not appreciate our own prejudices, but the next generation will. A few years ago, it was politically incorrect to support gay marriage; now it is politically incorrect to oppose gay marriage. Many of the people who support it today were opponents just a few short years ago, and many of them do not acknowledge their 180-degree shift.

### **Reverse Discrimination**

The new ABA rule specifically approves of reverse discrimination. Assume, for example, that two young lawyers (or two photocopiers) apply for one job. The lawyer making the hiring decision says that Applicant No. 1 is better than Applicant No. 2. However, Applicant No. 2 says that he is gay or transgender. The lawyer tells the two applicants, “I’m going with Applicant No. 2 because you are gay. Sorry, Applicant No. 1; you are a bit better, but I already have enough heterosexual lawyers and photocopiers.”

The rules are clear that the lawyer saying this, who is discriminating based on sexual orientation or gender identification, does not violate Rule 8.4(g). Comment 4 gives the lawyer a safe harbor: “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.”

Lawyers can discriminate, by words or conduct, against people because they are in a traditional marriage or because they are white, because “new

Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity.”<sup>41</sup> 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.

### **The Aftermath of the New Rule 8.4(g)**

Bar discipline authorities will typically tell anyone inquiring that they have their hands full disciplining lawyers who lie and steal from their clients. The state and federal reports are replete with cases disqualifying law firms (even some very prestigious law firms) for conflicts of interest. The first Rule of Legal Ethics, Rule 1.1, is that the lawyer must be competent, and Rule 1.5 forbids lawyers from filing excessive fees. Yet many lawyers violate those rules. Cases show that clients routinely sue their lawyers because of excessive fees or incompetence.

Is it the best use of scarce bar resources to discipline lawyers who may violate a vague rule that prohibits speech because that speech violates the new Rule 8.4(g)? It is not as if the disciplinary authorities are looking for things to do. There are plenty of lawyers who are incompetent, who commingle trust funds, or who cheat third parties.

The purpose of the new Rule 8.4(g) is to promote a “cultural shift” in the United States. Until now, that was not within the job description of the ABA or of the Rules Governing Professional Conduct.

### **CLE Programs, the ABA, and the New Rules on “Diversity”**

In 2008, the ABA House of Delegates adopted what it called “GOAL III: Eliminate Bias and Enhance Diversity”<sup>42</sup> in an effort to “Promote full and equal participation in the association, our profession, and the justice system by all persons” and “Eliminate bias in the legal profession and the Justice System.” Obviously, these are worthy goals. The problem is how the ABA chooses to implement them. The ABA now has a new rule to implement Goal III in the case of CLE programs. This new rule does not promote equal opportunity. It does not remove barriers to equal opportunity. It does not promote intellectual diversity. Instead, this poorly drafted rule imposes a requirement that each CLE panel must have “diversity” based on sexual orientation, gender identification, and so forth—the same litany we find in Rule 8.4(g).

In June 2016, in response to the efforts of the ABA's Diversity & Inclusion 360 Committee, the ABA Board of Governors adopted a new ABA rule for all ABA-sponsored Continuing Legal Education programs.<sup>43</sup> This rule "will take effect on March 2, 2017,"<sup>44</sup> and builds on what the ABA later adopted in Rule 8.4(g):

The ABA expects all CLE programs sponsored or co-sponsored by the ABA to meet the aspirations of Goal III by having the faculty include members of diverse groups as defined by Goal III (*race, ethnicity, gender, sexual orientation, gender identity, and disability*). This policy applies to individual CLE programs whose faculty consists of three or more panel participants, including the moderator. Individual programs *with faculty of three or four panel participants*, including the moderator, will require *at least 1 diverse member*; individual programs with faculty of five to eight panel participants, including the moderator, will require *at least 2 diverse members*; and individual programs with faculty of nine or more panel participants, including the moderator, will require *at least 3 diverse members*. The ABA will not sponsor, co-sponsor, or seek CLE accreditation for any program failing to comply with this policy unless an exception or appeal is granted. The ABA implementation date for the new Diversity & Inclusion CLE Policy shall be March 1, 2017.<sup>45</sup>

The ABA intends that this new policy be mandatory, not aspirational.<sup>46</sup> Favored groups include "race, ethnicity, gender, sexual orientation, gender identity, and disability." As individuals, we all are members of some race and some ethnic group. We all have some sexual orientation. Hence, one might think that every CLE panelist would count toward satisfying the mandated quotas for ABA CLE faculty participants. Of course, that is not what the ABA really means by its use of these code words.

While ABA groups must comply as of March 1, 2017, they may comply earlier, and some have, so we know what the ABA really means. One person said proudly that she sponsored a program in which every participant but one was from a diverse group. Who was the person that did not fit within all of the categories? It was a white male, she said.

Sexual orientation includes people who are lesbian, gay, bisexual, or transgender (LGBT). The ABA

tells us that only 1.25 percent of its members fall in this category.<sup>47</sup> At least 30 percent of all CLE panelists in any ABA-sponsored event must include one of the favored classes as part of affirmative action.

It will be interesting to see how the ABA will implement this rule. Assume, for example, that an ABA official planning a CLE on patent law e-mails a prospective panelist. The conversation might well go as follows:

ABA: We'd like to invite you to be on our October panel on estoppel rules in patent law. I understand your new article on this issue is brilliant.

PANELIST: Thank you so much. I'd love to attend. I've completed more empirical research since then, and I'd be pleased to share that with your audience.

ABA: Great. Tell me, what is your sexual orientation?

PANELIST: Excuse me! It's no business of yours what I do in my bedroom.

ABA: I'm sorry, but we need to know before we can extend the invitation. We're short one gay, and we need a woman. If you are a member of one of those groups, my next question would be which one, so we can, in fairness, exclude members of that group from inclusion on our next program in order to secure diversity from among the diverse groups when filling the few CLE faculty positions for each program. I notice your name is Chris. Is that Christine or Christopher?

PANELIST: What difference does that make?

ABA: I want to know if you are a woman.

PANELIST: My work speaks for itself. What difference does it make if my DNA has two X chromosomes or an X and Y chromosome?

ABA: We'll ask another person. I'm going to e-mail Ms. Smythe instead.

PANELIST: It's a free country; you can invite whomever you want, but you told me that I'm the expert in this area.

ABA: Yes, you are, and I know that your work demolished Smythe's earlier article. You really destroyed her logically. But we need diversity, and you're not that.

PANELIST: I came to this country 30 years ago, an orphan from Ukraine. I could not speak English, and now I'm one of the top patent lawyers in the country. Besides, I disagree with Smythe. A debate between the two of us would offer intellectual diversity.

ABA: We're not interested in intellectual diversity. As for your immigrant status, that's not on the approved list.

## Conclusion

As that old cliché reminds us, every cloud has a silver lining. Perhaps the ABA's new Rule 8.4(g) will ameliorate the problem of underemployed lawyers. We will need more lawyers to meet the demand that this new rule will create. Lawyers will get richer and richer as we sue and defend each other, obviating the need for clients. It will be like the village that raised its gross domestic product when everyone took in everyone else's laundry.

As for training lawyers through Continuing Legal Education programs, we will no longer worry about getting the best person, nor do we care about intellectual diversity. The new ABA requirement is not about equal opportunity; it is about equal results. As for the immigrant panelist who came to the United States alone, not knowing the language, that person should lobby the ABA to get on the approved list.

—*Ronald D. Rotunda is Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University, Fowler School of Law.*

## Endnotes

1. RONALD D. ROTUNDA, *THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL* (University of Iowa Press 1986).
2. Valerie Richardson, *University Officials Agree to Rip Up Constitution in Undercover Video*, WASH. TIMES (Nov. 8, 2015), <http://www.washingtontimes.com/news/2015/nov/8/yale-cornell-syracuse-vassar-oberlin-administrator/>.
3. *Id.*
4. Peter Fricke, *Administrators Literally Shred Constitution After Reporter Calls It "Oppressive" and "Triggering,"* CAMPUS REFORM (Nov. 3, 2015), <http://www.campusreform.org/?ID=6946>.
5. Oliver Bok, *Right-Wing Activist Poses as Student, Secretly Films Professors*, OBERLIN REV. (Nov. 6, 2016), <http://oberlinreview.org/9030/news/right-wing-activist-poses-as-student-secretly-films-professors/>.
6. A. G. Wallace, *16 Points, 1000 Demands* (Dec. 1, 2015), <https://agwallace.wordpress.com/2015/12/01/16-points-1000-demands/>.
7. Pardes Seleh, *State University Now Offers "Stop White People" Training*, DAILY WIRE (Aug. 23, 2016), [http://www.dailywire.com/news/8590/state-university-now-offers-stop-white-people-pardes-seleh?utm\\_source=facebook&utm\\_medium=social&utm\\_content=062316-news&utm\\_campaign=benshapiro](http://www.dailywire.com/news/8590/state-university-now-offers-stop-white-people-pardes-seleh?utm_source=facebook&utm_medium=social&utm_content=062316-news&utm_campaign=benshapiro).
8. Suh Neubauer, *BU Reviewed #StopWhitePeople2K16 Training Session, Not "Anti-White,"* Fox 40 WICZ-TV News (Aug. 26, 2016), <http://www.wicz.com/story/32831634/bus-stopwhitepeople2k16-training-program-slammed-by-bloggers-social-media>.
9. *E.g.*, Leonor Vivanco & Dawn Rhodes, *U. of C. Tells Incoming Freshman It Does not Support "Trigger Warnings" or "Safe Spaces,"* CHICAGO TRIBUNE (Aug. 25, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-university-of-chicago-safe-spaces-letter-met-20160825-story.html>.
10. California is an exception. The ABA accredits law schools, but the state also accredits other law schools in the state, and their graduates can take the California Bar Examination.
11. MPRE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION, *Jurisdictions Requiring the MPRE* (2016), <http://www.ncbex.org/exams/mpre/>.
12. MPRE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION, *Preparing for the MPRE* (2016), <http://www.ncbex.org/exams/mpre/preparing/> ("Amendments to the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct will be reflected in the examination no earlier than one year after the approval of the amendments by the American Bar Association.").
13. California also includes at least one essay question on its bar examination that tests both the Model Rules and the California Rules of Professional Conduct.
14. ABA, MODEL RULES OF PROFESSIONAL CONDUCT, RULE 8.4 (Aug. 2016), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html).
15. ABA, MODEL RULES OF PROFESSIONAL CONDUCT, RULE 8.4, COMMENTS 3, 4, 5 (Aug. 2016), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct/comment\\_on\\_rule\\_8\\_4.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html).
16. ABA MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE & SCOPE [21] (2016).
17. ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE, COMM. ON DISABILITY RIGHTS, DIVERSITY & INCLUSION 360 COMM., COMM. ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, COMM. ON SEXUAL ORIENTATION AND GENDER IDENTITY, COMM. ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109 (Aug. 2016), [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).
18. RULE 8.4, COMMENT 3 (replaced by the August 2016 ABA revisions).
19. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." ABA MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE & SCOPE [21] (2016).
20. STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, MEMORANDUM: DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, at 1 (Dec. 22, 2015), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/rule\\_8\\_4\\_language\\_choice\\_memo\\_12\\_22\\_2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf); *Id.* at 6.
21. ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17, at 2.
22. The ABA does list examples of lawyers disciplined engaging in improper sexual harassment, but most examples cover conduct. *E.g.*, "The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student's appearance; *engaged in unwelcome physical contact of a sexual nature with the student*; and attempted to convince the student to recant complaints she had made to authorities about him. *In re Griffith*, 838 N.W.2d 792 (2013)." (emphasis added). ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17, at 6 n.15. In a few cases, state courts have imposed discipline for lawyers saying things that are politically incorrect. What some state courts have done should be jaw-dropping for anyone who supports the First Amendment. *Id.* "The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made *repeated* disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re Campiti*, 937 N.E.2d 340 ([Ind.] 2009)." Such advocacy is surely not persuasive to any court. That does not mean the lawyer should be punished for saying something "disparaging." If the trial court thought there was a problem, it could have instructed the lawyer that it was unnecessary to repeat legal irrelevancies.

23. ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, MEMORANDUM: DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, 2 (Dec. 22, 2015) (emphasis added), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/rule\\_8\\_4\\_amendments\\_12\\_22\\_2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf).
24. ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17, at 3.
25. *Id.* at 11.
26. Shelton D., Complainant, EEOC DOC 0520140441, 2016 WL 3361228, at \*2 (June 3, 2016).
27. Eugene Volokh, *Wearing "Don't Tread on Me" Insignia Could Be Punishable Racial Harassment*, WASH. POST (Aug. 3, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?tid=a\\_inl&utm\\_term=.cba04ea026d3](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?tid=a_inl&utm_term=.cba04ea026d3).
28. Davis Next Friend LaShonda D. v. Monroe City Board of Education, 526 U.S. 629, 633 (1999) (emphasis added).
29. UWM Post, Inc. v. Board of Regents of University of Wisconsin System, 774 F. Supp. 1163 (E.D.Wis.1991).
30. The *LaShonda* Court also cited with approval *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D.Mich. 1989), a similar case. It also cited *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (C.A.4 1993), which overturned on First Amendment grounds the university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones. Cases like *IOTA XI Chapter* do not approve of "ugly woman" contests; such cases approve of the First Amendment, which allows people to say and do puerile things.
31. Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express "Bias," Including in Law-Related Social Activities*, WASH. 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=.094f10eab400](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=.094f10eab400).
32. *E.g.*, St. Thomas More Society of Orange County, <http://www.stthomasmore.net/>.
33. See *supra* note 25.
34. "Palimony" is the term used for court-ordered payments following the dissolution of nonmarital cohabitation. See Major Keith K. Hodges, *Palimony: When Lovers Part*, 102 MIL. L. REV. 85 (1983).
35. *Stropnick v. Nathanson*, 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003). The MCAD is the Massachusetts Commission Against Discrimination.
36. ABA MODEL RULE 8.4, COMMENT 4.
37. ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17, at 7. The ABA makes this point repeatedly: "The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. [It is not necessary for the complainant] to have brought and won a civil action against the respondent lawyer." *Id.* at 11. Indeed, if the complainant does use the civil courts and loses, the disciplinary authorities can still take action, because "the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context." *Id.* at 11-12.
38. Press Release, EEOC, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers (July 2016) ("EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation**. These protections apply regardless of any contrary state or local laws.") (bold in original), <https://content.govdelivery.com/accounts/USEEOC/bulletins/1567cc2>.
39. ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, at 12.
40. *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986). See also *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975), holding that a male has standing to object to the exclusion of females from his jury. The Court based its decision on the Sixth Amendment right to a jury drawn from a fair cross section of society.
41. ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17 at 1, 132.
42. ABA MISSION AND GOALS, GOAL III, [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html).
43. ABA, 1 VOICE OF EXPERIENCE (Issue 7, July 2016), [http://www.americanbar.org/publications/voice\\_of\\_experience/20160/july-2016/bog-approves-new-rules-for-diversity-in-cle-programs.html](http://www.americanbar.org/publications/voice_of_experience/20160/july-2016/bog-approves-new-rules-for-diversity-in-cle-programs.html).
44. *Id.*
45. *Id.* (emphasis added). See also Memorandum from ABA President Brown's Diversity & Inclusion 360 Commission to SOC Chairs and Chairs-Elect (Mar. 2016), [http://www.americanbar.org/content/dam/aba/administrative/public\\_contract\\_law/2016\\_agenda/pubconfpi16/2016\\_diversity\\_and\\_inclusion\\_cle\\_policy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2016_agenda/pubconfpi16/2016_diversity_and_inclusion_cle_policy.authcheckdam.pdf).
46. ABA, 1 VOICE OF EXPERIENCE, *supra* note 43.
47. ABA COMM. ON SEXUAL ORIENTATION AND GENDER IDENTITY, GOAL III REPORT FOR 2015-2016, EIGHTH ANNUAL REVIEW OF THE STATUS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARTICIPATION AT THE AMERICAN BAR ASSOCIATION, at 6, 15 (2016), [http://www.americanbar.org/content/dam/aba/administrative/sexual\\_orientation/sogi\\_2016\\_goaliii.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_2016_goaliii.authcheckdam.pdf).