

April 03, 2019

TOP STORY

# First Amendment Ruling May Affect Model Rules of Professional Conduct

Is Model Rule 8.4(g) constitutional?

By C. Thea Pitzen

Share this:



A [U.S. Supreme Court](#) case that made headlines regarding free speech rights in the context of abortion may also have far-reaching implications for ethical rules governing lawyers.



[ABA Model Rule of Professional Conduct 8.4\(g\)](#) prohibits lawyers from engaging in harassment or discrimination “in conduct related to the practice of law.” Opponents of the rule have argued that it

may violate the First Amendment. [ABA Section of Litigation](#) leaders caution that the recent ruling may strengthen such arguments.

Never break stride.

ABA members can skip the counter, pick a car and go.

Terms apply.

SIGN UP NOW

**Hertz**

## Notice Requirements Challenged on Free Speech Grounds

In [National Institute of Family and Life Advocates v. Becerra](#), the Court considered a California law that required pro-life crisis pregnancy centers to provide certain notices to women. The specific content of the notice turned on whether the center was licensed or unlicensed. Licensed facilities were required to provide certain information about free or low-cost health care, including abortions, available to state residents. Unlicensed clinics were required to notify women that the state had not licensed the clinic to provide medical services. The petitioners sued, alleging that the notice requirements violate the First Amendment. The [U.S. Court of Appeals for the Ninth Circuit](#) affirmed the lower court's denial of a preliminary injunction, finding that the petitioners could not show a likelihood of success on the merits. The appellate court found that the notice survived a lower level of scrutiny applicable to regulations of "professional speech," while the unlicensed notice satisfied any level of scrutiny.

## Court Afforded First Amendment Protection to Professional Speech

The Supreme Court reversed as to both notice requirements, noting that the appellate court did not apply strict scrutiny to the content-based licensed notice because it concluded that the notice regulated "professional speech." However, the Court explained that "this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" Applying ordinary First Amendment principles, the Court concluded that the licensed notice could not survive even intermediate scrutiny, let alone strict scrutiny.

"In some ways, this case reaffirms long-held principles in the First Amendment area," explains [Jonathan W. Peters](#), Athens, GA, chair of the First Amendment Subcommittee of the Section of Litigation's [Civil Rights Litigation Committee](#). However, the Court also made new law, finding that "professional speech does not lose its First Amendment protection and is not subject to more limited First Amendment protections simply because it is professional speech," Peters explains.

Importantly, the Court said it has never recognized “professional speech” as a unique category that would be regulated differently than other types of speech, Peters notes.

## Implications for Model Rule 8.4(g)

Model Rule 8.4(g) “is intended to combat discrimination and harassment and to ensure equal treatment under the law,” notes [Cassandra Burke Robertson](#), Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section’s Civil Rights Litigation Committee. While it serves important goals, “the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers’ speech rights—and after the Court’s decision in *Becerra*, it increasingly looks like the answer is yes,” Robertson concludes.

While only one state [has adopted Model Rule 8.4\(g\)](#), other states had pre-existing analogous rules, while some are still studying the rule. “A number of states had expressed doubts about the constitutionality of Rule 8.4(g) even before the Court’s decision in *Becerra*,” Robertson says. This decision will likely discourage other states from adopting the Model Rule, she concludes.

## Constitutional Questions After *Becerra*

After noting it has never recognized professional speech as a “separate category of speech,” the Court recognized two exceptions, observes Peters. While neither was implicated in the opinion, the second—that “States may regulate professional conduct, even though that conduct incidentally involves speech”—is relevant to the Model Rule, Peters says. The question under *Becerra* is whether “conduct related to the practice of law,” as referenced in the rule, is covered by that exception, he explains.

Ultimately, whether the Model Rule is constitutional following *Becerra* is a “close call,” Peters says. However, the breadth of the “conduct related to the practice of law” language in the rule—as well as the comments, which clarify that the rule applies to activities other than the practice of law and client representation—could have a chilling effect on attorney speech, Peters cautions.

In addition, the rule may have a vagueness problem because it does not clearly define harassment or discrimination, Peters adds. This creates room for arbitrary application, and “in doing so, it could inhibit the exercise of speech rights by causing attorneys to steer wide and clear of the line, not knowing exactly where it is drawn,” he notes. A more narrowly cabined clause and a precise definition of key terms would clarify the rule and make it more likely to survive a constitutional challenge, Peters concludes.

Some have indeed expressed concern that the comment to Model Rule 8.4(g) is overly broad and might implicate comments at, for example, a CLE program that someone regarded as discriminatory, observes [John M. Barkett](#), Miami, FL, cochair of the Section's [Ethics & Professionalism Committee](#). However, "I would be surprised that a lawyer would make offensive comments in a CLE context, so it may be that fact patterns that some have hypothesized will never occur and thus will never lead to a controversy requiring constitutional adjudication," Barkett adds.

## Key Takeaways for Litigators

"The most important takeaway from *Becerra* is that the Court has shot down the idea of a separate category for 'professional speech,'" explains Robertson. The Court clearly held that "the First Amendment offers robust protection for the speech of lawyers and other professionals," she adds. In addition, the decision is "likely to invite challenges to laws that require disclaimers or other disclosures—for example, much attorney advertising," Robertson notes. An attorney who objects to a mandatory disclosure will likely be able to argue the disclosure is "controversial," in which case *Becerra* "seems to forbid compelling its disclosure," Robertson adds.

Finally, the opinion "does not directly deal with the question of how a state should regulate misleading speech from professionals," Robertson says. "That is a problem at the heart of much of the regulation around attorney advertising, and it affects other professions as well," she adds. Attorney advertising is likely to be the subject of additional litigation in the wake of *Becerra*, Robertson concludes.

*C. Thea Pitzen* is a contributing editor for *Litigation News*.

---

Hashtags: #LegalEthics, #FirstAmendment, #freespeech

## Related Resources

- *ABA Center for Professional Responsibility Policy Implementation Committee, [Jurisdictional Adoption of Rule 8.4\(g\) of the ABA Model Rules of Professional Conduct](#) (Sept. 19, 2018).*
- Mark Walsh, "[Truth in Advertising: Court to weigh whether law aimed at crisis pregnancy centers violates First Amendment](#)," *ABA J.* (March 2018).

- [“ABA Rule 8.4 finding few followers, but sparking lots of encouraging discussion,” ABA News](#) (Aug. 3, 2018).

---

Copyright © 2019, American Bar Association. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. The views expressed in this article are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).

 **American Bar Association** |

[/content/aba-cms-dotorg/en/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond](#)