

## Texas Attorney General Urges State Bar to Reject Anti-Bias Rule

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DAVID LEE September 9, 2020

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Texas Attorney General Ken Paxton speaks at a news conference in Dallas in June 2017. (AP Photo/Tony Gutierrez, File)

AUSTIN, Texas (CN) — Texas Attorney General Ken Paxton warned the State Bar on Wednesday against further consideration of an American Bar Association anti-bias rule that deems discrimination based on gender or sexual orientation as professional misconduct, claiming the rule violates attorneys' free speech and religious rights.

Paxton, a Republican, made the warning one day before the State Bar of Texas' board of directors is to consider whether to refer [ABA Model Rule 8.4\(g\)](#) to an internal committee for possible adoption.

The rule deems it professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of ... sexual orientation, gender identity, marital status, or socioeconomic status in conduct" relating to practicing law.

Paxton concedes that attorneys' free speech rights can be limited inside the courtroom and outside when speaking about a pending case, but claims the anti-bias rule "extends far beyond the context of a judicial proceeding" to restrict speech "in any instance" regarding practicing law.

“The broad nature of the rule could apply to an attorney’s participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event, among other things,” Paxton’s [two-page letter](#) states. “In other words, Model Rule 8.4(g) will suppress thoughtful and complete exchanges about complex issues.”

The attorney general claims adoption of the anti-bias rule is not necessary, arguing that the Texas Disciplinary Rules of Professional Conduct already address discrimination issues “through narrower language that provides better clarification” about the described conduct.

“The rule could restrict an attorney’s free exercise of religion by disabling an attorney from freely participating in religious organizations that hold traditional viewpoints,” Paxton wrote. “It also could restrict an attorney’s freedom to associate with political, social or religious legal organizations.”

Paxton cited a nonbinding [advisory opinion](#) he issued in 2016 against the rule. State Senator Charles Perry, R-Lubbock, asked Paxton at the time if lawyers could be disciplined under the rule for “challenging the merits of same-sex marriage” during a legal education class, or for “being part of a legal association that holds religious beliefs that marriage is between one man and one woman and that a person’s gender is fixed at birth.”

“One commentator has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer’s statement, ‘Blue lives matter, and we should be more concerned about black-on-black-crime,’ could be subject to discipline under Model Rule 8.4(g),” the advisory opinion stated.

Paxton also pointed to the U.S. Supreme Court’s 2018 ruling in [National Institute of Family and Life Advocates v. Becerra](#). He said the high court concluded “state restrictions on ‘professional speech’ are presumptively unconstitutional,” and are subject to strict scrutiny due to the content-based restrictions on speech.

State Bar spokesman Lowell Brown said the board of directors “has not taken a position” on the rule.

“The board is receiving public comment on this issue and will carefully consider all viewpoints,” Lowell wrote in an email Wednesday afternoon.

The ABA said after Paxton’s 2016 advisory opinion that he is misinterpreting the rule.

“This proposed rule expressly states that it in no way infringes on free speech or the ability of an attorney to zealously defend any client (or choose not to defend a client) based on the client’s beliefs,” then-ABA President Linda A. Klein said at the time. “This proposed rule exemplifies the ABA’s strong policy that there is no place in the practice of law for discrimination or harassment.”

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