SUPREME COURT OF WISCONSIN

No. 22-02

In the matter of the Amendment of Supreme Court Rule SCR 20:8.4

FILED

JUL 11, 2023

Samuel A. Christensen
Clerk of Supreme Court
Madison, WI

On March 23, 2022, the State Bar Standing Committee on Professional Ethics ("Committee"), by Distinguished Clinical Professor Emeritus Ben Kempinen, Chair of the Committee, filed a rule petition asking the court to amend Supreme Court Rule ("SCR") 20:8.4(i) and replace the existing language[1] with American Bar Association ("ABA") Model Rule 8.4(g) to state:

> 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.

[1] Current SCR 20:8.4(i) states: "It is professional misconduct for a lawyer to . . . (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i)."

The petition included an extensive appendix containing feedback the Committee received, mostly in opposition to the petition.

At a closed administrative conference on May 19, 2022, the court voted to solicit written comments. The court sent letters to interested persons on July 11, 2022. Attorney Dean R. Dietrich, writing in his personal capacity, filed a comment in support of the petition on August 10, 2022. Attorney Donald Cayen filed a comment in opposition on February 23, 2023.

The court discussed the petition at a closed administrative conference on April 18, 2023, and voted to deny the petition.

Therefore,

IT IS ORDERED that rule petition 22-02, In the Matter of the Amendment of Supreme Court Rule SCR 20:8.4, is denied.

Dated at Madison, Wisconsin, this 11th day of July, 2023.

BY THE COURT:

Samuel A. Christensen
Clerk of Supreme Court

¶1 REBECCA GRASSL BRADLEY, J. *(concurring).* The State Bar of Wisconsin petitions this court to promulgate American Bar Association (ABA) Model Rule 8.4(g), a controversial model rule labeled by commentators a "lawyer speech code." Eugene Volokh, Court Strikes Down Pennsylvania Lawyer Speech Code, Volokh Conspiracy (Mar. 24, 2022, 4:45 PM).[2] The Bar has not established any need for this rule change but proposed it anyway, despite having received——before filing this petition——an extraordinary number of comments from members and concerned citizens who almost universally condemned Model Rule 8.4(g). The public expresses legitimate worries that Model Rule 8.4(g), if adopted, would prohibit affirmative action, eliminate race- and sex-based lawyer associations, chill protected speech, and weaponize the rules of professional conduct. Prudence counsels caution in the face of these possibly unavoidable but perhaps unintended consequences. I therefore respectfully concur with this court's decision to deny the petition without holding a public hearing.

¶2 The Bar proposes this court repeal SCR 20:8.4(i) and replace it with ABA Model Rule 8.4(g). SCR 20:8.4(i) states:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activity. Legitimate advocacy respecting the foregoing factors does not violate par. (i).

[2] https://reason.com/volokh/2022/03/24/court-strikes-down-pennsylvania-lawyer-speech-code/.

Model Rule 8.4(g) profoundly expands this existing definition of professional misconduct. It provides:

> 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.

While SCR 20:8.4(i) covers only harassment, Model Rule 8.4(g) would add "discrimination" to the definition of misconduct, significantly expand the list of protected classes, and introduce a "reasonably should know" standard. Notably, the Bar does not ask this court to adopt the comments associated with Model Rule 8.4(g) or incorporate them into the text of the rule itself. This court has a longstanding practice of not adopting comments——the text of the rule is the rule. See SCR 20 pmbl. [14] ("Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules."); id. pmbl. Wis. cmt. ("These comments are not adopted, but will be published and may be consulted for guidance[.]"). Nonetheless, the comments often are treated as persuasive.

¶3 SCR 20:8.4(i) has served this state well; the Bar does not argue otherwise. This court promulgated the rule in 2007. S. Ct. Order 04-07, 2007 WI 4 (issued Jan. 5, 2007, eff. July 1, 2007). After nearly two decades, the Bar does not identify a single

instance in which an attorney engaged in unprofessional conduct that was not subject to discipline under SCR 20:8.4(i) but would have been under ABA Model Rule 8.4(g). The Bar also does not offer any empirical evidence demonstrating a widespread——or even an isolated——discrimination problem within the Wisconsin legal community. No survey results, observational studies, data on discrimination lawsuits or Office of Lawyer Regulation complaints. Nothing. When the ABA adopted Model Rule 8.4(g), it desired to create a "cultural shift"——"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." Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 8.4-2(j)-2 (2021-22). "When the ABA proposed . . . [Model Rule 8.4(g)], it did not offer any examples in its [r]eport of the failure of the old [c]omment." Id.

¶4 This court's limited lawmaking power should not be used to virtue signal or conduct unnecessary social experiments. See virtue signaling, Merriam-Webster (last updated Mar. 30, 2023) ("[T]he act or practice of conspicuously displaying one's awareness of and attentiveness to political issues, matters of social and racial justice, etc., especially instead of taking effective action[.]").[3] Venerable wisdom counsels that "[n]o alteration should be made in a law without sufficient reason." See Montesquieu, The Spirit of the Laws ch. XVI (1748).

[3] https://www.merriam-webster.com/dictionary/virtue%20signaling.

¶5 Potential unintended consequences of promulgating ABA Model Rule 8.4(g) abound. Attorney Thomas E. Spahn, an expert on legal ethics, expressed particular caution about the adverse impact on affirmative action within the legal profession:

> Many of us . . . either explicitly or sub silentio treat[] race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes—but it is nevertheless discrimination. In every state that adopts the new . . . Model Rule 8.4(g), . . . [this] will become an ethics violation.

Thomas E. Spahn, Civil Rights and Diversity: Ethics Issues 10 (2018). He also explained Model Rule 8.4(g) would seemingly prohibit "women-only bar groups or networking events" and "conferences limited to . . . LGBT lawyers." Id. at 9–10. After all, the rule is a "flat prohibition" on "discrimination on the basis of race, sex, or any of the other listed attributes." Id. at 8. This prohibition "extends to any lawyer conduct 'related to the practice of law,'" which under comment [4] to Model Rule 8.4(g) includes "'operating or managing a law firm or law practice; and participating in bar association' activities." Id. at 9 (quoting Model Rule 8.4(g) & cmt. [4]).

¶6 ABA Model Rule 8.4(g) does not define "discrimination." Comment [3] notes, "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice toward others," but as indicated by the word "includes," this comment "does not purport to define discrimination, or limit its definitional

reach[.]" Id. at 7 (quoting Model Rule 8.4(g) cmt. [3]); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012) ("The verb to include introduces examples, not an exhaustive list.").

¶7 The last sentence of Comment [4] does not address these possible unintended consequences. It states: "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." ABA Model Rule 8.4(g) cmt. [4]. The "plain language" of Model Rule 8.4(g), however, cannot be "surreptitiously" overridden "by using a code word" like diversity or inclusion. Spahn, Civil Rights and Diversity, at 9. This sentence does not——indeed, it could not——permit affirmative action or other "activities permitting discrimination on the basis of the listed attribute"; rather, it merely clarifies that non-discriminatory "efforts to promote diversity and inclusion" are permissible. Id. For example, encouraging applicants of all backgrounds to apply for a position is obviously permissible. Additionally, "[t]here are numerous types of diversity and inclusion that have nothing to do with . . . Model Rule 8.4(g)'s listed attributes." Id. "[E]xamples include political viewpoint diversity, geographic diversity, and law school diversity. Comment [4] allows such diversity and inclusion efforts. Those types of diversity and inclusion efforts would not involve discrimination prohibited in the black letter rule." Id.

¶8 The actual consequences of ABA Model Rule 8.4(g) are largely unknown because the rule has been adopted only recently and in just two states——New Mexico and Vermont. Margaret Tarkington, Reckless Abandon: The Shadow of Model Rule 8.4(g) and A Path Forward, 95 St. John's L. Rev. 121, 122 n.9 (2021). Model Rule 8.4(g) was not even approved by the ABA until 2016. Id. at 121. Maine and Pennsylvania adopted variants of Model Rule 8.4(g); however, the Pennsylvania variant never went into effect. Id. at 144 n.117. A federal district court held it violated the First Amendment to the United States Constitution. Greenberg v. Haggerty, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

¶9 A majority of the comments submitted to the Bar opposed Wisconsin becoming a testing ground for ABA Model Rule 8.4(g). A number of concerns were raised, but one in particular is especially compelling: the chilling effect Model Rule 8.4(g) would have on speech.

¶10 The Christian Legal Society commented: "Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree." See also Rotunda & Dzienkowski, Legal Ethics, § 8.4-2(j)-1 (2021–22) ("We live in an era where many are anxious to control what we say, because language reflects and molds how we think, becoming, in the parlance of the day, 'politically correct.'"). Empirical evidence corroborates this comment. Support for free speech has ebbed to an unsettling low. Currently, more than seventy percent of Americans "believe that political

correctness has . . . silence[d] important discussions our society needs to have." Emily Ekins, The State of Free Speech and Tolerance in America, CATO Inst. (Oct. 31, 2017).[4] Even so, nearly forty percent of Americans believe the "[g]overnment should prevent people from engaging in hate speech . . . in public." Id. Unsurprisingly, Americans cannot agree on the definition of hate speech. Twenty-seven percent consider the statement "police are racist" to be hate speech. Id. Forty percent would categorize the statement "all white people are racist" as hate speech. Id. Fifty-three percent of self-identified conservatives "favor stripping U.S. citizenship from flag burners," and fifty-nine percent of self-identified liberals favor "a law that requires people refer to a transgender person by their preferred gender pronouns and not according to their biological sex." Id. The classic liberal mantra of "I disapprove of what you say, but I will defend to the death your right to say it" is withering. See S.G. Tallentyre, The Friends of Voltaire 198–99 (1906).

¶11 A recent event in Minnesota, brought to our attention by several Wisconsin attorneys, illustrates well the concern of the Christian Legal Society. In May 2018, the Minnesota Lavender Bar Association (MLBA)——a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies——objected to an accredited continuing legal education (CLE) presentation titled "Understanding and Responding to the

[4] https://www.cato.org/survey-reports/state-free-speech-tolerance-america.

Transgender Moment."[5] A Roman Catholic law school co-sponsored the CLE, which addressed transgender issues from a Roman Catholic perspective. Nothing about the presentation was outside the mainstream of legal and political discourse. Among other arguments, MLBA maintained the CLE violated ABA Model Rule 8.4(g)——never mind that Minnesota had not and has not adopted Model Rule 8.4(g). In response to MLBA's objection, the CLE accrediting body revoked CLE credit for the presentation——retroactively——reportedly for the first time in Minnesota's history. Barbara L. Jones, CLE Credit Revoked, Minn. Law. (May 28, 2018).[6] Ironically, neither MLBA nor the CLE accrediting body seemed to recognize Model Rule 8.4(g)'s prohibition of discrimination on the basis of religion.

¶12 The Christian Legal Society disclosed that "[s]ome lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike." These concerns were echoed by Attorney Daniel Suhr, a respected member of the Wisconsin Bar, who documented multiple instances of "cancel culture" infecting attorney regulating systems. For example, "[g]un rights advocates sought disbarment of then-U.S. Attorney General Eric Holder for his role in the 'Fast and Furious' operation and subsequent congressional review." Additionally, "[t]housands of lawyers and law students signed a petition calling for the ethics authorities in Missouri, Texas, and the District of Columbia to

[5] The presentation can be viewed at: https://www.youtube.com/watch?v=LbGZnnSIjbA&t=1s.

[6] https://minnlawyer.com/2018/05/28/in-a-first-cle-credit-revoked/.

disbar U.S. Senators Ted Cruz and Josh Hawley for their decision to contest the certification of certain electoral votes."

¶13 As Attorney Suhr explained:

> [T]hese . . . complaints . . . reflect a worrisome trend within the profession towards the weaponization of the . . . discipline process. Simply being subject to a filed complaint leads to negative media coverage and can cost large sums to defend. Even a complaint dismissed as frivolous can follow an attorney around for the rest of a career.

The rules of professional conduct must not become a "blunderbuss," wieldable by anyone with a political agenda designed to suppress attorneys' sincerely-held moral convictions. See Wis. Jud. Comm'n v. Woldt, 2021 WI 73, ¶55, 398 Wis. 2d 482, 961 N.W.2d 854 (Rebecca Grassl Bradley, J., concurring/dissenting) (quoting Ronald C. Rotunda, Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code, 34 Hofstra L. Rev. 1337, 1341 (2006)). The Preamble to the Rules of Professional Conduct states, "[an attorney] is . . . guided [not by codified law alone but also] personal conscience[.]" SCR 20 pmbl. [7]. Attorneys must not "become a group of thoroughly orthodox, time-serving, government-fearing individuals[.]" In re Anastaplo, 366 U.S. 82, 115–16 (Black, J., dissenting).

¶14 Against this backdrop, broadening SCR 20:8.4 to conform with the ABA's model rule would chill speech. Attorneys often must discuss difficult and sensitive topics, potentially offending ever-evolving sensibilities. Michael McGinniss, Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession, 42 Harv. J.L. & Pub. Pol'y 173, 249 (2019) (noting a

"diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests 'bias or prejudice,' is 'demeaning' or 'derogatory' because disagreement is deemed offensive, or is considered intrinsically 'harmful' or as reflecting adversely on the 'fitness' of the speaker'"). Problematically, ABA Model Rule 8.4(g) does not define "discrimination," but comment [3] vaguely notes it includes "harmful verbal or physical conduct that manifests bias or prejudice toward others." As Christian Legal Society argued, "'verbal conduct,' of course, is a euphemism for 'speech.'" Consider ABA Model Rule 8.4(g)'s application to a reasonable hypothetical offered by a reputable law professor: "one lawyer tells another, in connection with a case, 'I abhor the idle rich. We should raise capital gains taxes.'" Ron Rotunda, Op. Ed., The ABA Overrules the First Amendment: The Legal Trade Association Adopts a Rule to Regulate Lawyers' Speech, Wall St. J. (Aug. 16, 2016, 7:00 PM).[7] This lawyer, through verbal conduct, just manifested bias based on socioeconomic status, a protected class. Id.

¶15 Another law professor, who is generally reputed as among the preeminent First Amendment scholars, provided a similarly troubling hypothetical:

> [S]ay that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters——Islam,

[7] https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

> evangelical Christianity, black-on-black crime, illegal immigrants, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a . . . complaint.
>
> . . . [Y]ou've engaged in "verbal . . . conduct" that . . . [someone] sees as "manifest[ing] bias or prejudice" and thus as "harmful." That was at a "social activit[y] in connection with the practice of law."

Eugene Volokh, A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-related Social Activities, Volokh Conspiracy (Aug. 10, 2016, 8:53 AM).[8]

¶16 Whether Wisconsin's Office of Lawyer Regulation would prosecute complaints of this nature and if it did whether this court would impose discipline is largely beside the point. Non-frivolous complaints could be filed against attorneys for innocuous conduct, which would present a constitutional problem regardless of how those complaints might be resolved. See generally Rotunda & Dzienkowski, Legal Ethics, § 8.4-2(j)-2 (observing "[t]he language the ABA has adopted in [Model] Rule 8.4(g) and its associated [c]omments are similar to laws that the [United States] Supreme Court has invalidated on free speech grounds"); Andrew F. Halaby & Brianna L. Long, New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship, 41 J. Legal Prof. 201, 257 (2017) (explaining Model Rule 8.4(g) raises "unanswered questions," including questions related to free speech and recommending "jurisdictions asked to adopt it should think long

[8] https://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann/.

and hard about whether such a rule can be enforced, constitutionally or at all").

¶17 For all of these reasons, ABA Model Rule 8.4(g) is constitutionally suspect. Under well-established precedent, the First Amendment "gives significant protection from overbroad laws that chill speech[.]" Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002). Whatever else Model Rule 8.4(g) may be, it is overbroad, and "[t]he government may not suppress lawful speech as the means to suppress unlawful speech." Id.; see also ABA Model Rule of Professional Conduct 8.4(g) and LSBA Proposed Rule 8.4(g) Violate the First and Fourteenth Amendments of the United States Constitution, 17 La. Att'y Gen. Op. 0114, at 6 (Sept. 8, 2017) (concluding Model Rule 8.4(g) violates the First Amendment);[9] Whether Adoption of the American Bar Association's Model Rules of Professional Conduct 8.4(g) Would Constitute Violation of an Attorney's Statutory or Constitutional Rights, Tex. Att'y Gen. Op. KP-0123, at 4 (Dec. 20, 2016) ("[A]n attorney operating under Model Rule 8.4(g) may feel restricted from taking a legally supportable position due to fear of reprimand . . . . Such restrictions would infringe upon the free speech rights of members of the State Bar[.]").[10] "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, 371 U.S. 415 (1963) (citations omitted); see also Ramsey v.

[9] https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf.

[10] https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2016/kp0123.pdf.

Bd. of Prof'l Resp. of the Sup. Ct. of Tenn., 771 S.W.2d 116, 121 (Tenn. 1989) ("[W]e must ensure that lawyer discipline, as found in Rule 8 . . . , does not create a chilling effect on First Amendment rights.").

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¶18 Wisconsin joins a growing number of states that have declined to adopt ABA Model Rule 8.4(g). Tarkington, Reckless Abandon, at 145 ("Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee have all formally rejected the Rule[.]"). Respect for the free speech rights of Wisconsin lawyers compels denial of the Bar's petition. I respectfully concur with the court's order because ABA Model Rule 8.4(g) is constitutionally suspect and would weaponize Wisconsin's professional rules of conduct against Wisconsin lawyers.

¶19 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice PATIENCE DRAKE ROGGENSACK join this concurrence.

¶20 REBECCA FRANK DALLET, J. *(dissenting).* The State Bar Standing Committee on Professional Ethics spent more than a year reviewing the antidiscrimination rules of other jurisdictions and soliciting input from State Bar committees before petitioning the court to adopt ABA Model Rule 8.4(g). The petition spurred a vigorous debate: legal organizations and attorneys across Wisconsin submitted hundreds of pages of commentary both for and against the proposed rule. Those in favor contend the rule "will strengthen and improve how harassing and discriminatory conduct by Wisconsin lawyers is addressed." Those who oppose the rule——and there are many——argue that the proposed rule is unconstitutional, might chill attorneys' speech, and could have unintended consequences. In short, there is major disagreement over the merit of adopting the proposed rule.

¶21 As this extensive discourse illustrates, the petition has "arguable merit." IOP.IV.A. Thus, we should hold a public hearing in accordance with our internal operating procedures. See id. Moreover, a public hearing would give us the opportunity to engage meaningfully and transparently with the arguments for and against the adoption of this proposed rule. Because the court instead dismisses the petition without a hearing, I respectfully dissent.

¶22 I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFSKY join this dissent.