

# RETHINKING PENNSYLVANIA RULE OF PROFESSIONAL RESPONSIBILITY 8.4(G): CONCEPTUAL AND STRATEGIC CHANGES TO SURVIVE STRICT SCRUTINY\*

## I. INTRODUCTION

Rule 8.4(g) of Pennsylvania’s Rules of Professional Conduct states that it is professional misconduct for a lawyer to, “in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status.”<sup>1</sup>

This rule—Pennsylvania’s progeny of the American Bar Association’s (ABA) Model Rule 8.4(g)—has ignited public debate: weighing the First Amendment’s protections for political expression against the need for state bar association regulations on attorneys to ensure the integrity of the judicial system, a system which has never been more threatened.

In detailing the history of Pennsylvania rule 8.4(g), its legal precedent, and its precarious future, Section II of this Comment surveys several significant Supreme Court cases concerning the constitutional protections for free speech under the First Amendment. More specifically, Part II.B categorizes the corresponding standards of constitutional scrutiny that are triggered when a law is classified as content neutral, content discriminatory, or viewpoint discriminatory. Considering other context relevant to rule 8.4(g), Part II.C addresses the analysis used for reviewing restrictions on the government’s own speech. Looking deeper, Part II.C.4 dissects a few select cases defining—or rather failing to define—the specific free speech rights of lawyers. These cases illustrate how classification becomes increasingly complex when considering speech restrictions imposed by state bar associations on attorneys. Part II.D describes the political backdrop and recent case law surrounding Pennsylvania rule 8.4(g).

Section III of this Comment argues that the existing Supreme Court precedent provides a path for amendments or changes that may better protect the future of Pennsylvania rule 8.4(g) if (or rather when) it faces another constitutional challenge. These changes will not make Pennsylvania rule 8.4(g) perfect; however, these changes might just prevent the rule from triggering the most stringent and least survivable level of constitutional scrutiny, thus bolstering the chances that a future reviewing court will interpret the rule as having a sufficiently narrow scope.

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1. 204 PA. CODE § 8.4(g) (2025).

While these measures remain vitally important, the real change in fate for Pennsylvania rule 8.4(g) will only come from a conceptual change in the way attorneys and their free speech rights are viewed. This Comment argues that attorneys must be treated as they are: acting arms of the American court system.

## II. OVERVIEW

### A. *The Ultimate Utility of Speech: A Theory of First Amendment Jurisprudence*

The First Amendment says that “Congress shall make no law . . . abridging the freedom of speech.”<sup>2</sup> But despite the First Amendment’s constitutional importance and cultural staying power,<sup>3</sup> equally well-known is the reality that the right to free speech is not absolute (after all, everyone knows you cannot falsely yell fire in a crowded theater).<sup>4</sup> While this common refrain is largely considered a misrepresentation of First Amendment analysis,<sup>5</sup> its ubiquity<sup>6</sup> highlights a collective cultural understanding that the First Amendment’s protection of free speech is context dependent.<sup>7</sup> This conditional lens and its constitutionality are derived from an understanding that the First Amendment’s free-speech clause was not crafted to simply promote “freedom” but to promote the societal benefits of free speech.<sup>8</sup>

As illustrated by the Supreme Court’s doctrine, the history of America’s conception of free speech is built upon a kind of utilitarian perspective,<sup>9</sup> centering the benefits of free-flowing communication to “promote effective democratic government.”<sup>10</sup> The

2. U.S. CONST. amend. I, § 1.

3. See, e.g., Zach Smith, ‘South Park’ Reminds Us Everyone’s Freedom of Speech and Expression Are Protected Under the 1st Amendment, ODYSSEY (Oct. 8, 2017), <https://www.theodysseyonline.com/south-park-1st-amendment> [<https://perma.cc/34WM-U45W>].

4. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

5. See Carlton F.W. Larson, “Shouting ‘Fire’ in a Theater”: *The Life and Times of Constitutional Law’s Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 183 (2015) (describing, in part, how the very basis of the paraphrased quote differs from Justice Holmes’s intended meaning).

6. See Robert Shibley, *Walz/Vance VP Debate Another Reminder It’s Time To Extinguish the ‘Fire in a Crowded Theater’ Trope*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Oct. 2, 2024), <https://www.thefire.org/news/walz-vance-vp-debate-another-reminder-its-time-extinguish-fire-crowded-theater-trope> [<https://perma.cc/3R45-6ACW>] (discussing the use of the theater paraphrase during the 2024 vice presidential debate).

7. *Schenck*, 249 U.S. at 52 (holding, in part, that the determination of whether the First Amendment protects a party’s speech depends on “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger” that the government has the right to prevent by regulation); *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006) (Breyer, J., dissenting) (“I begin with what I believe is common ground: . . . [J]udges must apply different protective presumptions in different contexts.”); *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 432 (1992) (Stevens, J., concurring) (describing that the classification of speech as fighting words is determined in part by their context).

8. See LAURA E. LITTLE, *EXAMPLES & EXPLANATIONS FOR FIRST AMENDMENT 3* (2021) (“The most frequently touted value animating strong protection for freedom of communication is the need to promote effective democratic government. . . . This instrumental and utilitarian view of freedom of [speech] focuses on what good the freedom can achieve.”).

9. *Id.*

10. *Id.*

limiting, censoring, or silencing of speech—particularly of speech critical of the ruling regime—was understood by the Founders to be an explicit tool used by the British monarchy to stem dissent.<sup>11</sup> This underpinning of theory distills the rationale for the Court’s application of various levels of constitutional scrutiny when evaluating government restrictions.

## B. Understanding Free Speech Scrutiny

### 1. “Low-Value Speech”: A Kind of Rational Basis Review

Because utilitarian theory holds that society benefits from free speech, one appropriate mode of constitutional analysis for a government regulation on speech depends (at least in part) on the societal benefit of the type of speech affected.<sup>12</sup> Seeing that “[t]he First Amendment generally prevents the government from proscribing speech,” government restrictions are only allowable on those limited categories of speech that are seen as providing minimal social benefit.<sup>13</sup> These forms of “low-value speech” include fighting words,<sup>14</sup> some forms of defamation,<sup>15</sup> and obscene or profane speech.<sup>16</sup> Because of their seemingly limited societal benefits, these forms of speech are often set outside of the scope of complete constitutional protection and can be regulated, and these regulations can be reviewed under a much less demanding standard because these forms of speech are not considered essential to the functioning of a working democracy.<sup>17</sup> The constitutionality of government restrictions on such forms of speech may be analyzed under a kind of rational basis analysis, as the government must only prove that its restriction is reasonable given its application to only low-value speech.<sup>18</sup>

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11. See Marci A. Hamilton, *The First Amendment’s Challenge Function and the Confusion in the Supreme Court’s Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 85 (1994) (discussing how eighteenth-century Americans were united by a fear of tyranny).

12. See LITTLE, *supra* note 8, at 3. “It is widely accepted today that the First Amendment guarantee of freedom of speech does not apply—or applies only weakly—to ‘low-value’ categories of speech.” Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015) (challenging this assumption, Professor Genevieve Lakier notes that this line of thinking is the standard and dominant analysis for free speech doctrine).

13. See *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 382 (1992).

14. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

15. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 258 (1952); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

16. See, e.g., *Roth v. United States*, 354 U.S. 476, 485 (1957); *Miller v. California*, 413 U.S. 15, 37 (1973) (discussing lower constitutional protections for profane or “patently offensive” speech).

17. See Lakier, *supra* note 12, at 2171–72 (arguing against the dominant theory that without the distinction between high- and low-value speech the government’s ability to “maintain basic standards of public conduct,” “impose criminal sanctions on speech that facilitates . . . criminal behavior,” or regulate the commercial market would be seriously impeded).

18. See *R.A.V.*, 505 U.S. at 388 (“Such a [governmental] reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.”).

## 2. Content-Neutral Time, Place, and Manner Restrictions: Intermediate Scrutiny

The government may also “regulate speech indirectly” by regulating the circumstances in which speech is expressed.<sup>19</sup> Again derived from a utilitarian perspective, restrictions on the time, place, or manner of expression allow the government to regulate speech under the guise of decreasing public disturbance and ensuring safety. Such regulations are often used to “regulate the use of government property for speech purposes.”<sup>20</sup> However, because these regulations may necessarily restrict some forms of expression or limit a speaker’s access to a public audience, the constitutional protections of the First Amendment must be weighed against the government’s interest in regulating the speech.<sup>21</sup> Upon a constitutional challenge, the government must prove that its restriction on the time, place, or manner of speech (1) is “appropriately limited” to serve a significant state interest, (2) is truly intended to only regulate the circumstances of the expression, and (3) leaves “ample alternative channels for communication.”<sup>22</sup> Additionally, these restrictions must be truly content-neutral regulations (such as banning marches on a main road during rush hour traffic) for courts to analyze them under intermediate scrutiny.<sup>23</sup> Conversely, courts are especially suspicious of, and more strictly scrutinize, restrictions that are triggered by the subject matter or content of speech (such as banning marches on a main road if related to Black Lives Matter).<sup>24</sup>

## 3. Subject-Matter/Content-Based Discrimination: Strict Scrutiny

The level of analysis of time, place, and manner restrictions shows that while the government may regulate a mode of expression, it must do so evenhandedly, with no distinction or discrimination made based on the *subject matter* being expressed by the speech.<sup>25</sup> Put another way, government regulations on communications must be based only on the category or circumstance of the speech and not the *content* the speech seeks to express.<sup>26</sup> As one scholar puts it, “[subject-matter-based restrictions] . . . are a form of censorship and carry the appearance that the government is attempting to take particular subject matters out of the marketplace of ideas.”<sup>27</sup> Because of this concern, content-based restrictions are considered presumptively unconstitutional,<sup>28</sup> and such government restrictions on speech must be evaluated by the courts under strict scrutiny.<sup>29</sup> Under this

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19. LITTLE, *supra* note 8, at 21.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.* at 12.

24. *See id.*

25. *See id.* at 21.

26. *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 384 (1992).

27. LITTLE, *supra* note 8, at 11.

28. *R.A.V.*, 505 U.S. at 382.

29. *See* LITTLE, *supra* note 8, at 12–13.

exacting standard, the government must prove the regulation serves a compelling state interest and that the restriction is narrowly tailored to serve that interest.<sup>30</sup>

This standard of scrutiny, the definition of subject-matter discrimination, and the application of reasonable restrictions on low-value speech may be better demonstrated by comparing two Supreme Court cases regarding government restrictions on cross burning. In *R.A.V. v. City of Saint Paul*, Saint Paul’s ordinance regulating cross burning was found to be content based and facially unconstitutional.<sup>31</sup> In contrast, in *Virginia v. Black*, the Supreme Court held that a state statute against the same act could be constitutional—under the right circumstances.<sup>32</sup> The deciding difference, as described by the Court, lies in the breadth of the regulation’s restrictions.

First, in *R.A.V.*, the Supreme Court overturned the conviction of a white man who burned a cross on a Black family’s lawn.<sup>33</sup> Although the Court expressed (mild) disdain for the racist prejudices expressed by the convicted petitioner, the Court emphasized that—separate from his actions—his personal beliefs were constitutionally protected.<sup>34</sup> The city ordinance that was used to prosecute the petitioner specifically restricted the use of intentionally threatening symbols of expression such as cross burning and swastikas.<sup>35</sup> But “[t]he ordinance did not cover ‘[t]hose who wish to use “fighting” words [(burn crosses)] in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality.’”<sup>36</sup> Therefore, the city ordinance was triggered by the *subject matter* that the cross burning was meant to convey, thus constituting a content-based restriction.<sup>37</sup>

In comparison, the state statute at issue in *Black* outlawed the act of cross burning with the intent to intimidate *regardless* of the “victim’s race, gender, or religion,”<sup>38</sup> thus regulating the action of cross burning as intimidation in general, no matter the identity of the intended target.<sup>39</sup> The Court noted that the Virginia statute’s broad phrasing did not mean that the regulation could be considered content neutral, but only that—when evenly applied—the statute did not violate the First Amendment.<sup>40</sup> Because the Court considered the act of cross burning with the proven intent to intimidate as a “true

30. *See id.* at 11.

31. *R.A.V.*, 505 U.S. at 395–96.

32. *Virginia v. Black*, 538 U.S. 343, 367 (2003); *see also id.* at 361–62 (“The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V. v. City of Saint Paul* . . . to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree. . . . Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate.”).

33. *R.A.V.*, 505 U.S. at 379, 396.

34. *Id.* at 396.

35. *Id.* at 380.

36. *Black*, 538 U.S. at 361 (second alteration in original) (quoting *R.A.V.*, 505 U.S. at 391).

37. *R.A.V.*, 505 U.S. at 381.

38. *Black*, 538 U.S. at 362.

39. *Id.* (comparing Virginia’s statute outlawing cross burning with the intent to intimidate to the City of Saint Paul’s ordinance, “Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with the intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward” one of a few statutory specified groups).

40. *See id.* at 362–63.

threat,”<sup>41</sup> a state could regulate such actions because true threats, as a category of speech, are not protected by the First Amendment.<sup>42</sup> True threats, like fighting words, constitute a category of speech that serves no—or exceedingly limited—societal benefit, and traditionally true threats do not receive protection under the First Amendment.<sup>43</sup> However, the same conduct under a different context, such as cross burning for the purpose of sending a political message, or as part of a performance piece, would be considered a protected form of speech under the First Amendment.<sup>44</sup>

This dichotomy in the Court’s analysis demonstrates that content-based discrimination,<sup>45</sup> generally involves a government restriction on particular content within speech or an act of expression,<sup>46</sup> such as cross burning. While generally disfavored and subject to strict scrutiny,<sup>47</sup> some *categories of content*,<sup>48</sup> such as fighting words<sup>49</sup> or true threats,<sup>50</sup> may fall outside of First Amendment protections and can be prohibited.<sup>51</sup> This caveat is permissible “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, [and] no significant danger of idea or viewpoint discrimination exists.”<sup>52</sup>

#### 4. Viewpoint Discrimination: Severe Strict Scrutiny

However, if a government regulation on speech holds even the *potential* for viewpoint discrimination, courts apply strict scrutiny with “particular vigor.”<sup>53</sup> Referred to as “severe strict scrutiny,”<sup>54</sup> this (often amorphous) level of analysis is an exceptionally heightened form of constitutional scrutiny that almost no government

41. *Id.* at 359–60 (describing a “true threat” as a statement that the speaker intends to communicate their intention to harm an individual or group of individuals and includes threats made to intimidate the target of the speech even if the speaker does not intend to carry out the threatened action). Due to the history of cross burning in the country, the Court found that the action is often intimidating and intended to create fear in victims. *Id.*

42. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

43. *See id.* at 363 (“The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because [it] is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages ...”).

44. *Id.* at 365–66 (striking down the prima facie provision of Virginia’s prohibition on cross burning, finding that such a blanket application would chill constitutionally protected political speech, such as when the burning of a cross may be used not to intimidate but to express a statement of ideology, a symbol of a group, or when used for metaphorical or literary purposes such as in movies or a stage play).

45. *Id.* at 361.

46. *See* LITTLE, *supra* note 8, at 13.

47. *Id.* at 11 (clarifying, as one scholar describes it, “once a court labels a restriction as content based, the court will evaluate the restriction with strict scrutiny”).

48. *See* *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 382–86 (1992) (recounting the “few limited” categories and respective cases in which restrictions on the content of speech have been permitted, such as obscenity, defamation, and fighting words).

49. *See id.*; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

50. *See Black*, 538 U.S. at 359–60.

51. *Id.* at 359.

52. *Id.* at 361–62 (quoting *R.A.V.*, 505 U.S. at 388).

53. *See* LITTLE, *supra* note 8, at 11.

54. *See id.* at 12.

regulation can be expected to survive.<sup>55</sup> This extreme level of scrutiny is triggered in part because viewpoint discrimination is considered to be particularly “egregious,”<sup>56</sup> and is a presumptively impermissible form of content discrimination.<sup>57</sup> Again, harkening back to the aforementioned utilitarian values of the First Amendment and the marketplace of ideas, this heightened analysis stems from the Court’s often quoted doctrine that “a fundamental principle of the First Amendment [is] that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.”<sup>58</sup>

While partly discussed in *R.A.V.*,<sup>59</sup> this distinction between content discrimination and its more egregious cousin, viewpoint discrimination, may be better dissected in the Court’s decision in *Matal v. Tam*.<sup>60</sup> In *Matal*, the plaintiff filed an application with the Patent and Trademark Office (PTO) to register a racial epithet as a federally recognized and protected trademark.<sup>61</sup> The PTO rejected the plaintiff’s application based on a federal trademark law provision prohibiting the registration of trademarks that “disparage . . . persons, living or dead.”<sup>62</sup> Although this anti-disparagement provision was likely originally created in good faith,<sup>63</sup> the Court held that the PTO’s restriction blatantly violated free speech protections.<sup>64</sup> Although the restriction applied equally to trademarks held by “damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue,”<sup>65</sup> the Court concluded that whether a trademark is offensive, no matter to whom, “is a viewpoint.”<sup>66</sup> And to discriminatorily reject federal trademark registration based on this viewpoint would be preemptively unconstitutional.<sup>67</sup> The Court held that the government’s stated compelling interest in the trademark defamation provision did not, and likely never could, satisfy strict scrutiny as

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55. *See id.*

56. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

57. *Id.* (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”).

58. *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring) (citing *Rosenberger*, 515 U.S. at 828–29). However, recent government actions under President Donald Trump’s second administration have abandoned this principle entirely, leading to policies and government actions that directly target and punish citizens and institutions for speech that the administration disapproves of. *See Vera Eidelman & Ben Wizner, Protecting Free Speech in the Face of Government Retaliation*, ACLU (Sep. 18, 2025), <https://www.aclu.org/news/free-speech/protecting-free-speech-in-the-face-of-government-retaliation> [<https://perma.cc/YGT4-R5G3>].

59. *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 391 (1992) (describing that due to the City of Saint Paul’s ordinance only applying to certain disfavored groups, in practice the regulation went “beyond mere content discrimination, to actual viewpoint discrimination”).

60. 582 U.S. 218, 234 (2017).

61. *Id.* at 232–33. The plaintiff attempted to trademark the name of his all-Asian American rock band, “The Slants,” arguing that their use of the term was an attempt to reclaim an insult once used against them and their ancestors. *Id.*

62. *Id.* at 231 (omission in original) (internal quotation mark omitted) (quoting 15 U.S.C. § 1052(a)).

63. *See id.* at 228.

64. *See id.* at 243–44.

65. *Id.* at 243.

66. *Id.*

67. *Id.* at 243–44.

the restriction offended “a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”<sup>68</sup>

### C. *Compounding Conditions: Changing the Speaker and Purpose*

Present in this discussion of First Amendment jurisprudence is a basic outline of how a court’s constitutional analysis changes depending on contextual factors.<sup>69</sup> These factors, as discussed, include whether (1) the restriction curtails low-value categories of speech,<sup>70</sup> (2) the restriction is triggered by the speech’s content/subject matter,<sup>71</sup> or (3) the restriction could be seen as curtailing a specific viewpoint.<sup>72</sup> While all such restrictions are still subject to First Amendment concerns, courts generally consider these conditions with continually heightening suspicion, moving from intermediate to strict, and eventually “severe” strict scrutiny.<sup>73</sup>

#### 1. Specialized Analysis for Government Speech

However, the constitutional analysis changes again if the roles are reversed: when restrictions are placed on the speech of the government. The three-factor test for what can be considered government speech is “(1) whether the government has traditionally used the message or conduct at issue to speak to the public; (2) whether persons would interpret the speech as conveying some message on the government’s behalf; and (3) whether the government maintains control over the selection of the message.”<sup>74</sup>

When government speech is regulated, most free speech protections do not apply.<sup>75</sup> This reversal in standards is allowable because, in the Court’s perspective, it is “the democratic electoral process that first and foremost provides a check on government speech,”<sup>76</sup> not the First Amendment. Again, centering utilitarian perspectives, the Court has long held that applying content and viewpoint neutral requirements to government speech would make successful governing nearly impossible, stating, “[i]t is not easy to imagine how [the] government could function if it lacked th[e] freedom to select the messages it wishes to convey.”<sup>77</sup>

68. *See id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

69. *See R.A.V. v. City of Saint Paul*, 505 U.S. 377, 432 (1992) (Stevens, J., concurring) (describing that the classification of speech as “fighting words is determined in part by their context”); *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006) (Breyer, J., dissenting) (“I begin with what I believe is common ground: . . . [J]udges must apply different protective presumptions in different contexts.”).

70. *See R.A.V.*, 505 U.S. at 388 (“Such a [governmental] reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.”).

71. *See id.* at 383–86 (recounting the “few limited” categories and respective cases in which restrictions on the content of speech have been permitted, such as obscenity, defamation, and fighting words).

72. *See Matal*, 582 U.S. at 243–44.

73. LITTLE, *supra* note 8, at 12.

74. *Id.* at 191.

75. *See id.*

76. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

77. *Id.* at 208 (third alteration in original) (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467–68 (2009)).

## 2. When Individuals Speak on Behalf of the Government

However, just because the “government can speak for itself”<sup>78</sup> regardless of neutrality requirements, does not mean it can do so without restriction.<sup>79</sup> Showcasing the complexities of the doctrine, again, there are context-dependent caveats to this rule. Government communications are often carried out by individuals—government employees—in their capacity as parts of larger institutions.<sup>80</sup> In First Amendment cases involving government-imposed speech restrictions on government employees, courts must arrive at a balance between protecting the free speech interests of the private citizens employed by the government and the government’s interest in promoting the efficiency of the “public services it performs through its employees.”<sup>81</sup> While thousands of attorneys across America are directly employed by the government,<sup>82</sup> even more in the private sector carry out public services for the government via their work in the judicial system.<sup>83</sup>

On balance, the Court has upheld the vast majority of speech-restrictive conditions on government employees, finding that the “First Amendment does not protect government employee speech” so long as the restricted expression takes place while the employee is on the job and speaking within the scope of the employee’s duties.<sup>84</sup> While at first glance this rule may appear evenhanded, under this test, government employees may still be subject to “extreme” restrictions on their speech as a condition of their employment.<sup>85</sup> As the Court emphasized in *Garcetti v. Ceballos*, “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom,”<sup>86</sup> because the First Amendment interests of the government potentially at stake may “extend beyond the individual speaker.”<sup>87</sup> The Court explained that “[g]overnment employers . . . need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”<sup>88</sup> Emphasizing this effect on the public, the Court clarified that “[p]ublic employees . . . often occupy trusted positions in society. When they speak out, they can

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78. *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

79. *Id.*

80. See Julia Griffis & Taran Harmon-Walker, *When Government Employees Are Not Allowed To Speak to the Media*, FIRST AMEND. CLINIC: UNIV. OF GA. SCH. OF L. (May 4, 2021), <https://firstamendment.law.uga.edu/work/when-government-employees-are-not-allowed-to-speak-to-the-media/> [<https://perma.cc/R8NY-JDML>].

81. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

82. See Rob Chestnut, *As Lawyers Exit Government Service, Don’t Overlook the Potential*, BLOOMBERG L. (Jan. 27, 2025, at 04:30 ET), <https://news.bloomberglaw.com/us-law-week/as-lawyers-exit-government-service-dont-overlook-the-potential> (on file with the Temple Law Review). Roughly forty-four thousand lawyers are employed by the federal government alone, although there may be fewer these days. *Id.*

83. See *infra* Section III for further discussion on attorneys’ roles in the judicial system.

84. LITTLE, *supra* note 8, at 223.

85. *Id.*; see also Griffis & Harmon-Walker, *supra* note 80 (describing that although a majority of federal employees have no official duties that require or involve speaking with the media, many public employees are restricted from speaking to the press as a condition of their employment with the government).

86. *Garcetti*, 547 U.S. at 418.

87. *Id.* at 419.

88. *Id.* at 418.

express views that contravene governmental policies or impair the proper performance of governmental functions.”<sup>89</sup>

Because of the high value placed on effective control of government communication, government employees who wish to challenge a violation of their free speech rights by their employer must first clear several hurdles.<sup>90</sup> First, the employee must have been “off-duty” when the speech at issue occurred.<sup>91</sup> A government employee’s duty includes any task that is a part of their official job responsibilities, meaning any accompanying speech pursuant to those duties is not protected under the First Amendment.<sup>92</sup> However, if the speech was not a part of their professional responsibilities, the employee is considered to have communicated within their capacity as a private citizen.<sup>93</sup> Second, the employee must prove that their government employer took adverse action against them because of their off-duty speech.<sup>94</sup> If these first conditions are successfully established, the employee must then also show that the off-duty speech they were reprimanded for (1) “involve[d] matters of public concern”<sup>95</sup> and (2) “that the employee’s interest in exercising freedom of expression outweighs the government’s interests as an employer.”<sup>96</sup>

What can be considered a “matter of public concern” (or conversely, matters of personal or workplace interest) is contrasted clearly in the Court’s analysis in *Connick v. Myers*.<sup>97</sup> *Connick* concerned a questionnaire distributed by a (arguably disgruntled) government-employed attorney to her fellow staff members.<sup>98</sup> In general, the Court found that the content of the questionnaire did not constitute a matter of public concern, as the majority of the questions pertained to employee grievances (for example, asking about employees’ personal levels of trust in various supervisors) and was sent with the communicative purpose of organizing a vote of no confidence against a specific supervisor.<sup>99</sup> Therefore, the questionnaire was a matter of “private expression”<sup>100</sup> since the employee did not “seek to bring to light actual or potential wrongdoings or breach of public trust” on the part of the government employer.<sup>101</sup> Additionally, if the questionnaire was released to the public, its information would likely not have been of any interest to

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89. *Id.* at 419.

90. LITTLE, *supra* note 8, at 223.

91. *Id.*

92. *See Garcetti*, 547 U.S. at 418.

93. *Id.* at 423.

94. LITTLE, *supra* note 8, at 223.

95. *Id.* If the answer to this condition is no, the employee has no First Amendment cause of action based on the employee’s reaction to the speech. *Garcetti*, 547 U.S. at 419.

96. *Id.*

97. 461 U.S. 138, 147–48 (1983).

98. *Id.* at 141.

99. *Id.* at 148 (“[T]he focus of Myer’s questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee’s dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre.”).

100. *See id.* at 152–53 (stating that the time, manner, and place that the employee’s questionnaire was distributed was also an important factor because such “[p]rivate expression . . . may in some situations bring additional factors to the *Pickering* calculus” (quoting *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979))).

101. *Id.* at 148.

the community.<sup>102</sup> However, the Court found that further analysis of the employee’s First Amendment claim was required as to one question within the questionnaire.<sup>103</sup> The question asked if her fellow government attorneys had “ever fe[lt] pressured to work in political campaigns on behalf of office supported candidates.”<sup>104</sup> Because such official pressure, if proven, would have constituted “a coercion of belief in violation of fundamental constitutional rights”<sup>105</sup> and would be a “matter of interest to the community,”<sup>106</sup> the Court found that this specific question was a matter of public concern such that the government employees needed to be able to speak freely on the matter “without fear of retaliatory dismissal.”<sup>107</sup>

However, this finding was only a “threshold inquiry.”<sup>108</sup> After meeting this threshold, a government employee’s interest in expressing matters of public concern must be balanced against, and must eventually outweigh, the government’s interest in “effective and efficient fulfillment of its responsibilities to the public.”<sup>109</sup> Because of the perceived utility to the general public by implementing the government’s interests, the Court held that “the government, as an employer, must have *wide discretion* and control” over its staff and its communications.<sup>110</sup> This balancing test, referred to as the *Pickering* calculus,<sup>111</sup> looks to the “content, form, and context of a given statement as revealed by the whole record,” but ultimately gives wide deference to the government as an employer to regulate employees’ speech as a condition of their employment.<sup>112</sup>

### 3. Speech for “Professional” Purposes

These considerations, although exacting, do indicate the Court’s interest in marking some kind of dividing line between (1) the constitutional protections afforded to the speech of private citizens versus government employees, (2) statements made in one’s own personal capacity versus in a professional context, and (3) communications for the office space versus ideas for the marketplace.

Such distinctions are equally important for professionals who work in the private sector but are still subject to government regulations on their professional speech.<sup>113</sup> In abstract, just as professionals need the freedom of speech to effectively communicate complex subject matters, counsel their clients or patrons on sensitive issues, or debate

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102. *Id.*

103. *Id.* at 149.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 150.

109. *See id.*

110. *Id.* at 151 (emphasis added) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

111. *Id.* at 153; *Pickering v. Bd. of Educ. of Twp. High School Dist. 205*, 391 U.S. 563, 568 (1968) (“The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”).

112. *Connick*, 461 U.S. at 147–48.

113. *See LITTLE, supra* note 8, at 223.

the pros and cons of particular courses of action, there appears to be general consensus that *some* regulations are warranted given the profound responsibilities professionals can hold over the clients they speak for and with.<sup>114</sup> Again, looking towards values of efficiency, truth, and societal benefits, the constitutional considerations of government regulations on professional speech can be seen as an attempt to balance the protection of the theoretical marketplace of ideas with the economic marketplace of goods and services.<sup>115</sup> Government regulations on professional speech can come in the form of licenses, malpractice insurance requirements, and advertising restrictions.<sup>116</sup> Such regulations are fairly ubiquitous for many professionals,<sup>117</sup> including lawyers,<sup>118</sup> and in the context of nongovernment employment, are evaluated under standard First Amendment analysis.<sup>119</sup> Although the permissibility of restrictions on professional speech has developed considerably over time,<sup>120</sup> recent rulings<sup>121</sup> arising from the current conservative-majority Supreme Court<sup>122</sup> have emphasized that “professional speech” cannot be considered a fully separate or lower category of speech.<sup>123</sup> In other words, government-imposed content-based restrictions on professional speech must survive strict scrutiny all the same.<sup>124</sup>

This change in doctrine can be seen best in *National Institute of Family & Life Advocates v. Becerra*.<sup>125</sup> In *Becerra*, the Court considered the constitutionality of a California law<sup>126</sup> that could compel prenatal clinics (including largely antiabortion affiliated, unlicensed “crisis pregnancy centers” designed to discourage or prevent pregnant individuals from accessing abortions) to post certain notices in public view as a condition of lawful practice.<sup>127</sup> State-licensed clinics were required to notify patrons

114. Claudia Haupt, *Professional Speech*, 125 YALE L. J. 1238, 1242 (2016) (“Imposing professional malpractice liability has never been found to offend the First Amendment.”).

115. See *id.* at 1243–44 (discussing a kind of “epistemic marketplace” that is generated by the testing of the insights of a profession through communications within the professional-client relationship and regulated by rules such as professional malpractice liability).

116. *Id.* at 1240.

117. For a short list of the many professions that are governed by some form of regulating body backed by federal, state, or local government, see *Associations of Regulatory Boards*, COUNS. ON LICENSURE, ENF’T & REG., <https://www.clearhq.org/ARB> [<https://perma.cc/M3C2-YDDB>] (last visited Mar. 18, 2026).

118. *Lawyer Licensing*, A.B.A., [https://www.americanbar.org/groups/legal\\_services/flh-home/flh-lawyer-licensing/?login](https://www.americanbar.org/groups/legal_services/flh-home/flh-lawyer-licensing/?login) [<https://perma.cc/UL7M-PK LX>] (last visited Mar. 22, 2026) (“Lawyers are licensed by a state agency in each state.”).

119. See LITTLE, *supra* note 8, at 223.

120. See, e.g., Ashutosh Bhagwat, *A Brief History of the Commercial Speech Doctrine (With Some Implications For Tobacco Regulation)*, 2 HASTINGS SCI. & TECH. L.J. 103, 105 (2010); Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. CHI. L. REV. 955, 956 (2017).

121. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018).

122. See Ron Elving, *How the Supreme Court’s Conservative Majority Came To Be*, NPR (July 1, 2023, at 10:00 ET), <https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush> [<https://perma.cc/WQ2B-8VRH>].

123. *Becerra*, 138 S. Ct. at 2371–72.

124. *Id.* at 2368–69.

125. *Id.* at 2368.

126. *Id.*

127. *Id.*

that “California provides free or low-cost services, including abortions, and a number to call.”<sup>128</sup> Conversely, “[u]nlicensed clinics” were required to “notify women that California ha[d] not licensed the clinics to provide medical services” such as sonograms.<sup>129</sup> The Court ultimately sided with the petitioner—an unlicensed, antiabortion associated pregnancy center—positing that the notice “provide[d] a government-drafted script” containing information about “state sponsored services.”<sup>130</sup> By requiring these unlicensed clinics to post notices containing information about how patients could obtain subsidized abortions, while the clinic attempted to dissuade a pregnant person from such a procedure, the Court held that the notice “plainly ‘alter[ed] the content’ of the petitioners’ speech.”<sup>131</sup>

The Supreme Court split from the position taken by several circuit courts that previously held that professional speech could be considered a middle-value category of speech.<sup>132</sup> For many decades preceding *Becerra*, professional and/or commercial speech was treated by federal courts as more beneficial than, say, obscene language, but less useful to the marketplace of ideas than political speech,<sup>133</sup> meaning that *some* government restrictions on professional speech could avoid triggering review under strict scrutiny.<sup>134</sup> Striking down this theory, Justice Thomas<sup>135</sup> explained the Court’s reluctance “to mark off new categories of speech for diminished constitutional protection”<sup>136</sup> as well as its specific aversion to “exempt[ing] a category of speech from the normal prohibition on content-based restrictions.”<sup>137</sup> In part, Justice Thomas argued that such a categorical approach was unworkable because “professional speech” could not be defined with precision.<sup>138</sup> Surveying lower courts’ precedent,<sup>139</sup> the Court parsed that the precedential category of a “professional” seemed to simply mean anyone providing “personalized services and require[d] a professional license from the state.”<sup>140</sup> Justice Thomas hypothesized that under this definition, a state could reduce a professional’s First Amendment rights and engage in invidious discrimination under the guise of a licensing requirement.<sup>141</sup> Bolstered by these hypothesized harms, and with a clear political viewpoint at issue in the *Becerra* case, Justice Thomas confirmed his

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128. *Id.*

129. *Id.*

130. *Id.* at 2371.

131. *Id.* (citing *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988)).

132. *Id.*

133. *Id.* at 2366; *see, e.g.*, *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014).

134. *Becerra*, 138 U.S. at 2371.

135. Notably, Justice Thomas has been known to take an absolutist view on the First Amendment, including arguing that campaign finance restrictions are “grossly unconstitutional” forms of speech restriction. *See* David L. Hudson Jr., *Clarence Thomas*, FREE SPEECH CTR. (Mar. 31, 2025), <https://firstamendment.mtsu.edu/article/clarence-thomas/> [<https://perma.cc/98YT-WB5L>].

136. *Becerra*, 138 S. Ct. at 2372 (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996)).

137. *Id.* (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion)).

138. *Id.* at 2375.

139. *Id.* (citing *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013)).

140. *Id.*

141. *Id.* (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–24 (1993)).

position that professional speech had not been and therefore could not be considered a separate category of speech spared from traditional free speech analysis.<sup>142</sup>

But importantly, the Court did not fully close the door to the creation, or recognition, of professional speech as a category of communication worthy of differing constitutional consideration. The Court explained that while “neither California nor the Ninth Circuit ha[d] identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles[,] [w]e do not foreclose the possibility that some such reason exists,”<sup>143</sup> such that in the appropriate context, context-specific regulations of professional speech could be found constitutional.

Peripherally to this point, while the Court noted that there is no “tradition[al] . . . category called ‘professional speech,’”<sup>144</sup> it caveated there are in fact two previously recognized circumstances when restriction on professionals’ speech may only face intermediate scrutiny<sup>145</sup>: (1) laws that require professionals to disclose factual information in their “commercial speech” about the services they provide in a manner that is not “unduly burdensome,”<sup>146</sup> and (2) regulations of professional conduct that only “incidentally involve speech.”<sup>147</sup>

#### 4. Professionals of the Court: Restrictions Regarding Lawyers’ Speech

The case law regarding lawyers’ free speech rights straddles these discussed positions. Like many other professions, the practice of law requires a great deal of speech, in various forms, on a variety of topics, and for a plethora of purposes.<sup>148</sup> In this light, it appears difficult to conceptualize regulations on the practice of law that could only “incidentally involve[] speech”<sup>149</sup> and could therefore avoid heightened constitutional scrutiny. Yet regulations and requirements set by state bar associations that attorneys must follow to be lawfully licensed to conduct their practice are just as ubiquitous to the legal profession as speech.<sup>150</sup> This appears to be a potentially confusing juxtaposition: Despite the multitudinous ways speech restrictions may trigger strict scrutiny, a surprisingly large number of state-enforced regulations on the practice of law survive constitutional review. To better understand this, one might look to Supreme Court cases that directly dissect the free speech rights of lawyers, the rationale of these

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142. *Id.*

143. *Id.*

144. *Id.* at 2372.

145. *Id.*

146. *Id.*

147. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

148. See generally Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 J. LEGAL WRITING INST. 63 (2016) (discussing the breadth of regulations on attorneys’ written and oral communications).

149. *Becerra*, 138 S. Ct. at 2372 (citing *Casey*, 505 U.S. at 884).

150. See Cassius Gates, *The Lawyer and Coordination of the Bar*, 40 COM. L.J. 649, 649 (1935) (discussing the earliest formations of state bar association and the codifications of codes of professional conduct); *Model Rules of Conduct – Table of Contents*, A.B.A., [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/?login](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/?login) [https://perma.cc/87LE-NL2Q] (last visited Mar. 22, 2026).

cases, and the Court’s reliance on the previously discussed principles and theoretical positioning.

In one conception, the practice of law can be viewed as the most classical representation of public discourse, frequently challenging the state itself, and zealously advocating political positions both within the courtroom and the conceptual marketplace of ideas.<sup>151</sup> In this view, it seems that the practice of law might be best served by allowing attorneys to act free of any state control and by ensuring lawyers are entitled to the same free speech protections as any private citizen.<sup>152</sup> And yet, simultaneously, lawyers are also often considered “delegates of state power” who act as officers of the court, hold state-issued licenses, and arguably obtain certain professional privileges and access in exchange for conditions on their free speech.<sup>153</sup> All the while, the legal profession—whether acting as political speech or serving as an extension of the judicial system—exists within the scope of a capitalist system, necessitating lawyers to spend a substantial amount of their breath on acquiring business via commercial speech and solicitation.<sup>154</sup>

The cases discussed below detail these positions and shed light on the conflicting pressures that must be considered when analyzing regulations on lawyers’ professional speech.

*a. NAACP v. Button, 371 U.S. 415 (1963)*

Amidst the height of the civil rights movement, segregationist Virginia lawmakers used the guise of preventing unfair competition amongst attorneys to pass a law prohibiting the exact form of “solicitation of legal business” the state’s NAACP chapter was known to use to find, fund, and organize legal actions to desegregate Virginia’s school system.<sup>155</sup> Upon reviewing Virginia’s solicitation restriction under the strictest standard of constitutional scrutiny, the Supreme Court in *NAACP v. Button*, maintained that (at the time of the case)<sup>156</sup> solicitations were wholly outside the scope of protected speech under the First Amendment.<sup>157</sup> However, in providing its reasoning the Court

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151. See John Bliss, *Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis*, 42 L. SOC. INQUIRY 855, 857 (2016).

152. See Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998).

153. *Id.*

154. See *Legal Services Advertising*, AM. TORT REFORM ASS’N, <https://www.atra.org/issue/legal-services-advertising/> [https://perma.cc/V9FT-M97B] (last visited Mar. 18, 2026); *Plaintiffs’ Attorneys Spend Big on Campaigns and Advertising in PA!*, PA COAL. FOR CIV. JUST. REFORM (May 19, 2024), <https://paforciviljusticereform.org/2024/05/19/plaintiffs-attorneys-spend-big-on-campaigns-and-advertising-in-pa/> [https://perma.cc/TLA9-XVZ8]; Catherine Lovering, *The State of Advertising for Legal: 2024*, MARTINDALE AVVO (Aug. 15, 2024), <https://www.martindale-avvo.com/blog/the-state-of-advertising-for-legal-2024/> [https://perma.cc/U6KQ-686M].

155. *NAACP v. Button*, 371 U.S. 415, 423–27 (1963).

156. Restrictions on solicitation by lawyers have been found unconstitutional in cases where no secondary political motive for the state’s law can be found. See generally *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (finding that only advertising for legal services that is misleading or false can be regulated as a time, place, and manner restriction).

157. *Button*, 371 U.S. at 429.

explained that “to this contention there are two answers”<sup>158</sup>: (1) states cannot restrict protected speech simply by mislabeling it, and (2) the First Amendment specifically protects “vigorous advocacy” through this country’s legal system as a form of “political expression.”<sup>159</sup> Therefore, the Court found the state regulation unconstitutional not because it regulated lawyers’ professional speech, but rather because it regulated and foreclosed a form of political speech by the insidious misuse of “mere labels.”<sup>160</sup> This case expresses two themes seemingly in tension with each other: an openness to the conceptual, evenhanded policing of legal professionalism, and an imperative to ensure such regulations are not simply policies that curtail political speech by limiting a group’s access to the legal system.<sup>161</sup>

*b. Konigsberg v. State Bar of California, 353 U.S. 252 (1957)*

The Court has also provided some prose on lawyers’ First Amendment protections when applying for state bar licensure.<sup>162</sup> While affirming the constitutionality of the California State Bar Association’s “moral character” requirement, the Court in *Konigsberg v. State Bar of California* found that inquiring into an applicant’s political beliefs and associations was irrelevant for the matter of bar admission and ultimately unconstitutional.<sup>163</sup> Focusing on the California State Bar Association’s ultimate result and rationale—rather than its requirement of a moral character test itself—the Court held that the plaintiff’s refusal to confirm his past membership with the Communist Party of America and his published writings in a local newspaper (criticizing, among other things, the country’s involvement in the Korean War and the capitalist leanings of both major political parties) were not rational grounds to restrict his admission to the state bar for reasons of bad moral character.<sup>164</sup>

Like the Court’s response to the intersection of the legal profession and politics during the civil rights era in *Button*,<sup>165</sup> in response to the second Red Scare,<sup>166</sup> the Court in *Konigsberg* attempted to strike a balance between respecting government regulations on the legal profession and protecting the speech of legal practitioners.<sup>167</sup> Importantly, while California’s interest in creating “a bar [association] composed of lawyers of good character”<sup>168</sup> was found to be a sufficiently compelling reason to allow for some

158. *Id.*

159. *Id.*

160. *Id.* at 429–30.

161. See Sullivan, *supra* note 152, at 557–71.

162. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 267, 273 (1957).

163. *Id.* at 273–74.

164. *Id.* at 270–71, 273 (“As we said before, the mere fact of Konigsberg’s past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character.”).

165. *Button*, 371 U.S. at 415.

166. See Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN’S L. REV. 121, 126 (2021) (describing *Konigsberg* and a case decided the same year, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 246–47 (1957), also involving a former member of the Communist Party as the Court’s response to the “second Red Scare”).

167. *Konigsberg*, 353 U.S. at 273.

168. *Id.*

regulation of applicants, the Court concluded that presumptions of character based on one's political views and criticism of the government cannot "be reconciled with our national constitutional standard of freedom of speech."<sup>169</sup>

While the case states no specific standard of scrutiny, importantly, the Court seemingly treated *Konigsberg* as an "as applied" challenge, rather than upending the California State Bar Association's moral character test entirely by, say, treating moral character tests as viewpoint discrimination (even though it is unclear how "moral" character could not be a subjective determination).<sup>170</sup> This divergence, as well as the Court's affirmation of the "importance of leaving States free to select their own bars"<sup>171</sup> can be interpreted to indicate that more deference may be given to regulations on lawyers' speech as a condition of their status as officers of the court or delegates of state power,<sup>172</sup> under a similar theory underpinning the government's ability to restrict and regulate its own speech, or the speech of its employees.<sup>173</sup>

c. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)

In a similar vein, the Court has codified that once barred, the privileges, access, and authority conferred to lawyers by their connection to the courts can serve as cause to impose greater "obligations of expressive restraint."<sup>174</sup> In *Gentile v. State Bar of Nevada*,<sup>175</sup> the Court affirmed that the ABA's Model Rule 3.6 (prohibiting an attorney from making public "extrajudicial statement[s] . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding")<sup>176</sup> and other similar prohibitions on attorneys' speech are not "necessarily flawed."<sup>177</sup> Such a speech restriction could even be considered *necessary* because a lawyer's status as an officer of the court grants them the privilege of special access to information that, if widely shared, could pose a serious threat to the fairness of a pending proceeding as the general public could consider the lawyer's words especially authoritative, potentially tainting the jury pool before they are even selected.<sup>178</sup>

However, this conceptual application of Model Rule 3.6 notwithstanding, the Court in *Gentile* simultaneously noted that Nevada and its bar association failed to "demonstrate[] any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny."<sup>179</sup> Therefore, applying strict scrutiny, the Court quickly dismissed Nevada's interpretation and implementation of Model Rule 3.6.<sup>180</sup> The Court cited that the regulation, as implemented by the State Bar of Nevada,

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169. *Id.* at 269.

170. *See id.* at 273.

171. *Id.*

172. *See Sullivan*, *supra* note 152, at 584.

173. *Id.*

174. *Id.* at 574.

175. 501 U.S. 1030, 1036 (1991).

176. *Id.* at 1033 (quoting Nevada Supreme Court Rule 177(1), which is "almost identical" to ABA Model Rule of Professional Conduct 3.6).

177. *Id.* at 1036.

178. *See id.*

179. *Id.* at 1055.

180. *Id.* at 1049.

was far from sufficiently narrowly tailored because its regulation encompassed speech that, if publicly shared, would not risk the fairness of a trial and therefore functionally limited protected political speech.<sup>181</sup>

Yet despite admonishing the provided record and the rule as applied, as well as espousing strong statements regarding the importance of reviewing speech restrictions under stringent scrutiny, the Court again confirmed that arguments differentiating lawyers' speech from the general public's and that allow for greater regulatory obligations on officers of the court are far from moot. Rather than contending that all regulations on attorneys' speech are wholly unconstitutional, the Court carefully noted only that "[t]he [*Gentile*] case [was] a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statement[s]."<sup>182</sup>

#### D. 8.4(g): From Model Rule to Pennsylvania's Most Recent Decisions

So, what then does this mess of precedent mean for the fate of the ABA's Model Rule 8.4(g)? And from that, what might be the fate of the version adopted by the Pennsylvania State Bar Association? To better understand the implications of the aforementioned First Amendment precedent, our interpretation must also consider the political conversations, cultural movements, and the history of the ABA's Model Rules that predated Pennsylvania rule 8.4(g).

##### 1. Model Rule 8.4(g)'s Purpose and Early Political Pushback

As amended in 2016, the ABA's Model Rule of Professional Conduct 8.4(g) added a new definition of professional misconduct and additional grounds for potential disciplinary action against an attorney.<sup>183</sup> In its model form, the Rule reads:

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.<sup>184</sup>

The 2016 amendment specifically made three changes to the original Model Rule 8.4 as first adopted by the ABA in 1983.<sup>185</sup> First, when adding subsection (g), the 2016 amendment also added a new "knowledge component" prohibiting conduct a lawyer "knows or reasonably should know" to be discriminatory or harassing.<sup>186</sup> Second, it

181. *See id.* at 1058.

182. *Id.* at 1057.

183. Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working To Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, A.B.A.: UNDER CONSTR. (Mar. 12, 2019) (on file with the Temple Law Review).

184. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (A.B.A. 2016).

185. Kubes et al., *supra* note 183.

186. *Id.*

expanded the classes protected from discrimination and harassment.<sup>187</sup> Third, the amendment broadened the application of the rule to apply when a lawyer is engaged in all “conduct related to [the] practice of law,” rather than only its conduct “related to the administration of justice.”<sup>188</sup> Proponents of the Model Rule firmly argued that the additional parameters of harassing or discriminating speech in a broader scope of settings—including those outside the courthouse, such as at continuing learning events (CLEs), firm dinners, “and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law”<sup>189</sup>—were necessary additions to address systemic problems of sexual harassment and discrimination in the legal profession.<sup>190</sup>

Yet still, this new Rule has also always had its opponents. Since its inception, Model Rule 8.4(g) has raised serious First Amendment concerns.<sup>191</sup> The question is this: Do lawyers agree to limit some exercise of their freedom of speech for the privilege of practicing law and, if so, to what extent can their speech be reasonably regulated by state bar associations and/or other governing bodies? This question has triggered a plethora of scholarly debate<sup>192</sup> and diverging reactions from state bar associations,<sup>193</sup> courthouses,<sup>194</sup> and attorneys across the nation.<sup>195</sup>

Like many of the other cases discussed before, the new professional standards posed by Model Rule 8.4(g), and its subsequent backlash, can be viewed as a direct response to the political issues of the time.<sup>196</sup> Model Rule 8.4(g), and its expansion of protected

187. *Id.*

188. *Id.*

189. David L. Hudson Jr., *States Split on New ABA Rule Limiting Harassing or Discriminatory Conduct*, A.B.A. J. (Oct. 1, 2017, at 2:30 CT) (citation omitted), [https://www.abajournal.com/magazine/article/ethics\\_model\\_rule\\_harassing\\_conduct](https://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct) [<https://perma.cc/P8QG-SCAC>].

190. *Id.* (“There are enough incidents of sexual harassment that make [Rule 8.4(g)] important for the profession to have largely what is a symbolic statement.”). *See also* Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, A.B.A. (Oct. 2018) (on file with the Temple Law Review) (“Drafters of Model Rule 8.4(g) heard from female lawyers who represent other women lawyers in harassment and discriminatory complaints against their employers. . . . [T]he ABA was told of illegal and inappropriate harassment taking place at firm outings, dinners[,] and bar association events . . .”).

191. Rendleman, *supra* note 190.

192. *See* George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 135, 135 (2018) (discussing the constitutional and political backdrop of Model Rule 8.4(g)); Michael Ariens, *Anti-Discrimination Ethics Rules and the Legal Profession*, 50 HOFSTRA L. REV. 501, 509 (2022). *See generally* *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (responding to increasing panic against communist ideals during the McCarthy era and second Red Scare).

193. Allison L. Wood, *What Is ABA Model Rule 8.4(g), Why Is It So Controversial and How Did Illinois Respond?*, 45 S. ILL. U. L.J. 589, 596 (2021). The bar associations of Arizona, Louisiana, Montana, South Carolina, Tennessee, and Texas have rejected adoption of Model Rule 8.4(g) for First Amendment concerns. *See id.*

194. *See, e.g.*, *Cerame v. Slack*, 123 F.4th 72, 83 (2d Cir. 2024) (allowing a pre-enforcement challenge of Connecticut’s version of Model Rule 8.4(g) on First Amendment grounds).

195. *See, e.g.*, Olivia K. Leary, *What Should We Do with Harassing, Abusive Opposing Counsel? A Female Litigator’s Perspective*, PLAINTIFF MAG. (Jan. 2024), <https://plaintiffmagazine.com/recent-issues/item/what-should-we-do-with-harassing-abusive-opposing-counsel> [<https://perma.cc/QT66-QNAH>].

196. *See generally* *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (responding to increasing panic against communist ideals during the McCarthy era and second Red Scare); *NAACP v. Button*, 371 U.S. 415 (1963) (addressing efforts by state governments to fight against desegregation during the civil rights era); Matal

classes against harassment or discrimination, was viewed by many as the ABA's response to calls for increased diversity, equity, and inclusion (DEI) efforts from the guiding legal establishment.<sup>197</sup> Due to these tensions, the timing of Model Rule 8.4(g)'s release by the ABA, and the politicization of the practice of law in general, have led many supporters of Model Rule 8.4(g) to believe that the outspoken rebuke of Model Rule 8.4(g) was not based on the rule's legality, but rather the unfortunate fate of the ABA's efforts being "sucked into the national partisan political morass."<sup>198</sup>

But despite the plethora of ink spilled on what some have described as the ABA's "culture war" pet project,<sup>199</sup> it is important to note that Model Rule 8.4(g) is just that—a model. And while currently only two states have adopted the rule in its original form,<sup>200</sup> just shy of a majority of states have either (1) codified an amended version of the rule in their own codes of professional legal ethics or (2) promulgated rules of professional conduct that address the same goals of Model Rule 8.4(g) by updating their preexisting statutes that sanction lawyers who engage in such conduct.<sup>201</sup>

## 2. The Path to the Present: Pennsylvania Rule of Professional Conduct 8.4(g)

Following the adoption of Model Rule 8.4(g) by the ABA in 2016, the approval and adoption process in Pennsylvania quickly began to stall and inspire strife.<sup>202</sup> While historically Pennsylvania has adopted its own state-specific codes of legal ethics in exact symmetry, or close similarity, to the ABA's Model Rules (so as to "promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction"),<sup>203</sup> the Pennsylvania Disciplinary Board openly rejected the prospect of complete adoption of the Model Rule as written, citing First Amendment concerns.<sup>204</sup> These concerns mostly echoed the national discussion of the Model Rule's potential constitutional pitfalls, ultimately culminating in a years-long process of several altered and alternative versions of the rule being published for public comment, facing intense criticism, and ultimately being cast aside by the Pennsylvania Supreme Court.<sup>205</sup> From one failed version to the next, the drafters spent significant time attempting to find the "sweet spot" of the rule's appropriate scope: changing the rule's mens rea requirement and nexus, its definition of "in the practice of law," and the classes and characteristics protected under the rule.<sup>206</sup>

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v. Tam, 582 U.S. 218 (2017) (indicating, arguably, the rise of the "new right" conservative majority on the Supreme Court and their interest in pushing free speech absolutism).

197. Nellie Q Barnard & Christopher Heredia, *Efforts Toward Improved Diversity and Inclusion Through the Anti-Bias Rule*, FED. BAR ASS'N (Dec. 15, 2021), <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/> [<https://perma.cc/JJ7N-GUZY>].

198. Rendleman, *supra* note 190.

199. Tarkington, *supra* note 166, at 124.

200. *Id.* at 122. As of 2023, Vermont and New Mexico have "adopted Rule 8.4(g) as promulgated by the ABA." *Id.*

201. Alex B. Long, *Discrimination, Model Rule 8.4(g), and the ABA's Quixotic Quest for Uniformity*, 81 WASH. & LEE L. REV. 1551, 1557 (2024).

202. Thomas G. Wilkinson Jr., *Pennsylvania's New Disciplinary Rule Prohibiting Harassment and Discrimination in the Practice of Law*, 95 PA. BAR ASS'N Q. 55, 69 (2024).

203. *Id.*

204. *Id.* at 70.

205. *See id.* at 69.

206. *Id.* at 69–74.

After nearly four years, and three reworked versions, the Pennsylvania Supreme Court approved the Pennsylvania Disciplinary Board's proposed rule change to Pennsylvania rule 8.4(g).<sup>207</sup>

Pennsylvania's rule differed from the ABA's Model Rule in several ways such as (1) limiting the potentially covered conduct from that "relat[ing] to the practice of law" to conduct "in the practice of law," (2) heightening the mens rea requirement by "excluding inadvertent or negligent conduct" from the rule's coverage, (3) solidifying the definition of harassment and discrimination by imposing the terms as understood under preexisting substantive law, and (4) omitting certain forms of conduct that the ABA's Model Rule qualified as harassing.<sup>208</sup>

### 3. The Constitutional Challenge to Pennsylvania Rule 8.4(g)

#### *a. Greenberg v. Haggerty, 491 F. Supp. 3d 12 (E.D. Pa. 2020)*

Despite the lengthy approval process and careful considerations leading up to the Supreme Court of Pennsylvania's initial approval of Pennsylvania rule 8.4(g), the constitutional critiques persisted.<sup>209</sup> Almost as soon as it was approved by the court, in August of 2020, Pennsylvania-based lawyer Zachary Greenberg, a self-proclaimed First Amendment advocate with the nonprofit group the Foundation for Individual Rights in Education (FIRE),<sup>210</sup> challenged the constitutionality of the newly adopted Pennsylvania rule 8.4(g).<sup>211</sup> In his pre-enforcement challenge, Greenberg sought both declaratory and injunctive relief, claiming that the new rule was unconstitutionally vague and infringed on his free speech rights as an attorney.<sup>212</sup> Greenberg argued he had sufficient standing to pursue his suit because Pennsylvania rule 8.4(g), if adopted, would force him to self-censor his speech during CLE presentations and other speaking events related to First Amendment jurisprudence, religious liberty, online hate speech, or other controversial topics—so as to avoid disciplinary action for being incorrectly "perceive[d] as . . . manifest[ing] bias or prejudice."<sup>213</sup> While Greenberg cited a plethora of First Amendment cases in support of his claim, his initial complaint provided no examples of

207. *Id.* at 77.

208. *Id.* at 80–81.

209. See Zachary Greenberg, *In Striking Down Pa. Rule 8.4(g), Federal Court Affirms that Lawyers Have First Amendment Rights*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Dec. 17, 2020), <https://www.thefire.org/news/blogs/eternally-radical-idea/striking-down-pa-rule-84g-federal-court-affirms-lawyers-have> [<https://perma.cc/VBG5-XP7G>].

210. Foundation for Individual Rights in Education's (FIRE) primary work focuses on promoting free speech in public schools and on college campuses, and the organization reports its mission as one to "defend and sustain the individual rights of all Americans to free speech and free thought" through civil liberties litigation. *Free Speech Makes Free People*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/> [<https://perma.cc/M5KG-ZL9G>] (last visited Mar. 22, 2026). Of particular interest to the author, FIRE's 2025 College Free Speech Rankings ranked Temple University 204th out of 257 schools. *2025 College Free Speech Rankings*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://rankings.thefire.org/campus/216339-temple-university?demo=all&year=2025> [<https://perma.cc/A2BV-CD2G>] (last visited Mar. 19, 2026).

211. See Memorandum in Support of Motion for Preliminary Injunction at 1–2, *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2022) (No. 20-cv-03822).

212. *Id.* at 3.

213. *Id.* at 16.

state bar disciplinary actions taken against lawyers for controversial speech.<sup>214</sup> Rather, his filing included many examples of speakers in *other* professions being publicly criticized for seemingly intolerant statements.<sup>215</sup> Again, turning to the contemporary political landscape of the time, 2020 saw a sharp rise of these “call outs” of public professionals for what some considered unsavory remarks or conduct, as well as a rise in the public’s awareness and use of the phrase “cancel culture” to describe this phenomenon.<sup>216</sup> Similarly, Greenberg joined the national conversation surrounding the ABA’s Model Rule 8.4(g). In an email to members of the First Amendment Lawyers Association, he affirmed that his suit was not only meant to enjoin Pennsylvania rule 8.4(g) but also to serve as “a shot across the bow to other states as they consider adopting the rule.”<sup>217</sup>

Greenberg initially succeeded in his suit.<sup>218</sup> In the decision penned by Judge Kenney (released on the same day that Pennsylvania rule 8.4(g) was scheduled to take effect), the court announced that Greenberg not only faced a sufficiently imminent threat of prosecution,<sup>219</sup> but that Pennsylvania rule 8.4(g) posed a larger threat to attorney autonomy.<sup>220</sup> Judge Kenney emphasized his investment in the cause through his characterization of the issue, stating, “[r]ule 8.4(g)[] . . . will hang over Pennsylvania attorneys like the sword of Damocles.”<sup>221</sup>

Judge Kenney’s initial opinion described at length the constitutional pitfalls of Pennsylvania rule 8.4(g) and what the court viewed as the rule’s incongruence with First Amendment jurisprudence.<sup>222</sup> The court identified (1) what kind or kinds of speech would be potentially regulated by Pennsylvania rule 8.4(g); (2) whether these categories of speech typically receive full protection under the First Amendment; and (3) if impacted, whether restrictions on those categories of speech trigger a heightened level of constitutional scrutiny.<sup>223</sup> While the court noted that the Commonwealth of Pennsylvania had a compelling interest in controlling the licensure of attorneys and their administration of justice as arms of the state’s court system, the court found that the potential scope of Pennsylvania rule 8.4(g) was too broad to fit the few exceptions for lesser protected speech categories carved out in First Amendment precedent.<sup>224</sup> The court stated that although “[t]he Supreme Court has ‘expressly contemplated that the speech of those participating before the courts could be limited,’”<sup>225</sup> rule 8.4(g) failed to confine

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214. *See id.* at 20 (alluding only to Indiana’s guidance for attorneys using social media).

215. Wilkinson Jr., *supra* note 202, at 82 n.158.

216. *See* Emily A. Vogels, Monica Anderson, Margaret Porteus, Chris Baronavski, Sara Atske, Colleen McClain, Brooke Auxier, Andrew Perrin & Merrin Ramshankar, *Americans and ‘Cancel Culture’: What Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), <https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/> [https://perma.cc/CC79-T83G].

217. Wilkinson Jr., *supra* note 202, at 81 n.157.

218. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 33 (E.D. Pa. 2020).

219. *Id.* at 23–24.

220. *See id.* at 24.

221. *Id.*

222. *Id.* at 26.

223. *Id.*

224. *Id.* at 27.

225. *Id.* at 26–27.

itself to the narrow scope allowed to regulate attorney speech because the rule expanded the prohibition of “words . . . [that] manifest bias or prejudice” to contexts outside of the courthouse walls and into other activities “required for a lawyer to practice law,” such as CLEs.<sup>226</sup> Secondly, the court concluded that rule 8.4(g)’s reach was not confined to the two categories of “professional speech” that could be afforded less protection according to the Supreme Court in *Becerra* because rule 8.4(g) did not apply specifically to commercial speech, did not require that attorneys disclose “factual, noncontroversial information,” and did not strictly apply to “conduct that incidentally involves speech.”<sup>227</sup> Finding that “[r]ule 8.4(g) does not regulate the specific types of attorney speech . . . that the Supreme Court has identified as warranting a deferential review,” the court concluded that the “speech that [r]ule 8.4(g) regulates is entitled to the full protection of the First Amendment”—thus triggering heightened constitutional scrutiny of the already much admonished, discussed, and picked-apart rule.<sup>228</sup>

The court’s critique of rule 8.4(g) was further compounded by Judge Kenney’s conclusion that comments three and four of rule 8.4(g) could be considered discriminatory based on content and viewpoint.<sup>229</sup> Relying on a nonplurality opinion in *Matal*, Judge Kenney argued that by restricting an attorney’s ability to express bias or prejudice against the protected classes listed in rule 8.4(g), while allowing attorneys to “express tolerance or respect based on these same statuses,” the rule “singled out” words that manifest bias or prejudice based on the “views expressed” by the language.<sup>230</sup> Again, focusing on the rule’s specific phrase prohibiting “words . . . [that] manifest bias or prejudice” and the rule’s potential application to contexts outside of the courtroom, the court chided that the “government ha[d] created a rule that promotes a government-favored, viewpoint monologue” that could not be upheld.<sup>231</sup>

*b. Greenberg v. Goodrich, 593 F. Supp. 3d 174 (E.D. Pa. 2022)*

With Judge Kenney’s critiques in mind, Pennsylvania rule 8.4(g) was sent back to the drawing board yet again.<sup>232</sup> The subsequent version of the rule approved by the Pennsylvania Supreme Court in 2021 contained several significant changes.<sup>233</sup> The much-admonished phrase “manifest bias or prejudice” was removed.<sup>234</sup> The amended comments further clarified the meaning of the phrase “in the practice of law,” limiting the rule’s scope to a list of specific activities within the purview of the legal profession and “the administration of justice.”<sup>235</sup> Specifically, the newly edited comments noted that the new rule 8.4(g) would not apply to “speeches, communications, debates, presentations or publications.”<sup>236</sup>

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226. *Id.* at 27.

227. *Id.* at 32–34.

228. *Id.* at 30.

229. *Id.* at 30.

230. *Id.* at 31 (citing *Matal v. Tam*, 582 U.S. 218, 248–50 (2017) (Kennedy, J., concurring)).

231. *Id.* at 32.

232. Wilkinson Jr., *supra* note 202, at 85.

233. *Id.*

234. *Id.*

235. *Haggerty*, 491 F. Supp. 3d at 26.

236. Wilkinson Jr., *supra* note 202, at 85 (quoting 204 PA. CODE § 8.4 cmt. 4 (2025)).

Again, Greenberg filed a complaint challenging the revised rule, arguing that rule 8.4(g) still facially violated the First and Fourteenth Amendments.<sup>237</sup> Anticipating Greenberg's arguments, Pennsylvania's Chief Disciplinary Counsel submitted a declaration to the court stating that Greenberg's planned presentations on potentially "offensive, denigrating, hostile and hateful" content would not violate rule 8.4(g) as written, and that the state had no plan to pursue disciplinary actions against Greenberg for the presentations.<sup>238</sup> Despite this declaration's attempt to deflate Greenberg's standing, again Judge Kenney found Pennsylvania rule 8.4(g) to be "vague, overbroad[,] and constituting viewpoint-based," or alternatively, content-based discrimination.<sup>239</sup>

Reusing many of the same arguments and selected quotations from his previous opinion, Judge Kenney's 2021 decision focused on the scope of rule 8.4(g), writing, "the state simply does not have the authority to police professionals in their daily lives to root out speech the state deems to be below 'common decency.'"<sup>240</sup> Judge Kenney, in his second opinion, was not swayed by the revised scope of Pennsylvania rule 8.4(g), which now only applied to attorneys' speech when participating in "conduct in the practice of law," specifically including:

(i) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (ii) operating or managing a law firm or law practice; or (iii) participation in judicial boards, conferences, or committees; continuing legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term "the practice of law" does not include speeches, communications, debates, presentations, or publications given or published outside the contexts described in (i)-(iii).<sup>241</sup>

Judge Kenney insisted that even this more limited scope stretched far past *Gentile*'s standards for allowable restrictions on attorneys' free speech because rule 8.4(g) would still apply to professional spaces outside of the courtroom, such as at a law firm or during CLEs.<sup>242</sup> Additionally, Judge Kenney stated that Pennsylvania rule 8.4(g) could not be considered a reasonable regulation against harassing or discriminatory *conduct* in professional legal spaces that only placed a "permissible incidental" burden on speech (i.e., a constitutional caveat created in *Becerra*).<sup>243</sup> To support his argument that even this amended scope of Pennsylvania rule 8.4(g) remained too expansive, Judge Kenney took a roundabout approach: reading the express disclaimer in comment four of rule 8.4(g) that the rule's new scope excluded "speeches, communications, debates, presentations, or publications given or published outside the contexts described" (which was added in response to Judge Kenney's previous critiques) to mean that all those activities "*are included* within the scope of [r]ule 8.4(g)" if they occurred within the

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237. *Id.*

238. *Id.* at 85–86.

239. *Id.* at 86.

240. *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 209 (E.D. Pa. 2022).

241. 204 PA. CODE § 8.4 cmt. 4 (2025).

242. *Goodrich*, 593 F. Supp. 3d at 208–09 (first citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071–72 (1991); then citing 204 PA. CODE § 8.4(g) (2025)).

243. *See id.* at 207 (citations omitted).

spaces otherwise outlined in the rule, such as in legal proceedings or while representing a client.<sup>244</sup>

Further discrediting the revised rule's more limited applicability, Judge Kenney reverted his criticism back to the ABA's Model Rule 8.4(g)—despite its stark differences from the amended Pennsylvania rule—to substantiate the claim that Pennsylvania rule 8.4(g), regardless of the letter of the law, focused on suppressing speech outside the status quo and warning “Pennsylvania lawyers to self-censor.”<sup>245</sup>

Lastly, a large portion of Judge Kenney's seventy-eight-page opinion was dedicated to describing how Pennsylvania rule 8.4(g) and its associated comments constituted impermissible viewpoint discrimination, and/or unconstitutional content discrimination.<sup>246</sup> Again, pointing to a nonplurality opinion in *Matal*,<sup>247</sup> Judge Kenney argued that rule 8.4(g) “singled out a subset of messages”<sup>248</sup> or viewpoints “intended to intimidate, denigrate or show hostility or aversion toward a person,”<sup>249</sup> in a substantially similar way as the “provision in *Matal* prohibited trademarks that disparage, or show contempt or disrepute towards a person.”<sup>250</sup>

Judge Kenney argued that this focus on intent further indicated the rule's focus on regulating speech, rather than on professional conduct.<sup>251</sup> Rule 8.4(g)'s definitions of harassment and discrimination are partly determined by the speaker's intention, unlike federal harassment law that imposes liability based on the speech's effect on the institution or workplace.<sup>252</sup> In Judge Kenney's view, this focus on the subjective purpose of an attorney's harassing or discriminatory speech thereby expanded the rule's scope to include “simple offensive acts” and certain speech which otherwise would be “insufficient for federal anti-harassment liability.”<sup>253</sup> Judge Kenney further asserted that this subjectivity, of the speaker and listener, showcased rule 8.4(g)'s impermissible viewpoint discrimination, as “the listener . . . subjectively determines if they are offended enough to file a complaint,” and then the “reviewing [disciplinary officer] . . . determines whether the language is offensive enough to proceed towards discipline.”<sup>254</sup> Judge Kenney forwarded that without an objective standard to determine if the attorney's statement “prevented equal access or the fair administration of justice,” the line for enforcing rule 8.4(g) could not functionally be based on the material effect of an attorney's actions.<sup>255</sup> To Judge Kenney, enforcement of rule 8.4(g) rests on whether an attorney's speech rises to the level of the rule's definition of harassment or discrimination: a standard that in the court's view “floats in the sea of whatever the

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244. *Id.* at 208.

245. *See id.* at 207–08.

246. *Id.* at 210–18.

247. *Matal v. Tam*, 582 U.S. 218, 218 (2017).

248. *Id.* at 248 (Kennedy, J., concurring).

249. 204 PA. CODE § 8.4 cmt. 5 (2025).

250. *Goodrich*, 593 F. Supp. 3d at 211.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 212.

majority finds offensive at the time.”<sup>256</sup> Seeing as “[g]iving offense is a viewpoint,” Judge Kenney again concluded that rule 8.4(g) could not survive exacting First Amendment scrutiny and the rule was subsequently blocked, for a second time, from taking effect.<sup>257</sup>

c. *Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023)

However, Judge Kenney’s order to permanently enjoin the enforcement of rule 8.4(g) was not long-lived. The Pennsylvania Bar Association quickly took steps to appeal the district court’s ruling.<sup>258</sup> Again, the case cultivated buzz in Pennsylvania’s professional legal circles.<sup>259</sup> Echoing earlier trends, the split of submitted amicus briefs from legal professional associations and affinity groups as expected tracked with political ideologies, with conservative advocacy groups opposing the rule and groups such as the Inter-Branch Commission for Racial, Gender, and Ethnic Fairness backing the appeal.<sup>260</sup>

But while public debate focused on Pennsylvania rule 8.4(g)’s potential effects on the legal profession, the Third Circuit’s critique of the Eastern District of Pennsylvania’s previous rulings mostly avoided cultural issues and political conflict. Rather than determining the appropriate level of constitutional scrutiny by which to review Pennsylvania rule 8.4(g), the Third Circuit took a starkly procedural approach and looked to determine whether the rule’s challenger had sufficient standing to bring his claim in the first place.<sup>261</sup>

Beginning its ruling, the Third Circuit directed its attention not at the constitutional controversy of rule 8.4(g) itself, but rather at the Constitution’s limitation on Article III courts’ jurisdiction to “actual cases or controversies.”<sup>262</sup> With the standards of justiciability in focus, the court concluded, “[t]o have standing to sue, Greenberg must establish he suffers an actual or imminent injury that is fairly traceable to [r]ule 8.4(g). He cannot.”<sup>263</sup>

Echoing aspects of Judge Kenney’s earlier opinion, the Third Circuit’s opinion spent significant ink on interpreting rule 8.4(g)’s definitions of harassment and discrimination, as provided in comments five and six of the statute.<sup>264</sup> However, the district court and the Third Circuit configured the scope of Pennsylvania rule 8.4(g) in opposing directions. Judge Kenney’s opinion interpreted the inclusion of the speaker’s intent to intimidate as an *expansion* of the rule’s scope to include “speech that merely has [the] purpose” of harassing another.<sup>265</sup> Under this view, the scope of rule 8.4(g)

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256. *Id.* at 211–12.

257. *Id.* at 211 (alteration in original) (citing *Matal v. Tam*, 582 U.S. 218, 243 (2017)).

258. See Max Mitchell, *Third Circuit Nixes Suit Challenging Pa. Disciplinary Board’s Anti-Bias Rules*, LAW.COM (Aug. 29, 2023, at 12:48 ET), <https://www.law.com/thelegalintelligencer/2023/08/29/third-circuit-nixes-suit-challenging-pa-disciplinary-boards-anti-bias-rules/?slreturn=20250128-24903> [https://perma.cc/TRJ9-E5CZ].

259. See Wilkinson Jr., *supra* note 202, at 86–87.

260. *Id.*

261. *Greenberg v. Lehocky*, 81 F.4th 376, 379 (3d Cir. 2023).

262. *Id.* at 384 (citing U.S. CONST. art. III, § 2, cl. 1).

263. *Id.*

264. 204 PA. CODE § 8.4 cmt. 5–6 (2025).

265. See *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 211 (E.D. Pa. 2022).

potentially incorporates “simple offensive acts that are generally insufficient for federal anti-harassment liability.”<sup>266</sup>

Conversely, the Third Circuit concluded from its interpretation that rule 8.4(g)’s definitions of harassment and discrimination were more than sufficiently restrictive: the rule’s requirement to show the speaker’s intent “to intimidate, denigrate or show hostility or aversion towards a person”<sup>267</sup> greatly narrowed the definition of harassment and discrimination from their typical use.<sup>268</sup> Additionally, the Third Circuit described that these heightened intent standards in rule 8.4(g)’s definitions of harassment and discrimination, in combination with the Pennsylvania Rules of Professional Conduct’s standard definition of “knowingly,” heightened the required mens rea for rule 8.4(g)’s enforcement past any point pertinent to Greenberg’s planned speech.<sup>269</sup> Seeing as “[n]one of Greenberg’s planned speech could be interpreted as knowing harassment or discrimination *directed at a person*,”<sup>270</sup> and the rule “only reaches lawyers who are practically certain their speech will cause harassment or discrimination, not those who inadvertently offend their audience,”<sup>271</sup> Greenberg’s claimed fear of prosecution for his presentations could not be substantiated.<sup>272</sup>

Turning to Greenberg’s alternative theory of standing, that rule 8.4(g) chilled his speech or caused him to self-censor due to the “specter of disciplinary proceedings,” the Third Circuit found fatal flaws in this argument as well.<sup>273</sup> Again, separating the larger political context from the procedural standards at hand, the court found that Greenberg’s examples of “public attitudes toward protections for offensive speech,” academics who were “sanction[ed] based on their speech,” and other non-attorneys who suffered repercussions for perceived prejudiced speech failed to provide any proof that his speech would be chilled by the potential enforcement of Pennsylvania rule 8.4(g).<sup>274</sup> These cited instances were not evidence of the potential effect of a new rule for professional legal ethics, but rather were an appeal to the larger concept of “cancel culture.”<sup>275</sup> The provided examples showcased individuals that suffered consequences outside the “attorney discipline process” and were unrelated to the enforcement of professional codes of conduct.<sup>276</sup> As the court noted, Greenberg’s allegations of chilled speech were “largely informed by his perception of the social climate, not [r]ule 8.4(g).”<sup>277</sup> While Greenberg might have felt pressured to alter his CLE presentations out of concern for his reputation, this self-censorship could not reasonably be traced to potential discipline under rule 8.4(g), thus making his final claim of standing functionally moot.<sup>278</sup>

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266. *Id.*

267. 204 PA. CODE § 8.4 cmt. 5 (2025).

268. *See Lehocky*, 81 F.4th at 381.

269. *Id.* at 386.

270. *Id.* (emphasis added).

271. *Id.*

272. *Id.*

273. *Id.* at 388–89.

274. *Id.* at 389.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

However, while the Third Circuit clearly concluded that Greenberg failed to establish sufficient standing to sue and stop the enforcement of Pennsylvania rule 8.4(g), the court importantly noted that its determination “depend[ed] on [the] assessment of the present situation.”<sup>279</sup> While arguably some aspects of the court’s opinion (specifically their pseudostatutory interpretation of rule 8.4(g)’s scope) attempted to buttress some First Amendment concerns, the Third Circuit conceded that it could not express an opinion on the merits of a potential *post*-enforcement suit to vindicate Greenberg’s constitutional rights.<sup>280</sup>

Still the court was not unaware of the writing on the wall. In a succinct two-paragraph concurrence, and considering the rule’s survival on slim jurisdictional grounds, Judge Ambro shared his strategic guidance for the supporters of rule 8.4(g).<sup>281</sup> Alluding to a near future, Judge Ambro predicted, “someday an attorney with standing will challenge Pennsylvania Rule of Professional Responsibility 8.4(g). When that day comes, the existing [r]ule and its commentary may be marching uphill needlessly.”<sup>282</sup> Judge Ambro addresses the larger conversation of Pennsylvania rule 8.4(g)’s First Amendment concerns, calling for the Pennsylvania Bar Association to prevent the rule from being overturned by continuing to amend the rule to eliminate “many of the constitutional infirmities alleged by Greenberg in this case.”<sup>283</sup>

### III. DISCUSSION

#### A. *The Future of Pennsylvania Model Rule 8.4(g)*

While Pennsylvania rule 8.4(g) has already faced an exceptionally long path to publication, and even with the Third Circuit’s dismissal of Greenberg’s preemptive challenge, the future of rule 8.4(g) remains rocky. Supporters of rule 8.4(g) faced another scare in 2024 when Greenberg filed a petition for writ of certiorari to the United States Supreme Court.<sup>284</sup> Following similar trends to the rule’s earlier challenges, the prospect of review by the Supreme Court attracted many free speech advocacy groups to file amicus briefs in support of Greenberg’s final appeal.<sup>285</sup> In addition to the involvement of several impact litigation groups on both sides of the potential suit, the likelihood of Supreme Court review surmounted: Simultaneous to the Supreme Court’s consideration of Greenberg’s petition for certiorari, the Second Circuit Court of Appeals held that two attorneys had sufficient standing to bring a pre-enforcement suit against Connecticut’s version of rule 8.4(g), thus potentially setting the stage for a pseudo-circuit-split situation.<sup>286</sup>

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279. *Id.*

280. *See id.*

281. *Id.* at 390 (Ambro, J., concurring).

282. *Id.*

283. *Id.*

284. Petition for Writ of Certiorari at 34, *Greenberg v. Lehocky*, 144 S. Ct. 1393 (2024) (No. 23-833).

285. *See, e.g., Greenberg v. Lehocky: SLF Supports First Amendment Challenge to Pennsylvania Legal Ethics Rule*, SE. LEGAL FOUND., <https://slfliberty.org/case/greenberg-v-lehocky/> [<https://perma.cc/9CK3-9SRX>] (last visited Mar. 22, 2026).

286. *See Cerame v. Slack*, 123 F.4th 72, 73 (2d Cir. 2024).

While the Supreme Court ultimately denied Greenberg’s petition for certiorari in April of 2024,<sup>287</sup> the story of rule 8.4(g) seems far from over. The constitutionality of Pennsylvania rule 8.4(g) is still highly contested by many legal scholars, and due to the risk of opening up another wave of constitutional challenges, its actual enforceability against attorneys who engage in harassing or discriminatory conduct remains unclear.<sup>288</sup> This uncertainty is additionally heightened as the Third Circuit’s opinion that ultimately saved Pennsylvania rule 8.4(g) now stands in strong contrast, and potentially direct opposition, to a Second Circuit Court decision on Connecticut’s version of the rule.<sup>289</sup> This means that enforcing rule 8.4(g) against any attorney would not only trigger a constitutional challenge, but also would also give the future challenger sufficient case law from other federal courts to support their claims.

Similarly, the cultural backlash against efforts to make workplaces “politically correct,” more inclusive, or safer for women and minorities is also a factor that those invested in the future of Pennsylvania rule 8.4(g) must meaningfully contend with.<sup>290</sup> Serious strategic consideration must be given to the future of Pennsylvania rule 8.4(g) if its supporters hope to heed Judge Ambro’s advice, better configure the statute to survive strict scrutiny, and prevent the erosion of Pennsylvania rule 8.4(g)’s long path to publication, and have to “start from scratch” all over again.<sup>291</sup>

#### B. Further Protecting Pennsylvania Rule 8.4(g)

If we are to secure the future of Pennsylvania rule 8.4(g), we must begin by starkly stating where the rule, as currently written, fails to follow First Amendment jurisprudence.<sup>292</sup>

Plainly put, rule 8.4(g) does not seek to curtail a complete category of speech, like fighting words or true threats.<sup>293</sup> Rule 8.4(g) seeks to regulate all forms of conduct attorneys knowingly engage in that rise to the level of harassment or discrimination (as defined in comments five and six)<sup>294</sup> if the speech takes place within the parameters of “the practice of law.”<sup>295</sup>

287. Debra Cassens Weiss, *Supreme Court Won’t Hear Lawyer’s Challenge to Anti-Bias Ethics Rule*, A.B.A. J. (Apr. 24, 2024, at 10:16 CT), <https://www.abajournal.com/news/article/supreme-court-wont-hear-lawyers-challenge-to-anti-bias-ethics-rule> [<https://perma.cc/6PK7-QNGX>].

288. As of February 25, 2026, no completed or pending disciplinary actions against an attorney for violating Pennsylvania rule 8.4(g) have been reported by the Disciplinary Board of the Supreme Court of Pennsylvania. See *Recent Supreme Court & Board Disciplinary Actions*, THE DISCIPLINARY BD. OF THE SUP. CT. OF PA., <https://www.padisiplinaryboard.org/cases/recent-cases> [<https://perma.cc/V4ZW-2T85>] (last visited Mar. 22, 2026).

289. See *Cerame*, 123 F.4th at 73.

290. See Curtis Bunn, *DEI Programs Weathered a Myriad of Attacks This Year, with More To Come in 2025*, NBC NEWS (Dec. 29, 2024, at 7:00 ET), <https://www.nbcnews.com/news/nbcblk/anti-dei-program-effort-2025-states-companies-universities-trump-rcna184580> [<https://perma.cc/JME6-PFHA>].

291. See *Greenberg v. Lehocky*, 81 F.4th 376, 390 (3d Cir. 2023) (Ambro, J., concurring).

292. See *supra* Part II.A for a discussion of the levels of constitutional scrutiny in First Amendment jurisprudence.

293. See *supra* Part II.B.1 for a discussion of categories of speech outside First Amendment protection.

294. 204 PA. CODE § 8.4 cmt. 5–6 (2025).

295. *Id.* cmt. 4.

This parameter of enforcement to the practice of law also does not categorically set rule 8.4(g) apart as a time, place, and manner restriction,<sup>296</sup> as the rule is expressly concerned with the *content* of an attorney's speech or conduct and whether it is harassing or discriminatory, rather than simply where the conduct takes place.<sup>297</sup> While rule 8.4(g) has been argued from the outset as a regulation of professional conduct rather than speech<sup>298</sup> and is written to reflect this position,<sup>299</sup> there is a salient point to be made<sup>300</sup> that rule 8.4(g) fails to slot neatly into the exceptions outlined in *Becerra* that allow for government restrictions on professional speech to face only intermediate scrutiny.<sup>301</sup> Seeing as speech, both oral and written, is an integral part of the legal profession, it seems unlikely that regulations of the legal profession itself, and the conduct of lawyers, could only "incidentally involve[] speech."<sup>302</sup> However, the fact that Pennsylvania rule 8.4(g)'s regulation of harassing and discriminatory conduct in the practice of law does not fall within a preconceived unprotected category of speech is not the critical blow to rule 8.4(g) that some critics may have hoped.

To untangle how Pennsylvania rule 8.4(g)'s compounding restrictions on speech, in a specific location and relation to specific subject matter, may translate to the tiered system of constitutional scrutiny, comparisons can be made between Pennsylvania rule 8.4(g) and the ordinance against cross burning at issue in *R.A.V. v. City of Saint Paul*.<sup>303</sup> As discussed in Part II.B.3, in *R.A.V.* the Supreme Court concluded that Saint Paul's Bias-Motivated Crime Ordinance constituted a content-based restriction of speech, triggering constitutional review under strict scrutiny, because although the ordinance attempted to restrict low-value conduct, its coverage did not extend far enough and only explicitly criminalized cross burning and similar threatening symbols as expressions of racist or antisemitic hostility.<sup>304</sup> Rule 8.4(g) faces a similar folly. As written, rule 8.4(g) provides that attorneys engage in professional misconduct if, in the practice of law, they knowingly engage in harassing or discriminatory conduct "based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status."<sup>305</sup>

While this long list of protected groups certainly casts a wide net in comparison to the ordinance challenged in *R.A.V.*, the categorical designation of protected classes *at all* showcases that rule 8.4(g) could reasonably constitute a content-based restriction and therefore would be considered presumptively unconstitutional in court.<sup>306</sup> By describing harassing or discriminatory conduct as treating another as inferior or with hostility or

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296. See *supra* Part II.B.2 for a discussion of time, place, and manner restrictions.

297. See 204 PA. CODE § 8.4(g) (2025).

298. See *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 202 (E.D. Pa. 2022) (explaining the defendant's argument that rule 8.4(g) only regulated professional conduct that only incidentally burdened speech).

299. See 204 PA. CODE § 8.4 cmt. 5–6 (2025).

300. See *Goodrich*, 593 F. Supp. 3d at 212.

301. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

302. See *id.*

303. *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 382–86 (1992).

304. *Virginia v. Black*, 538 U.S. 343, 361 (2003) (citing *R.A.V.*, 505 U.S. at 391).

305. 204 PA. CODE § 8.4(g) (2025).

306. See *R.A.V.*, 505 U.S. at 382.

aversion based on *only* the characteristics outlined in paragraph (g),<sup>307</sup> rule 8.4 seemingly draws a line in the sand. Currently, the rule selectively regulates harassing and discriminatory speech relating to the rule’s listed classifications—rather than others such as veteran status, union membership, or pregnancy<sup>308</sup>—thus committing the cardinal sin of subject-matter/content discrimination.<sup>309</sup>

While this flaw may not be fatal to the rule (as subject-matter-based regulations can still theoretically survive strict scrutiny), in an attempt to answer Judge Ambro’s call to action,<sup>310</sup> there are ways to amend rule 8.4(g)’s wording and potentially resolve this specific constitutional infirmity within it. Again, comparing the Supreme Court’s analysis of state-imposed laws against cross burning, the statute described in *Black v. Virginia* was held to be potentially constitutional, and able to survive strict scrutiny, in part because the statute was *broader* than its counterpart in *R.A.V.*<sup>311</sup> Following this model, we might find a surprisingly simple solution to the issue of subject-matter discrimination: Rule 8.4(g) only needs to be reworded from applying to an exclusive list of protected classes, to applying to an inclusive, or at the very least, a more ambiguous list of covered content. Pennsylvania rule 8.4(g)’s counterparts in the New Hampshire,<sup>312</sup> New York,<sup>313</sup> and Connecticut<sup>314</sup> professional codes of conduct all provide additional potential classifications that could be incorporated under the protection of Pennsylvania rule 8.4(g)’s scope so as to shrink the possibility of restricted speech based on subject matter not included within Pennsylvania’s rule.

However, no matter how many protected characteristics are included in this proposed amended version of rule 8.4(g), the categorical approach to protected classes is at the core of the rule’s collision with the label of content-based discrimination. Just as the statute in *Black* outlawed cross burning with the intent to intimidate *regardless* of the intended victim’s characteristics,<sup>315</sup> rule 8.4(g) must protect against conduct intended to harass or discriminate in the “practice of law”<sup>316</sup> *whole cloth*, which might include—but would not be limited to—harassing and discriminatory conduct targeted at the protected characteristics currently listed in rule 8.4(g).

Importantly, such an amendment would not completely convert rule 8.4(g) to a content-neutral restriction, as the distinction between harassing and discriminatory content from other subject matter is required to achieve the rule’s purpose of curtailing a specific kind of harmful conduct. However, by amending the exclusionary list of protected characteristics through the simple addition of the word “including” within a few key phrases in the statute, an expansive coverage model can be read in its plain text.

307. 204 PA. CODE § 8.4 cmt. 5–6 (2025).

308. These example classifications come from *R.A.V.* and the Connecticut Rules of Professional Conduct. *R.A.V.*, 505 U.S. at 391; CON. GEN. STAT. ANN. § 8.4(7) (West 2022).

309. See *supra* Part II.B.2 for a discussion of subject-matter discrimination as a trigger for severe constitutional scrutiny.

310. *Greenberg v. Lehocky*, 81 F.4th 376, 390 (3d Cir. 2023) (Ambro, J., concurring).

311. See *supra* Part II.B.3; *Virginia v. Black*, 538 U.S. 343, 362 (2003).

312. N.H. REV. STAT. ANN. § 8.4(g) (2019).

313. N.Y. JUD. L. § 8.4(g) (McKinney 2025).

314. CONN. GEN. STAT. ANN. § 8.4(7) (West 2022).

315. See *Black*, 538 U.S. at 362.

316. 204 PA. CODE § 8.4 cmt. 4 (2025).

In this way, expanding the scope of the conduct potentially covered under rule 8.4(g), paradoxically, may better situate its survival under strict scrutiny. By removing the rule's implicit requirement that an attorney knowingly engage in harassment or discrimination strictly based on one of the characteristics included in paragraph (g)'s explicit list, rule 8.4(g) will be triggered by an attorney knowingly or manifesting the intent to harass or discriminate against *anyone* in the practice of law. Like the true threats regulated by the state statute in *Black*,<sup>317</sup> when the protections of rule 8.4(g) are applied evenhandedly, the argument for providing the full protection of the First Amendment to forms of speech with little social value—discriminatory or harassing speech—is sufficiently weakened. With this change, the necessary subject-matter discrimination of the statute no longer potentially separates and disproportionately regulates speech regarding some protected characteristics as compared to other characteristics, but only separates and regulates speech that has little utilitarian or societal value, which a state bar association has a greater compelling interest in curtailing.<sup>318</sup> With this change, rule 8.4(g) can be arguably read as a regulation of a *category* of low-value content that otherwise protects attorneys' First Amendment rights, therefore potentially within the slim survival route through strict scrutiny for content specific regulation carved out by the Supreme Court's ruling in *Black*.<sup>319</sup>

Importantly, this creative caveat to the general rule that content-based regulations on speech are presumed unconstitutional can only apply “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable” such that “no significant danger of idea or viewpoint discrimination exists.”<sup>320</sup> Pennsylvania rule 8.4(g)'s potential for viewpoint discrimination has been much discussed.<sup>321</sup> While many of rule 8.4(g)'s opponents attempt to draw conclusive comparisons between rule 8.4(g) and the overturned PTO's regulation at issue in *Matal*,<sup>322</sup> there is an integral difference between the regulation of harassment and discrimination as described in rule 8.4(g),<sup>323</sup> and the prevention of “disparagement” at issue in the often cited Supreme Court case.<sup>324</sup> Disparagement is, at its core, the crime of offense and can be described as derogatory actions, or “injurious statement[s],” that may produce a real harm, but only through reputational damage.<sup>325</sup> Whether or not a statement disparages a group or person is, as Justice Thomas correctly noted, a decision informed by one's perception, or viewpoint, of the offensive nature of the statement.<sup>326</sup> Conversely, harassment and discrimination, as defined in Pennsylvania rule 8.4(g) comments five and six, are not measured by the effect caused on the listener, but rather

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317. See *Black*, 538 U.S. at 359–60.

318. See Ellen Brotman & Amy Coco, *Pennsylvania Lawyers Behaving Badly: Is 8.4(g) a Solution?*, 50 HOFSTRA L. REV. 521, 540–41 (2022).

319. See *Black*, 538 U.S. at 361–62.

320. *Id.*

321. See *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 212 (E.D. Pa. 2022).

322. *Matal v. Tam*, 582 U.S. 218, 223 (2017).

323. 204 PA. CODE § 8.4 cmt. 5–6 (2025).

324. *Matal*, 582 U.S. at 223.

325. See *Disparagement*, BLACK'S LAW DICTIONARY (12th ed. 2024).

326. See *supra* Part II.B.4 for a discussion of the use of “disparage” in the Patent and Trademark Office rule at issue in *Matal*, 582 U.S. at 226–29.

the intent of the speaker themselves, and the real or intended effect of the speaker's words on the tangible treatment of another or the fair administration of justice.<sup>327</sup>

To better understand this difference by comparison, consider a city ordinance banning cross burning only if the action *caused* another to feel intimidated: This would clearly be categorized as viewpoint discrimination on an act of expression, as the determination of intimidation would be a subjective viewpoint that may differ from person to person and may even be invoked if the cross was burned for protected political reasons.<sup>328</sup> But as seen in *Black*, regulating cross burning done with the proven *intent* to intimidate does not trigger such a threshold as it is only the actor's own purpose that must be scrutinized.<sup>329</sup> Still, while such differences between Pennsylvania rule 8.4(g) and the PTO regulation at issue in *Matal* are clear through this lens of analysis,<sup>330</sup> the argument that rule 8.4(g) could face particularly vigorous constitutional scrutiny due to its *potential* for viewpoint discrimination is one that supporters of the rule must contend with.

Again, heeding Judge Ambro's advice,<sup>331</sup> to better safeguard Pennsylvania rule 8.4(g) from the severe strict scrutiny which most speech regulations do not survive, an advantageous amendment would be to further distinguish Pennsylvania rule 8.4(g) from *Matal* by removing the phrase "inten[t] to . . . denigrate" from the definition of harassment in comment five of the rule.<sup>332</sup> Although the rule's enforcement is nevertheless distinctly based on the speaker's intent, rather than its effect on the listener, the term "denigrate," like the concept of disparagement at issue in *Matal*,<sup>333</sup> points to a less clearly defined intended harm. In the interest of preserving Pennsylvania rule 8.4(g), this term should be shaved from the definition of harassment in comment five to better insulate the rule from invoking the severe strict scrutiny that is triggered by the potential for viewpoint discrimination in a speech regulation's plain text.

Lastly, even if such changes insulate Pennsylvania rule 8.4(g) from the most severe scrutiny, the regulation may not even survive lower standards of constitutional review if the rule is read to still infringe on the First Amendment's almost absolute protection of political speech.<sup>334</sup> This inflection point persisted in Greenberg's challenges, and the amendments to Pennsylvania rule 8.4(g) that followed Judge Kenney's first ruling

327. 204 PA. CODE § 8.4 cmt. 5–6 (2025).

328. See *supra* Part II.B.3 for a discussion of cases involving cross burning and the importance of intent and perception in determining if a speech regulation is unconstitutional. See *Virginia v. Black*, 538 U.S. 343, 365–66 (2003) (striking down the prima facie provision of Virginia's prohibition on cross burning and finding that such a blanket application would chill constitutionally protected political speech, such as when the burning of a cross *may be used not to intimidate* but to express a statement of ideology, a symbol of a group, or when used for metaphorical or literary purposes such as in movies or a stage play).

329. See *supra* Part II.A.3 for a discussion of the specific holding of *Black*, 538 U.S. at 365–66.

330. Compare 204 PA. CODE § 8.4 cmt. 5–6 (2025) (defining harassing and discriminatory conduct based on the speaker's intent), with *Matal*, 582 U.S. at 223 (citing 15 U.S.C. § 1052(a)) (emphasizing that the effect of a disparaging statement is informed by one's viewpoint).

331. *Greenberg v. Lehocsky*, 81 F.4th 376, 390 (3d Cir. 2023) (Ambro, J., concurring).

332. 204 PA. CODE § 8.4 cmt. 5 (2025) (emphasis added).

333. See *Matal*, 582 U.S. at 223.

334. See *supra* Parts II.A, II.B.3 for a discussion of the protection of political speech from government regulation under all levels of constitutional scrutiny.

attempted to course correct this potential weak spot in the rule's prose.<sup>335</sup> While excluding "speeches, communications, debates, presentations, or publications" from the scope of "in the practice of law"<sup>336</sup> proved to be a satisfactory change to undercut Greenberg's standing,<sup>337</sup> such wording is unlikely to stand up to further statutory interpretation. Pennsylvania rule 8.4(g)'s promise to protect attorneys' political speech must be sufficiently clear to survive any level of constitutional scrutiny. A potential solution is the addition of an explicit provision protecting an attorney's right to "political speech," such as advocating for a client or public policy, as modeled after New Hampshire's rule 8.4(g).<sup>338</sup> This inclusion is intrinsically necessary for the survival of Pennsylvania rule 8.4(g) because when there is a sufficiently compelling reason to allow a state to impose some restrictions on speech, like composing a bar of lawyers of good character, as stated in *Konigsberg*,<sup>339</sup> no regulation can stand if it cannot "be reconciled with our national constitutional standard of freedom of speech."<sup>340</sup> Just as a moral character test for potential California bar members can stand so long as it does not make presumptions about an applicant's political views,<sup>341</sup> Pennsylvania rule 8.4(g), arguably, can restrict speech for the compelling state interest of preventing discrimination and harassment in the legal profession if it is clear that political speech is nevertheless protected. The addition of a clear promise to protect attorneys' political speech may also circumvent the argument that Pennsylvania rule 8.4(g) is an attempt by the state bar to restrict protected speech simply by mislabeling it. Additionally, explicit protection for political expression guarantees that political speech, if made in a CLE, a presentation, or other communications "at conferences, seminars and [during] other activities" within the listed contexts of paragraph (g) would be clearly excluded from rule 8.4(g)'s scope.<sup>342</sup> By better clarifying the rule's protections for political speech, the issue of inverse statutory interpretation of rule 8.4(g)'s scope—either as entirely too expansive or sufficiently restrictive—as seen in Judge Kenney's opinions<sup>343</sup> and as alluded to by the Third Circuit's reply,<sup>344</sup> is potentially resolved.

Resolving ambiguities in Pennsylvania rule 8.4(g)'s scope is paramount to its prospects of surviving strict scrutiny and being considered sufficiently narrowly tailored, lest it face the same fate as Model Rule 3.6 in *Gentile*.<sup>345</sup> Where the scope of the rule at issue in *Gentile* functionally restricted attorneys' protected political speech,<sup>346</sup> supporters

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335. See Wilkinson Jr., *supra* note 202, at 86–87.

336. 204 PA. CODE § 8.4 cmt. 3 (2025).

337. *Greenberg v. Lehocky*, 81 F.4th 376, 379 (3d Cir. 2023).

338. N.H. REV. STAT. ANN. § 8.4(g) (2019) ("[Rule 8.4(g)] shall not . . . preclude a lawyer from engaging in conduct or speech . . . that [is] constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.").

339. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957).

340. *Id.*

341. *See id.*

342. *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 208 (E.D. Pa. 2022).

343. *Id.* at 208–11; *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 26–32 (E.D. Pa. 2020).

344. *Greenberg v. Lehocky*, 81 F.4th 376, 389 (3d Cir. 2023).

345. See *supra* Part II.C.4.c for a discussion of the Supreme Court's ruling in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991).

346. See *Gentile*, 501 U.S. at 1049.

of Pennsylvania rule 8.4(g) must ensure that any future amendments to the rule outlining protections for political speech—alongside the mens rea requirements of both rule 8.4(g) (“knowingly”) and comments four and five (“intended to”)<sup>347</sup>—provide sufficient guidance both to avoid unconstitutional vagueness and to remain within the bounds of a narrowly tailored scope by clearly separating protected political speech from the rule’s range of enforcement. If such a delicate balance can be struck, then *Gentile* may surprisingly serve to support Pennsylvania rule 8.4(g), showing that the Supreme Court, even if said through dicta, is open to state regulations limiting attorneys’ out-of-court statements, so long as they survive strict scrutiny.<sup>348</sup>

Similarly, by invoking an expressed protection for lawyer’s political speech, the definition of discrimination under Pennsylvania rule 8.4(g)’s comment five as “conduct that a lawyer knows manifests an intention: to . . . cause or attempt to cause interference with the fair administration of justice”<sup>349</sup> takes on a new meaning and may be better asserted as an asset to Pennsylvania rule 8.4(g)’s survival. If under this regulation an attorney’s political speech is expressly protected, then the rule’s protection against interferences, or attempts to interfere, with the fair administration of justice only further embodies the First Amendment’s specific protections for “vigorous advocacy” through the courts as a form of “political expression” as outlined in *Button*.<sup>350</sup> With the inclusion of expressed protection for lawyer’s political speech, Pennsylvania rule 8.4(g) can better align itself with the Supreme Court’s jurisprudence regarding reasonable policing of the legal system, and simultaneously, the requisite protection of political speech within and through the court system necessitated by both its utility and its proximity to the government itself.<sup>351</sup>

Importantly, these are small changes with compounding effects: (1) the removal of the categorical list of protected characteristics by the addition of inclusive language such as “including” in paragraph (g) and comments five and six, (2) the removal of reference to “denigration” in comment five’s definition of harassment, and (3) the addition of an explicit provision outlining protections for attorneys’ rights to political speech, may not themselves spare Pennsylvania rule 8.4(g) from strict scrutiny seeing that, as previously stated, almost all regulations on the right to free speech must face heightened constitutional review if challenged.<sup>352</sup> However, these small changes, modeled after successful regulations of low-value speech and the Supreme Court’s controlling synthesis of free speech jurisprudence, may better insulate Pennsylvania rule 8.4(g) from the most severe forms of strict scrutiny and provide the necessary parallels in existing precedent to better its odds for survival.

Supporters of Pennsylvania rule 8.4(g) must prepare for the rule’s almost inevitable fate: another constitutional challenge, likely to occur immediately following its first

347. 204 PA. CODE § 8.4 cmt. 4–5 (2025).

348. See *supra* Part II.C.4.c for a discussion of the Supreme Court’s arguments in *Gentile*, 501 U.S. at 1049.

349. 204 PA. CODE § 8.4 cmt. 6 (2025).

350. NAACP v. Button, 371 U.S. 415, 429 (1963).

351. See *supra* Part II.C.4 for a discussion of the Supreme Court’s view of “reasonable” restrictions on attorney speech.

352. See *supra* Part II.B.3–4 for a discussion of the levels of constitutional scrutiny applied to government restrictions on speech.

enforcement.<sup>353</sup> It is more than fair to predict this future, given the pushback to rule 8.4(g)'s publication, the district court's preexisting outline for an oppositional argument,<sup>354</sup> Judge Ambro's clear-eyed warning,<sup>355</sup> and the political calling cards of "censorship," "wokeness," "political correctness," and "cancel culture," which invoke increased interest in the issue from the public and within the legal profession.<sup>356</sup> If, or rather when, Pennsylvania rule 8.4(g) is challenged in court again, we can also predict with great certainty that the rule will be reviewed, at the very least, under strict scrutiny.

While the amendments to Pennsylvania rule 8.4(g) may place the rule in a better position to survive such a challenge, a larger conceptual challenge must be addressed and incorporated into supporters' arguments and actions for the rule's preservation. If supporters are to successfully articulate both a sufficiently compelling state interest in enforcing the regulation, and perhaps more importantly, meaningfully engage with the cultural dialogue present since the inception of Model Rule 8.4(g) by the ABA, Pennsylvania rule 8.4(g)'s purpose must be viewed through the context of its regulation of attorneys as extensions, representatives, and implementers of the court system itself. As discussed, restrictions on the government's speech, even when expressed through individuals, require entirely separate, and significantly more relaxed, constitutional analysis.<sup>357</sup> Is the kind of speech regulated by Pennsylvania rule 8.4(g) a kind of government speech? Under a strict interpretation of the three-factor test provided in Supreme Court precedent,<sup>358</sup> the answer to this question is likely negative. However, if viewed more abstractly, governments often communicate their agendas on crime, commerce, contract law, and even constitutional rights through the court system, as enabled by attorneys on both sides of any issue.<sup>359</sup> When a court provides an opinion with guiding precedent, the general public can expect legal professionals to take on the task of translating the meaning and outcome of the case, thus making both the court's and the lawyers' words outgrowths of the government's opinion on the matter.<sup>360</sup> And importantly, it is the job of legal professionals to further interpret these past cases into

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353. See *Greenberg v. Lehoccky*, 81 F.4th 376, 390 (3d Cir. 2023) (Ambro, J., concurring).

354. See *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 24 (E.D. Pa. 2020).

355. *Lehoccky*, 81 F.4th at 390 (Ambro, J., concurring).

356. See, e.g., David Lat, *Free Speech, Wokeness, and Cancel Culture in the Legal Profession*, ORIGINAL JURISDICTION (Dec. 8, 2022), <https://davidlat.substack.com/p/free-speech-wokeness-and-cancel-culture> [<https://perma.cc/Y3EH-XSMP>]; Jay Willis, *Big Law's Cancel Culture, and Other Obviously Fake Things That Do Not Exist*, BALLS & STRIKES (Feb. 2, 2023), <https://ballsandstrikes.org/legal-culture/biglaw-cancel-culture-david-lat-lol/> [<https://perma.cc/DX5X-7FJQ>].

357. See *supra* Part II.B.1 for a discussion of the tests and level of scrutiny employed when courts review government restrictions on government speech.

358. See *supra* Part II.B.1 for a discussion of the tests and level of scrutiny employed when courts review government restrictions on government speech. *Shurtleff v. City of Boston*, 928 F.3d 166, 172 (1st Cir. 2019).

359. See Sidney Post Simpson & Ruth Field, *Social Engineering Through Law: The Need For a School of Applied Jurisprudence*, 22 N.Y.U. L.Q. REV. 145, 145 (1947) ("[Jurisprudence] is man's principal peaceful means of controlling his collective social environment.").

360. See Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PRO. 161, 165 (2008) (describing how ethical rules restricting attorney's ability to criticize the judiciary reduce the overall information available to the public, as lawyers communicate such matters to their clients and the legal culture provides "information on matters of public concern from those individuals who are most informed.").

present work.<sup>361</sup> Additionally, the government seemingly already maintains some control over the messages that officers of the court convey—as seen by the many other (albeit less controversial) restrictions on attorneys’ speech imposed by state bar associations as a condition of attorneys’ access to the court system.<sup>362</sup> Through this lens, the context of lawyers as an extension of the court system calls for the significant reconfiguration of the standard constitutional analysis required for restrictions on attorneys’ speech.<sup>363</sup>

Even outspoken opponents of Model Rule 8.4(g) agree that failing to contend with the circumstances of attorneys’ connection to the court system leads to incongruent constitutional conclusions.<sup>364</sup> As one scholar writes, “the use of normal First Amendment doctrines for analyzing lawyer regulations” falls short of “identify[ing] either what speech must be protected so lawyers can fulfill their role in the justice system or what speech can, or should, be forbidden to protect the proper function of the justice system.”<sup>365</sup> Just as it is “not easy to imagine how government could function if it lacked th[e] freedom to select the message it wishes to convey,”<sup>366</sup> it is unclear how state bar associations, as governing bodies of the legal profession, might preserve the integrity of the justice system without some permission to regulate their spokespeople—i.e., attorneys.<sup>367</sup> There has seemingly never been much disagreement that “lawyers do, indeed, agree to limit the exercise of some First Amendment rights for the privilege of practicing law.”<sup>368</sup> Lawyers, like conventional government employees, occupy trusted positions in society, and their expressions can impact the integrity and public perception of the judicial system.<sup>369</sup> Indeed, it is in part this societal trust in legal professionals that has led to increased public *distrust* of democratic institutions, directly due to the public statements of legal professionals.<sup>370</sup>

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361. See Glen Staszewski, *A Deliberate Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 1 (2023) (“Stare decisis is widely regarded as a vital mechanism for promoting the rule of law.”).

362. See, e.g., MODEL RULES OF PROF. CONDUCT r. 8.2 cmt. 1 (A.B.A. 2016).

363. See *supra* Part II.B.2 for a discussion of the conception of government employees’ free speech rights.

364. Tarkington, *supra* note 166, at 130.

365. *Id.* at 129–30.

366. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015) (alteration in original).

367. See 204 PA. CODE § 8.4 cmt. 3 (2025).

368. Rendleman, *supra* note 190; see also *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917) (speaking of restrictions placed on attorneys’ rights, Justice Cardozo stated, “[m]embership in the bar is a privilege burdened with conditions”); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1081 (1991) (Rehnquist, J., concurring) (describing that when the petitioner joined the state bar he took an oath to follow the state’s rules of professional conduct and that “[t]he First Amendment does not excuse him from that obligation”).

369. See Paulina A. Monopoli, *Legal Ethics & Practical Politics: Musing on the Public Perception of Lawyer Discipline*, 10 GEO. J. LEGAL ETHICS 423, 425 (1997).

370. See Christine Berger & Joe Gaeta, *The Department of Justice’s Broken Accountability System*, BRENNAN CTR. (Oct. 20, 2025), <https://www.brennancenter.org/our-work/research-reports/departments-justices-broken-accountability-system#:~:text=Over%20the%20past%20several%20months,had%20violated%20his%20court%20orders> [https://perma.cc/Y8JA-M4G2]. Additionally, concentrated campaigns of disinformation regarding the results of the 2020 presidential election spread, in part, by high-powered attorneys associated with and working for Donald J. Trump, caused serious erosion of public trust in state election systems. See Tom Dreisbach, *Trump Lawyer’s Jan. 6 Actions ‘Threatened Our Democracy,’ State Bar Attorney Says*, NPR (Mar. 24, 2024, at 16:33 ET), <https://www.npr.org/2024/03/29/1241726803/trump-lawyers-jan-6-actions-threatened>

Under an amended Pennsylvania rule 8.4(g), harassing and discriminatory speech that is knowingly made by an attorney in the practice of law, viewed as a kind of low-value speech, and sufficiently separated from potential infringement on political speech, does not constitute an attorney acting as an arm of the court system or communicating a matter of public concern, because such speech is a manifestation of personal grievance or prejudice, specifically directed at another person.<sup>371</sup> More importantly, a lawyer's interest in exercising their own freedom of expression to "treat a person as inferior . . . or to cause or attempt to cause interference with the fair administration of justice"<sup>372</sup> cannot outweigh the government's interest in, and the public policy objective of, preserving the integrity of the court system through rules of professional conduct.<sup>373</sup> This is the measure of utility, of public good, that is a long held component of First Amendment philosophy.

#### IV. CONCLUSION

The road to finalizing Pennsylvania rule 8.4(g) is far from over. Interpreting the scope of rule 8.4(g) as sufficiently narrow has already been seen as a far stretch to many scholars. Supporters of the rule must ensure that amendments and other future provisions to the Pennsylvania Rules of Professional Conduct are designed with the potential consequences for the survival of rule 8.4(g) under constitutional scrutiny in mind.

Alternatively, without action taken to better safeguard rule 8.4(g) by amending some of its biggest constitutional infirmities—perhaps by implementing some of the suggestions discussed in this Comment—those interested in decreasing bias, harassment, and discrimination in the legal profession leave the rule exposed. Just as Judge Ambro predicted,<sup>374</sup> we can expect the first attorney to face disciplinary action under the authority of Pennsylvania rule 8.4(g) to bring another suit challenging the rule's constitutionality on First Amendment grounds, at which point the attorney's standing to bring a case would be sufficient. Not only will this prospective plaintiff have a case, but also the motivating context of a politically charged controversy. Perhaps this is why, as of this Comment's publication, no disciplinary proceedings have been brought using the new power of rule 8.4(g)—or maybe, of course, simply no attorney in Pennsylvania has knowingly engaged in harassing or discriminatory conduct against another while in the practice of law in the last three years.<sup>375</sup>

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-our-democracy-state-bar-attorney-says [https://perma.cc/676U-6XUZ]; Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 739, 744–58 (2022); Quinta Jurecic, *The Professional Price of Falsehoods*, KNIGHT FIRST AMEND. INST. (Mar. 23, 2023), <https://knightcolumbia.org/content/the-professional-price-of-falsehoods> [https://perma.cc/4928-W6NV].

371. See *supra* Part III.B for a discussion of the specific application of Pennsylvania rule 8.4(g) and this Comment's suggested amendments.

372. 204 PA. CODE § 8.4 cmt. 6 (2025).

373. See *supra* Part II.D.3.c for a discussion on the need to protect the integrity of the judicial system in light of the current political climate.

374. See *Greenberg v. Lechoky*, 81 F.4th 376, 390 (3d Cir. 2023) (Ambro, J., concurring).

375. The author is being sarcastic. As of February 2026, no completed or pending disciplinary actions against any attorney for violating rule 8.4(g) have been reported by the Disciplinary Board of the Supreme Court of Pennsylvania. See *Recent Supreme Court & Disciplinary Actions*, *supra* note 288.

Considering the long history of Pennsylvania rule 8.4(g) and the plethora of First Amendment precedent that can be used to inform future amendments for the purpose of its protection, to stop the progress of the rule now and stymie its potential enforcement for fear of another court challenge is, to this author, a crying shame. Whether through the proposed amendments as set forth in this Comment, a larger shift in the conceptual view of attorneys and their First Amendment rights in relation to their role as arms of the court system, or by other means altogether, if supporters of Pennsylvania rule 8.4(g) truly care about the conditions of the legal profession as they claim to, they need not shrink from using the rule they fought so hard to codify by simply waiting for it to be overturned upon another challenge. “If [the Pennsylvania Bar Association] thinks it can do better, it need not start from scratch.”<sup>376</sup>

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376. *Lehocky*, 81 F.4th at 390 (Ambro, J., concurring).