

THE RULE OF LAW



BY MARC J. RANDAZZA, ESQ.

ATTACKS ON ATTORNEY SPEECH ARE ATTACKS ON THE RULE OF LAW

Threats to the rule of law may come in the guise of well-intentioned reforms meant to remedy societal ills. As attorneys, it is our job to detect and protect against these threats. For instance, let's consider ABA Model Rule 8.4(g). This model rule takes aim at harassment and discrimination related to the practice of law; it's a noble cause, but could Model Rule 8.4(g) come at a cost? Some argue that ABA Model Rule 8.4(g) subverts the rule of law by interfering with attorneys' First Amendment rights and undermining the public's access to justice and zealous representation.

Either way, the purpose of this article is not to argue for or against Model Rule 8.4(g), but to play devil's advocate, using Model Rule 8.4(g) to illustrate the type of threats to the rule of law that may exist and the objective analysis we must use to protect the rule of law.

Model Rule 8.4(g) makes it professional misconduct to:

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 related to the practice of law...

Comment 3 defines "discrimination and harassment" as including "harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct..." Comment 4 says, "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law ... and participating in bar associations, business or social activities in connection with the practice of law."

Does this go too far? Model Rule 8.4(g) may govern attorney speech no matter where and when it might occur—even in social situations—unless that speech is 100 percent disassociated from any tangent of the attorney's practice. While engaged in the practice of law in any way, attorneys could possibly say that all women are beautiful, but maybe

not that all men are pigs. "Senior citizens are wise" could be ok, but probably not "Millennials are lazy." An attorney might extoll the virtues of Mormonism but might face discipline for calling Dudeism a joke.

The rule also contains standards that might require attorneys to guess which statements are permitted and which are not. Could this rule curb speech that attorneys have a right or duty to express? And could Rule 8.4(g) subvert the rule of law in favor of a nebulous censorship regime—and one that could be selectively enforced? For instance, without clear definitions of harassment or discrimination, a bar could prosecute any attorney at any time; it would be the sole arbiter of what constitutes harassment or discrimination. And perhaps those with political agendas could insist on strict enforcement against attorneys espousing messages they don't like, while looking the other way when attorneys express discriminatory viewpoints of which they approve.

Finally, it seems possible that all but the most milquetoast clients could come with a Rule 8.4(g) violation risk. An attorney may risk discipline for representing controversial organizations if he or she makes any statement in support of those clients outside of direct courtroom advocacy. Could this hamstring zealous representation of the unpopular? And if so, to what end? Perhaps this would only end up serving to promote some current version of political correctness. Attorneys who advocate for controversial clients could have their hands tied and find themselves under heightened scrutiny by activists both within and outside of their bar organizations.

As attorneys, we have an obligation to guard against potential and disguised threats if we are to defend the Constitution and maintain it as the rampart that protects the rule of law—whether such threats come from Model Rule 8.4(g)'s possible implications or other means. Much depends on us, and we cannot abandon our post. *See Kopf v. Skyrn*, 993 F.2d 374, 380 (4th Cir. 1993) (those who defend the Constitution "must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people"). **NL**

MARC JOHN RANDAZZA is a Las Vegas-based First Amendment lawyer and CNN legal columnist. Randazza Legal Group has offices across the country, located in Miami, Las Vegas, Philadelphia and San Francisco.