IN SUPREME COURT
STATE OF WISCONSIN

In the Matter of the Amendment of Supreme Court Rule SCR 20:8.4	MEMORANDUM IN SUPPORT OF PETITION
	No. _____

INTRODUCTION

Public confidence in government institutions is critical to the functioning of our democratic republic. Our justice system may be the most important of these institutions given its role in protecting the rights of all citizens. Central to our justice system is the legal profession. An unwavering and public commitment to fairness and equality can do much to strengthen public confidence in the legal profession and the justice system. At the same time, silence and inaction in the face of discriminatory or harassing behavior can only weaken confidence that those responsible for administration of our system are committed to these core principles, particularly in a time when confidence in our profession[1], our system[2] and our courts[3] is, in the view of some, waning.

Although various considerations constrain our profession's ability to counter external criticism, it may be that the most effective and appropriate response is the continued

[1] https://www.rasmussenreports.com/public_content/politics/general_politics/july_2018/are_lawyers_trusted; https://mcginnandcompany.com/Resources/Docs/Legal-Issues-Survey-120303.pdf; https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx.

[2] https://iaals.du.edu/blog/trusting-public-s-perception-our-justice-system; https://thecrimereport.org/2015/04/29/2015-04-young-people-have-little-confidence-in-justice-syste/; https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/.

[3] https://news.gallup.com/poll/4732/supreme-court.aspx; https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/state-of-the-state-courts; https://willowresearch.com/american-confidence-courts/.

maintenance of a structure of oversight unequivocally committed to fairness and equality. This has long been a hallmark of this Court's management of the legal profession and the petition before the Court breaks no new ground. It simply tells the public who we are and what we stand for. Our commitment to equal justice under law is now and has long been reflected in several ways.

The very first section of Article I of our state constitution provides:

> … [a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed ...

These rights have value only if there is a legal system accessible to all citizens and administered by lawyers committed to fairness and equality. This Court has imposed important requirements for admission and maintaining good standing to reinforce these goals:

(1) Applicants for admission to the bar must establish "good general character and fitness to practice law" as a precondition to admission. SCR 40.06(1);

(2) Applicants must publicly swear to honor the Attorney's Oath, which requires support for the Wisconsin and United States Constitutions, both of which require equality under law. SCR 40.15; Wis. Const. Art. I sec. 1; U.S. Constitution, Amendments V, XIV;

(3) Once admitted, Wisconsin lawyers must comply with the Wisconsin Rules of Professional Conduct for Attorneys[4], which include several rules that require fairness and equality in the treatment of others. For example, (a) SCR 20:8.4(i), our current anti-discrimination rule; (b) SCR 20:4.4(a) (prohibition against conduct that may delay, burden, or embarrass a third party); (c) SCR 20:1.8(j) (prohibition against sexual relations with

[4] The preamble to Chapter 20 recognizes that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Chapter 20, Supreme Court Rules, Preamble ¶1.

clients); (d) SCRs 20:8.4(g), 40.15 (prohibition against engaging in "offensive personality"); (e) SCR 20:3.5(c)(3) (prohibition against coercion, misrepresentation, duress or harassment of jurors), and (f) SCR 20:7.3(b)(3) (controls on solicitation of clients).

These provisions have long been part of our disciplinary rules. Experience demonstrates they have functioned well in the service of Wisconsin lawyers, clients, and the public at large.

This Court's creation of standards to ensure equality and fairness has not been limited to practicing lawyers. More than twenty-five years ago this Court adopted its own anti-discrimination rule. SCR 60.04(1)(e), (f).[5] Like the existing lawyer disciplinary rules, there is no indication that this part of the Judicial Code of Conduct has proven problematic or unduly burdensome.

1. The Current Wisconsin Rule – SCR 20:8.4(i)

In 2007 this Court adopted the current SCR 20:8.4(i). It was enacted as part of the comprehensive Ethics 2000 initiative. It generated little discussion and no significant opposition.[6] It provides:

> It is professional misconduct for a lawyer to … (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital

[5] SCR 60.04(1)(e), (f) provide:

> (e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.
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> (f) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This subsection does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status or other similar factors are issues in the proceeding.

[6] Petitioner, State Bar Counsel Timothy Pierce, and Dean Dietrich, past chair and current member of the State Bar Standing Committee on Professional Ethics were members of the Ethics 2000 Committee.

status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).[7]

Since its adoption it has rarely been the basis of lawyer discipline.[8]

2. ABA Model Rule 8.4(g)

In 2016, the ABA adopted Model Rule 8.4(g). It provides:

> It is professional misconduct for a lawyer to … (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Enactment followed a lengthy, thorough, and contentious process.[9] Previously, the ABA Model Rules addressed discriminatory conduct only in the comments to Rule 8.4:

> [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

When Model Rule 8.4(g) was adopted, the commentary was changed by deleting former paragraph three and adding the following paragraphs:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes

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[7] The Wisconsin Committee note explained:

> Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.

[8] *See,e.g., Disciplinary Proceedings Against Kratz*, 2014 WI 31 (2014) and *Disciplinary Proceedings Against Isaacson*, 2015 WI 33 (2015). A review of these decisions suggests intentional conduct of an egregious nature.

[9] *See ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, 32 Law. Man. Prof. Conduct 481 (Aug. 10, 2016); Revised Resolution and Report 109 to the ABA House of Delegates.

> harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
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> [4] 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; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
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> [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

More than half of the states address discrimination and harassment either in the text or commentary to their ethics rules. Their approaches vary widely.[10] Thirteen states do not address the issue at all.[11] The committee examined the various approaches and believes the ABA version is the soundest. It is based on extensive debate and consideration. Adoption would provide the benefits of the ABA's lengthy and thorough deliberative process and its history would provide a substantial body of interpretive aids.[12]

[10] Attached to the petition is a spreadsheet detailing the related rules of other states. It was last updated in December of 2021.

[11] Id.

[12] *See* ABA Formal Opinion 493 at 1, which "offers guidance on the purpose, scope and application of Model Rule 8.4(g)."

Next is a comparison of our current rule and ABA Model Rule 8.4(g).

3. Comparison of SCR 20:8.4(i) and Model Rule 8.4(g)

A. Prohibited Behavior

SCR 20:8.4(i) prohibits harassment of a person. ABA Model Rule 8.4(g) would expand the prohibited behavior to include "harassment or discrimination". While the text does not explicitly require that the conduct be directed at a particular person, common usage[13], and ¶3 of the comment, in explaining that the behavior must be "harmful" and directed towards "others", suggests such a limitation, an interpretation the committee supports. Enforcement of state anti-discrimination rules reflects a similar approach.[14] ABA Formal Opinion 493 further explains that "[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern [and] … [t]he fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation."[15]

Both versions suggest substantive law can provide interpretive guidance. Neither version requires a violation of other law or a judicial finding of wrongdoing as a precondition to discipline.[16]

B. Mental State

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[13] For example, the Oxford English Dictionary defines discrimination as "the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex." https://en.oxforddictionaries.com/definition/discrimination [https://perma.cc/C7LQ-VWJ2].

[14] *See* 101 *Law. Man. Prof. Conduct* 801 (2020).

[15] ABA Formal Opinion 493 at 1.

[16] *See*, Ill. Rule 8.4(j)(requires final adjudication of a violation of statute or ordinance); Minn. Rule 8.4(h), (g) (one part of rule requires proof of violation of a statute or ordinance whereas the latter does not); N.J. Rule 8.4(g) (rule violation requires final determination of law violation in cases involving employment discrimination); N.Y. Rule 8.4(g) (prohibits a lawyer from "unlawfully discriminat[ing] in the practice of law" and exhaustion of other remedies if available); Washington Rule 8.4(g), (h)(varied approach – certain claims must violate separate state laws and others not).

SCR 20:8.4(i) is a strict liability rule – if a lawyer's conduct constitutes harassment there is a violation regardless of whether it was intended or realized. Model Rule 8.4(g) narrows its reach to instances in which "the lawyer knows or reasonably should know" the behavior violates the rule.[17] By so doing, it protects against inadvertent violations. A review of related disciplinary cases suggests this change would make little difference in enforcement as most cases reflect repeated, intentional, and egregious conduct.[18]

C. Scope

There are three options for defining the scope of anti-discrimination rules: (1) limiting its reach to conduct directly related to client representation, (2) applying the rule to all activities connected to the practice of law, or (3) applying it to both professional and personal conduct.

Both the current Wisconsin rule and ABA Model Rule 8.4(g) take a middle ground. In Wisconsin, SCR 20:8.4(i) has applied to behavior "in connection with the lawyer's professional activities" since its enactment in 2007. ABA Model Rule 8.4(g) applies to "conduct related to the practice of law". There does not appear to be a significant difference between the two.[19] Paragraph four of the ABA comments gives examples of how the provision might apply.

The committee believes the middle ground strikes an appropriate balance.[20] A lawyer's behavior at a firm, government office, conference, seminar, or business meeting reflects on the individual lawyer and the profession as much as conduct in litigation and may be more visible. This approach is not new. Lawyer conduct outside of the courtroom has always been subject to

[17] *See* SCR 20:1.0(g), (m); Revised Resolution and Report 109 to the ABA House of Delegates 8 (Aug. 2016).

[18] See cases cited in 101 *Law. Man. Prof. Conduct* 801 (2020).

[19] Comment ¶3 to the pre-2016 ABA version of Rule 8.4 suggested it would apply only to conduct "in the course of representing a client".

[20] Twelve jurisdictions would limit the rule to conduct related to the representation of a client. *See* Excel Spreadsheet – *State Bar Ethics – Discrimination Rules*.

regulation, and in some instances, regulation that reaches beyond professional activities, although ABA Rule 8.4(g) would not apply to wholly personal conduct unrelated to the lawyer's professional role.[21]

D. Protected categories.[22]

Both the current Wisconsin rule and ABA Model Rule 8.4(g) include sex, race, age, religion, national origin, disability, and marital status as protected categories.

SCR 20:8.4(i) also includes creed, color, and sexual preference, categories not included in the ABA Model Rule. On the other hand, ABA Model Rule 8.4(g) includes categories not addressed in the Wisconsin rule – ethnicity, gender identity and socio-economic status.

The committee believes the ABA approach improves upon the current Wisconsin rule. An examination of the various categories may be useful in comparing the two.

The following categories would be omitted if Model Rule 8.4(g) replaced the current SCR 20:8.4(i).

The term "creed" is defined as "a brief authoritative formula of religious belief" or "a guiding principle".[23] If the former, it would be redundant, as both rule versions include religion as a protected category. Alternatively, if any "guiding principle" were included, individuals and groups espousing racism, anti-Semitism or white supremacy as their creeds would be protected.

"Color" would appear to be included by "race" and if so, would be unnecessary to include as a separate category.

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[21] *See* pp. 17-19, *infra*. SCR 20:8.4(b)(criminal conduct reflecting on fitness to practice) and SCR 20:8.4(c) (dishonesty or misrepresentation whether or not related to client representation).

[22] *See* Chart – Comparison of SCR 20:8.4(i) and ABA MRPC 8.4(g).

[23] https://www.merriam-webster.com/dictionary/creed.

"Sexual preference" as a term has fallen into disfavor as it suggests sexual orientation is a choice. It has been largely replaced by "sexual orientation".[24] This change would conform the rule to more common current usage.

The following categories would be added if Model Rule 8.4(g) is adopted.

"Ethnicity" is conceptually broader than "race" or "color" and has been defined as "a social group that shares a common and distinctive culture, religion, language, or the like."[25] Given the ambiguity that may arise with terms such as race or national origin including "ethnicity" may be a useful descriptive term.

ABA Model Rule 8.4(g) includes "gender identity" as a protected category. This would expand the rule's reach. [26]As noted, it would also replace the term "sexual preference" with "sexual orientation".

Finally, the ABA version extends protections to "socioeconomic status". This addresses discrimination or harassment based on one's economic status or the acceptance of free or low-cost legal services.[27] As income inequality expands, increasing numbers of persons must rely on free or low-cost legal services to be represented at all. Any lawyer who has worked in these areas know that disparagement of the attorneys and parties in such cases is commonplace. This seems an appropriate addition to the class of protected categories.

On balance, the committee believes the ABA listing of protected categories and choice of language are improvements over the current SCR 20:8.4(i).

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[24] https://www.apa.org/pi/lgbt/resources/language.

[25] https://www.dictionary.com/browse/ethnicity.

[26] https://www.hrc.org/resources/glossary-of-terms.

[27] Revised Resolution and Report 109 to the ABA House of Delegates 13. Comment ¶5 explains that this provision does not limit a lawyer's ability to collect a reasonable fee or limit her practice to clients able to pay.

E. Exceptions.

Both the Wisconsin and ABA rules include exceptions.[28] SCR 20:8.4(i) states, "[l]egitimate advocacy respecting the foregoing factors does not violate par. (i)." ABA Model Rule 8.4(g) is more expansive, noting, "[t]his 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."

The committee views the ABA language as preferable. It provides greater clarity about the rule's interface with existing rules regarding acceptance, declination, and withdrawal from representation, and advice to and advocacy on behalf of clients.[29]

4. Feedback

The committee began its study of our anti-discrimination rule in the summer of 2020. Memoranda describing our work were circulated to elicit commentary. Only two formal bar groups responded, both in support of the proposal.[30] Twenty-four total responses were received, including some from out-of-state advocacy groups. A majority of respondents opposed the proposal. All responses are included as an appendix to the petition.

The comments reflected a number of themes:

- Some expressed concern the proposed changes would violate lawyers' First Amendment rights – freedom of association and religion as well as punish protected speech. None expressed concerns that existing rules SCR 20:8.4(i) or SCR 60.04 were similarly problematic.

[28] More than thirty jurisdictions have created exceptions like those in Wisconsin and in the ABA Model Rule. *See* Excel Spreadsheet – *State Bar Ethics – Discrimination Rules*.

[29] *See* p. __ infra (discussion of freedom of association and religion), SCR 20:1.16; 101 *Law. Man. Prof. Conduct* 801 (2020).

[30] The committee heard from the Legal Assistance Committee and the Indian Law Section of the State Bar.

- None acknowledged that discrimination against or harassment of others were problems or issues of concern either in the legal profession or society at large or that granting lawyers the freedom to discriminate against others would chill the speech of and cause harm to those targeted.
- None acknowledged that all Wisconsin lawyers must swear an oath to promote fairness and equality to all persons.
- Several hypothetical examples were offered to suggest the proposed rule would allow discipline for advocacy or expression of personal opinions. None were supported by actual examples of discipline. Nor has the committee found any examples of discipline in situations like the hypotheticals offered.
- The most detailed responses were from interest groups, often from outside of Wisconsin. They were very similar to the comments provided to the ABA during the enactment process for ABA Rule 8.4(g).
- Some individual objections were expressed, including opposition to including transsexuals as a protected class, and objections to requiring mandatory diversity and inclusion training as part of continuing education requirements.
- Some felt that our current rule was adequate and that no change was needed.

More than 25,000 lawyers are licensed to practice in Wisconsin. The feedback received represents less than .15% of all Wisconsin lawyers. Even though respondents represent an extremely small sample, their concerns merit thoughtful consideration.[31] The committee has

[31] Three members of the current State Bar Standing Committee on Professional Ethics participated in the comprehensive Ethics 2000 revision of our rules nearly twenty years ago. N. 6, infra. It was at that time the current anti-harassment rule, SCR 20:8.4(i), was adopted. At the time and since, little interest in or opposition to the change was expressed. To our knowledge, the same can be said about the judicial code's anti-discrimination provisions, adopted more than twenty-five years ago.

made its best effort to do so, considering both the comments received and the underlying law relied upon. We address the constitutional issues involved in the next section of this memorandum.

All feedback was shared with the State Bar Executive Committee and the Board of Governors. After due consideration, in September of 2021 the Board of Governors overwhelmingly approved seeking adoption of ABA Model Rule 8.4(g).

5. Constitutional issues

The ABA's adoption of Rule 8.4(g) generated significant debate and academic commentary.[32] While only a handful of Wisconsin and out-of-state lawyers communicated their views, those who did raised constitutional similar to those presented to and rejected by the ABA during the enactment process for Rule 8.4(g).[33] The committee has reviewed and considered these concerns.[34] For the reasons developed in the following sections of this memorandum the

[32] *See* Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. Legal Ethics 31 (2018); Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195 (2017); Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 265 (2017); Taslitz & Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 Geo. J. Legal Ethics 781, 788 (1996); Weiner, *Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 Harv. J.L. & Public Policy 125 (2018); Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018); Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf; Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019); Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018). Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016.

[33] Several opponents of the proposal who claim it would be unconstitutional cite *Greenberg v. Haggerty*, Case No. 20-3822 (E.D. Penn. Dec. 8, 2020) as proof of their claim. However, the *Haggerty* court considered a different rule with language distinct from ABA Rule 8.4(g), or for that matter, our current SCR 20:8.4(i). An appeal of the decision was voluntarily dismissed by the Pennsylvania Bar Association in March of 2021. To date, the committee has found no case, state or federal, holding either ABA Rule 8.4(g) or a variant, unconstitutional, although one recent case has upheld a challenge to a variant of the ABA rule. *In re Abrams*, 2021 CO. 44, 488 P. 3d 1043 (2021).

[34] One criticism suggested the the committee ignored the constitutional issues involved in ABA Rule 8.4(g). This is not so. The committee reviewed and discussed the materials available as part of the ABA enactment process, reviewed the rules and related laws of other jurisdictions, utilized two law student research assistants and elicited comments from faculty at the University of Wisconsin Law School. The impression that the committee did not

Committee is confident its proposal is constitutional and strikes a proper balance between the interests in a system devoted to equal justice for all and free speech of lawyers.

A. Governmental interests and restrictions on lawyer's speech.

That restrictions on speech are disfavored is beyond challenge.[35] However, given the unique role lawyers play in our system of justice the Court has long treated lawyer speech differently, allowing greater regulation when compelling government interests are at stake.[36] For example:

> [The] interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).*

In re Primus, 436 U.S. 412, 422 (1978).

> [T]he State bears a special responsibility for maintaining standards among members of the licensed professions. The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' While lawyers act in part as 'self-employed businessmen,' they also act as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 460 (1978).

Similarly, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-1072 (1991), Chief Justice Rehnquist noted,

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consider the constitutionality of the proposal perhaps came from a memo written by the committee to the Board of Governors in January of 2020 which focused primarily on how the current Wisconsin rule differed from the ABA rule.

[35] *See National Institute of Family Life Advocates v. Becerra*, 585 U.S. ___ (2018); *Janus v. AFSCME*, 585 U.S. __ (2018); *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).

[36] It has been suggested that recent case law requires that restrictions on any professional speech be narrowly tailored and satisfy the strict scrutiny test – that the restrictions serve a compelling government interest. *National Institute of Family Life Advocates v. Becerra*, 585 U.S. ___ (2018). While the cases upholding restrictions on lawyer speech predate *Becerra*, that case involved medical professionals, not lawyers, a profession that does not play a central role in our system of justice nor one that is required to swear an oath to promote equal justice for all. Nor do other recent cases involve regulation of lawyer speech. *See Iancu v. Brunetti*, 139 S. Ct. 2294 (2019). Perhaps most important, prohibiting discriminatory and harassing conduct by the very professionals that administer the justice system to ensure its commitment to equal justice may be among the most compelling government interests of all. The committee believes ABA Model Rule 8.4(g) satisfies the strict scrutiny test as well as the standards applied in the earlier cases involving regulation of attorney speech.

> Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, 360 U.S. 622 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be ... The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for reversal of the sanction, said in his separate opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." Id., at 646. He said that "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." Id., at 646-647.

Perhaps no principle of our justice system is more compelling or fundamental than the notion that all are equal before the law. It is enshrined in the Fourteenth Amendment to the United States Constitution and the very first section of our state constitution.[37] Indeed, the façade of the United States Supreme Court announces to all who enter, "Equal Justice Under Law".

To make this promise a reality our justice system must both operate fairly and be perceived as operating fairly. Nothing diminishes confidence in and respect for the rule of law more than evidence of unequal treatment by those sworn to uphold the rule of law.

Our justice system depends on the conduct of lawyers. In a very real sense, our every action and every word when acting as lawyers reflects on ourselves, our fellow lawyers, and our justice system. As the Preamble to the Model Rules states, "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[38] Described another way,

> … lawyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself."[39]

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[37] *See also* Wis. Const. Art. I, sec. 1.

[38] Wisconsin Rules for Professional Conduct for Attorneys – Preamble [1].

[39] Wendel, *"Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, 65 Law & Contemp. Probs. 33, 52–53 (Spring 2002).

Other courts have expressed similar views:

> When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.

In re Thomsen, 837 N.E.2d 1011, 1012 (Ind. 2005).

> Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole.

In re Charges of Unprofessional Conduct, 597 N.W.2d 563, 568 (Minn. 1999).[40]

Model Rule 8.4(g) does not involve commercial speech or peripheral issues; its focus goes to the core interests of our justice system – regulation of conduct that undercuts our commitment to a system of equal justice for all.

It is likewise important to note that Wisconsin lawyers, by swearing to follow the Wisconsin Attorney's Oath[41], a commitment required of all Wisconsin lawyers by this Court for more than one hundred years, have in essence agreed to not engage in discriminatory or harassing conduct by promising to uphold the Wisconsin and United States Constitutions and advance the cause of equal justice. We are not bakers[42] or florists.[43] The words of Justice Cardozo more than one hundred years ago still ring true today, "[m]embership in the bar is a privilege burdened with conditions."[44] One of the costs of this privilege is honoring one's promise to treat others equally.

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[40] The Court has allowed speech restrictions of lawyers even when less compelling interests have been involved. *See, Ohralik v. Ohio State Bar Assn*., 436 U.S. 447 (1978) and *Fla. Bar v. Went For It, Inc*., 515 U.S. 618 (1995) (limits on solicitation of clients).

[41] SCR 40.15.

[42] *See Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___(2018).

[43] *See Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (mem.); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

[44] *In re Rouss*, 221 N.Y. 81, 83, 116 N.E. 782 (1917).

It is ironic that those lawyers opposing restrictions on discriminatory or harassing conduct at some point swore an oath to not engage in such conduct.

A discussion of the legitimacy of restrictions on lawyer speech would not be complete without mention of several other rules, the validity of which has never been seriously questioned. They include the prohibition against disclosure of confidential information, SCRs 20:1.6(a), 20:1.9(c), filing frivolous claims, SCR 20:3.1, making false statements, SCRs 20:3.3, 4.1(a), mention at trial of irrelevant or unsubstantiated claims, SCR 20:3.4(e), unauthorized communications with the court or jury, SCR 20:3.5(a), commentary that could prejudice an ongoing matter, SCR 20:3.6(a), contact with a person represented by counsel, SCR 20:4.2, communications that serve only to harass another, SCR 20:4.4(a), improper criticism of the judiciary, SCR 20:8.2(a), and "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation", SCR 20:8.4(c).

B. Freedom of association and religion.

Opponents of ABA Rule 8.4(g) suggest it would require representation of a client that may conflict with the lawyer's religious beliefs. Careful analysis suggests this unlikely to be a problem.

First, as a practical matter, it seems highly doubtful a prospective client would seek to retain a lawyer who harbors deep-seated prejudice against the class to which the person belongs.

Second, the text of ABA Rule 8.4(g) provides, "This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." Model Rule 8.4(g) does not change the longstanding practice of lawyer autonomy in the selection of clients even though the cited rule – ABA Rule 1.16 – only addresses withdrawal

from representation rather than the threshold decision whether to accept a client or not.[45] To suggest that not representing a member of a protected class violates the rule appears to suggest that declining representation constitutes discrimination or harassment. Nothing in the history or comments to the rule support such a far-fetched construction.

Third, a lawyer may not represent a client if they are unable to provide competent and diligent representation, SCRs 20:1.1, 20:1.3, or if there is an actual conflict of interest. SCR 20:1.7(a)(2). If a lawyer harbors such animus towards a prospective client or their legal claim that adequate representation would be impossible our rules would require that the representation be declined. Under no reasonable construction of the disciplinary rules would a lawyer be forced to represent the client.

Not surprisingly, opponents have presented no cases in which a lawyer was disciplined for declining representation for religious reasons. ABA Rule 8.4(g) does not conflict with a lawyer's freedom of association or religion.[46]

C. Freedom of speech – vagueness.

The vagueness doctrine requires that a statute or regulation be sufficiently clear to give fair warning of what conduct is prohibited and to provide adequate standards to enforcement entities.[47] When free speech interests are involved the concern is that an ambiguous prohibition may chill lawful expressions.[48]

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[45] SCR 20:1.16(b)(4) allow discretionary withdrawal "when the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement".

[46] Gillers, supra n. 25 at 232. See also *Restatement (Third) of the Law Governing Lawyers* §14 cmt. b (2002).

[47] *See, e.g.*, *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Connally v. General Const. Co*., 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Colautti v. Franklin*, 439 U.S. 379 (1979).

[48] *Grayned v. Rockford*, 408 U.S. at 109.

For several reasons, the committee is confident ABA Rule 8.4(g) is not unconstitutionally vague.

There is little ambiguity in the rule's scope of protections or when it applies – the protected categories are listed in the text and the text and comment detail what activities are "conduct related to the practice of law."[49] Explanations of the operative terms – "discrimination" and "harassment" – are found in the comments to the rule[50] and ABA Formal Opinion 493[51]. There is a rich body of parallel law that provide additional guidance in application.[52] That all ambiguity cannot be removed from a narrowly crafted rule does not render it unconstitutionally vague. Indeed, consideration of this Court's rejection of a vagueness challenge to the prohibition against engaging in "offensive personality"[53] is instructive.

> We also reject Attorney Beaver's constitutional challenge to the "offensive personality" provision on the ground of vagueness. The context in which that provision is promulgated and the cases to which it has been applied render the term understandable by a person who has been licensed as an officer of the court. Attorney Beaver cannot be heard to argue that he lacked adequate notice of the kind of conduct from which he swore to abstain when he was admitted to the practice of law in Wisconsin.

In re Beaver, 181 Wis. 2d 12, 17, 510 N.W.2d 129 (1994). The language "offensive personality" is on its face substantially more ambiguous than the text of ABA Model Rule 8.4(g) and lacks the same interpretive resources. Yet its inclusion in our Attorney's Oath for more than one hundred years has survived several challenges. Of note, this Court recognized that context provides clarity when the challenged language applies in a professional setting and also its expectation that Wisconsin lawyers are held to know the meaning of the oath they took when

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[49] Cmt. ¶4, ABA Rule 8.4(g). Infra, pp. 7-8.

[50] ABA Rule 8.4(g) Cmt. ¶3.

[51] ABA Formal Opinion 493 at 7-9.

[52] See Aviel, n. 33, infra at 46-50.

[53] SCR 40.15.

admitted to practice. Id. at 13-14.[54] ABA Model Rule 8.4(g) give fair notice to those to whom it applies.

D. Freedom of speech – overbreadth.

A final constitutional claim against ABA Rule 84.(g) is that it is overbroad; that even though it primarily focuses on conduct, that the text and comment[55] are so expansive as to reach protected speech.

A statute or rule may be challenged facially – that the law is invalid in all circumstances, or as applied – that the law is only invalid in a particular circumstance. A facial challenge is the most difficult because in most cases it requires proof that "no set of circumstances exists under which the Act would be valid". *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, when applied to free speech cases, a law may be vulnerable to a facial challenge even when some applications of the challenged rule are valid. As explained by the late Justice Scalia:

> According to our *First Amendment* overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks, 539 U.S. 113, 119-120 (2003)*. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

United States v. Williams, 553 U.S. 285, 292 (2007).

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[54] ABA Rule 8.4(d) prohibits "conduct that is prejudicial to the administration of justice". This provision – not adopted in Wisconsin – lacks the specificity of ABA Rule 8.4(g) and has been applied in a wide variety of circumstances. Nonetheless, it has been upheld against vagueness challenges on several occasions. *See* 101 *Law. Man. Prof. Conduct* 501 (2020).

[55] The relevance of both the Wisconsin and ABA comments to the Wisconsin disciplinary rules in interpreting the rules is not altogether clear as this Court did not adopt them in enacting changes to the rules but rather published them for informational purposes. 2007 WI 4.

In the earlier case of *Virgina v. Hicks*, 539 U.S. 113 (2003), Justice Scalia emphasized the substantial costs of invalidating a law that operates appropriately in most instances. Because of the substantial costs of invalidating such a statute, a facial challenge must show substantial proof that protected speech is significantly chilled, and not simply creative or fanciful hypotheticals.

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct". . . . For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications . . . before applying the "strong medicine" of overbreadth invalidation.

Id. at 119-120.

It is here that opponents of ABA Model Rule 8.4(g) fail. They do not question, nor could they, that most of the conduct targeted by the rule is inappropriate – sending unwanted sexually harassing text messages to a crime victim[56], making religious slurs against a judge[57], making anti-Semitic remark to opposing counsel at deposition[58] or seeking to bar a paralyzed court clerk from the courtroom because counsel in a civil case sought to argue that their client, who was less disabled than the clerk, could not work[59] – to name but a few. Yet they would jettison restrictions against such conduct to prevent discipline in theoretical situations unsupported by any proof of

[56] *Disciplinary Proceedings Against Kratz*, 2014 WI 31 (2014).

[57] *Disciplinary Proceedings Against Isaacson*, 2015 WI 33 (2015).

[58] *In re Williams*, 414 N.W.2d 394 (Minn. 1987).

[59] *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976*, 653 N.W. 2d 452 (Minn. 2002).

discipline in similar cases.[60] And, even in the unlikely event that one of proffered hypotheticals would become the basis of an OLR complaint there is an available remedy – an as-applied challenge to the rule.[61]

The current Chair of the State Bar Standing Committee on Professional Ethics believes his own experiences may be relevant to this issue. In more than forty years of law school teaching and participation in continuing education programs, not once was there an issue or concern raised about discipline for addressing difficult and divisive issues, including those addressed by ABA Model Rule 8.4(g) and current SCR 20:8.4(i). This is not to say disagreements did not arise or all discussions ended with agreement or consensus. Rather, it provides additional proof that public comment on controversial issues does not convert such speech into a rule violation.

A final concern related to overbreadth is the scope of ABA Model Rule 8.4(g), which is essentially the same as the scope of our current rule – applicable when a lawyer is acting in role, or, in the words of the proposed rule, engaging in "conduct related to the practice of law". As noted, the free speech of lawyers in their personal lives is not affected by the rule at all. This is not, as some may suggest, an unprecedented intrusion into the lives of lawyers.

Regulation of lawyers has always reached conduct both outside of the courtroom and, on occasion, outside the practice of law entirely. For example, SCRs 20:8.4(b) and (c) provide:

> It is professional misconduct for a lawyer to …
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects [or]
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation …

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[60] *Blackman*, supra n. 33 at 246. ABA Formal Opinion 493 includes several hypotheticals to demonstrate how ABA Model Rule 8.4(g) should be applied. This demonstrates that the rule is neither intended to or would permit punishment of protected speech.

[61] *See Weiner* infra, n. 32.

Even a brief review of reported decisions reflects scores of lawyers disciplined for behavior having nothing to do with the practice of law. Such are the limits on those who seek the privilege of practicing law.[62]

CONCLUSION

The concerns of opponents to the proposal before the Court are understandable. Given the limits of language it may not be possible to craft a rule that eliminates all risk of improper application.

However, careful analysis makes clear that adopting ABA Model Rule 8.4(g) would at most result in modest changes to existing disciplinary rules, rules that have operated without problems or complaints for a significant period of time. Importantly, no proof been offered that adoption of the rule would improperly restrict lawyers' speech.

In contrast, embracing the views of the opponents, would put the legitimacy of current SCRs 20:8.4(i) and 60.04(1)(e), (f) at issue, and would place much discriminatory and harassing conduct, conduct wholly inconsistent with our profession's commitment to equality and fairness and the oath each Wisconsin lawyer has taken, beyond the reach of our disciplinary rules. If we, as a profession, cannot stand against harassment and discrimination by our fellow lawyers, who can?

For the reasons stated, the petitioner respectfully requests that this Court adopt ABA Model Rule 8.4(g) to replace the current SCR 20:8.4(i).

Dated: March 23, 2022

[62] *Aviel*, supra n. 25 at 62-73; Wisconsin Supreme Court Rules Annotated pp. 214-222, https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf.

Respectfully submitted,

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