

*ABA Model Rule 8.4(g) Straddling
the line between Attorney misconduct
and free speech rights*

Current Kansas Rule 8.4(d)

In Kansas, “It is professional misconduct for a lawyer to...(d) engage in conduct that is prejudicial to the administration of justice...[and] (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.”

ABA Comment [3] to Rule 8.4(d) “...Such discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public’s confidence in our system of justice, as well as notions of equality.”

Current Kansas Rule 8.4(g)

It is professional misconduct for a lawyer to “engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.”

Proposed Model Rule 8.4(g)

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.

- Replaces “biases or prejudices justice” with “knows or should know” is “harassment or discrimination”
- Replaces “in the representation of a client” with “in the practice of law”

KU Ethics Law Professor Suzanne Valdez is a Clinical Professor of Law. She teaches upper level practical skills courses that include Practice in Kansas, Pretrial Advocacy, and the Deposition Skills Workshop. She teaches two ethics courses - Professional Responsibility and Prosecutorial Ethics - and serves on the Kansas Bar Association's Ethics Grievance Committee. She will present the ethical issues to be addressed by the new rule, as well as the new ethics issues it creates.

Richard Levy is the J.B. Smith Distinguished Professor of Constitutional Law at University of Kansas School of Law. He is nationally and internationally known as a teacher and scholar in the field of American public law, including constitutional law, administrative law and legislation. He joined the KU Law faculty in 1985, having received his law degree with honors from the University of Chicago Law School. Before joining the faculty, he served as a clerk for Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit.

Washburn Law Professor Shawn Leisinger is Executive Director of the Centers for Excellence and Externship Director at Washburn University School of Law. The Centers for Excellence are focused in the areas of Advocacy, Business and Transactional Law, Children and Family Law, Oil and Gas Law, International and Comparative Law and Law and Government. He also works with the developing RURAL law practice program, which led him to conclude we need a moderated version of 8.4(g) that addresses professional misconduct but doesn't negatively impact the ability of litigants to secure representation in underserved communities.

Jack Mcinteer is a business and real estate lawyer who primarily represents entrepreneurs. Jack speaks frequently on business and ethics topics and is an author or editor of four editions of the Kansas Ethics Handbook, past Chairman of the State Ethics Advisory Committee, and a member of the Wichita Ethics Investigation Committee. He was a member of the Kansas Board for Discipline of Attorneys for 15 years, and member of several special committees appointed by the Kansas Supreme Court to review and recommend proposed ethics rule changes. He will present on the need for Model Rule 8.4(g).

Tyson Langhofer serves as senior counsel with Alliance Defending Freedom, where he plays a key role in the Center for Academic Freedom. Langhofer's practice focuses exclusively on defending the First Amendment rights of students and faculty on public university campuses. Prior to joining ADF, Langhofer was a partner with Stinson Leonard Street LLP in Wichita where he practiced for more than 15 years in business litigation. He is an AV Preeminent® attorney. and will present on the likely issues with Model Rule 8.4(g) that will lead to litigation.

Constitutional Issues

- Rule 8.4(g) may violate freedom of speech as applied to discriminatory speech that does not rise to the level of harassment, intimidation, or threats, although the state interest in regulating the bar and promoting equal access to justice may sustain it.
- Rule 8.4(g) may violate the void for vagueness doctrine, especially as applied to speech, although the inclusion of a scienter requirement probably saves it.
- Rule 8.4(g) would not violate the Free Exercise Clause unless it is applied to pure statements of belief or in a way that targets particular religions or religious practices.
- Rule 8.4(g) may violate freedom of association if it is used to punish membership in groups engaged in lawful expression or to force attorneys to take on clients, although the state interest in promoting equal access to justice might support such applications.

Potential conflicts with
other rules

POTENTIAL CONFLICT WITH OTHER MODEL RULES

NEW MODEL RULE 8.4(G) MAY NOT BE CLIENT-CENTRIC

- MR 1.1 – COMPETENCE
- MR 1.3 – DILIGENCE
- MR 1.4 – COMMUNICATION
- MR 1.7 – CONFLICT OF INTEREST
- MR 2.1 - ADVISOR
- MR 6.2 – PUBLIC SERVICE: ACCEPTING APPOINTMENTS

Rule 1.16(a)(4) provides that: (a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law.



Does a Rural Lawyer violate Model Rule 8.4(g) in choosing clients?

Rule 8.4 Misconduct

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.”



Is there a “Rural Lawyer” problem?

Simple answer is yes – absolutely yes!

Rural lawyers are “aging out of service”.

The continuing declining numbers impact basic legal services provision and often disrupt normal operation of the courts.

When there are only one or two attorneys serving a county the vast majority of citizens must either do without or pay the cost (if they are able) to bring in outside counsel.



Is there evidence of a “Rural Lawyer” problem?

Simple answer is yes – absolutely yes!

Most everyone should be familiar with the ABA Journal article which articulated rural opportunities.

Lorelei Laird, Too Many Lawyers - Not Here: In Rural America Rural lawyers are Few and Far Between, 100 A.B.A. J. 37, 46 (2014).

The “20% percent of the population living in rural areas but only 2% of the small law firms providing services there” statistic speaks volumes.



Is the “Rural Lawyer” problem a social justice concern?

Simple answer is yes – absolutely yes!

The most simple and basic step to fair and equal justice is ACCESS!

Many rural lawyers are facing the tough choices of de facto rationing of justice in choosing what legal work to do and what cases they can take.



Rule 8.4 (g) and De Facto Rationing of Justice?

In rural Kansas the lawyers in place deal with real issues of choosing each and every day to turn down cases and how that will impact their practice and livelihood.

They choose to represent a family or member of any group and have then chosen to represent that whole group in part due to the realities of the application of conflicts rules in practice.

Why consider Model Rule 8.4(g)?

“These women need protection, and they need a remedy, . . . Firms don’t want to punish their partners, and judges often are reluctant to police their own. So in the end there is no justice for victims of discrimination.”

- Each one of the protected groups has and is now undergoing discrimination or harassment from a small minority of lawyers.
- Rules needed to be stretched beyond their original intent to encompass offenses by predatory individuals like Jerry Berg. *In re Berg*, 264 Kan. 254, 955 P.2d 1240 (1998).
- KRPC 8.4(g) is seldom applied except in connection with the violation of another disciplinary rule. In its current form, it does not adequately serve as an effective prohibition on harassment or discrimination of historically persecuted groups.

When is a lawyer free speech code appropriate?

- “[I]n those instances where a lawyer’s unbridled speech amounts to misconduct that threatens a significant State interest, it is clear that a State may restrict the lawyer’s exercise of personal rights guaranteed by the federal and state Constitutions.” *In re Pyle*, 283 Kan. 807, 156 P.3d 1231 (2007)
- “A lawyer’s right to free speech is tempered by his or her obligations to the courts and the bar, obligations ordinary citizens do not undertake.” 283 Kan. at 822.

Current rules that already limit a lawyer's free speech rights

- i. MRPC 1.6 and 1.9 prevent a lawyer from revealing a client's confidential information.
- ii. MRPC 3.4 limits what a lawyer can say at trial.
- iii. MRPC 3.4(f) forbids a lawyer from asking a witness not to cooperate with the adversary.
- iv. MRPC 3.6 limits what a lawyer can say to the media.
- v. MRPC 4.2 forbids communications with another lawyer's client.
- vi. MRPC 4.4 forbids a lawyer from using means that have no substantial purpose other than to embarrass.
- vii. MRPC 8.2 prevents a lawyer from making certain false statements about judges and judicial candidates.

Compromise? Consider Colorado

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process