PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 51 | Issue 2 Article 1

2-23-2024

Interpreting Ethics Rules

Samuel J. Levine

Interpreting Ethics Rules

Samuel J. Levine*

ABSTRACT

This Article explores the interpretation of ethics rules through the prism of two rules that have been the subject of ongoing controversy and contention: Rule 4.2, the "no-contact" rule, which prohibits a lawyer from communicating with a represented client absent the consent of that client's lawyer, and Rule 8.4(g), which prohibits various forms of discrimination and harassment. Each of these rules provides a model for a wider examination of different interpretive approaches to ethics rules, grounded in different attitudes toward the features and functions of ethics codes. Specifically, the debate revolving around Rule 4.2 illustrates competing approaches to interpreting a rule that appears clearly articulated but, if applied as stated, would defy the similarly clear purpose of the rule, while Rule 8.4(g) has elicited sharply contrasting approaches to the interpretation and application of broadly articulated ethics rules.

The Article concludes that, while divisions over the interpretation of ethics rules may not prove inherently problematic, the relative lack of attention to the examination of interpretive approaches to ethics rules remains striking, particularly in light of the central role of the rules both in the regulation of lawyers and as expressions of the ethical norms of the legal profession. Thus, without expecting or proposing uniformity, the Article represents an effort to promote further discussion and consideration of interpretive attitudes and approaches to ethics codes and ethics rules, encompassing issues of vital importance to the legal community.

* Professor of Law & Director of the Jewish Law Institute, Touro Law Center. I presented earlier drafts of this Article at the Association of American Law Schools 2021 Annual Meeting and the International Legal Ethics Conference 2022 at UCLA Law School. I thank the conference organizers and participants, and I thank Rebecca Aviel, Bruce Green, Jon Lee, and Alex Long for their helpful comments.

TABLE OF CONTENTS

I. INTRODUCTION

Legal ethics codes differ significantly from other sources of law. Among other salient—and unusual—features and functions, ethics codes are enacted by courts rather than by a legislature, they are aimed directly and exclusively at lawyers, and, perhaps most importantly, in addition to serving as grounds for professional discipline, ethics codes consist of legal rules that are designed, by definition, to embody, express, and articulate ethical principles central to the community of lawyers.[1] In turn, the interpretation of ethics rules plays a vital role both in the regulation of lawyers and in the expression of the ethical norms of the legal profession.[2] Nevertheless, in the words of one leading ethics scholar, "[l]ittle attention has been given either to how the [American Bar Association] (ABA) ethics committee should interpret model ethics rules or to how state courts and state and local bar associations' ethics committees should interpret state ethics rules."[3]

This Article explores the interpretation of ethics rules through the prism of two rules that have been the subject of ongoing controversy and contention: Rule 4.2,[4] the "no-contact" rule, which prohibits a lawyer from communicating with a represented client absent the consent of that client's lawyer, and

1. *See generally* Samuel J. Levine, *The Law and the "Spirit of the Law" in Legal Ethics*, 2015 J. PROF. LAW. 1, 2 (2015) ("This article aims to explore the notion of the lawyer's ethical responsibility to go 'beyond' the letter of the law and to comply with the 'spirit' or 'purpose' of the law.").

2. *See id.* at 15–16 ([A]lthough ethics codes share some qualities, in both form and substance, with other statutory and regulatory schemes, by their nature, ethics regulations are designed, at least in part, to incorporate ethical aspirations and considerations. Accordingly, a spirit of the law analysis may appropriately play a central role in the interpretation and application of ethics rules.").

3. Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure in Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57, 69 (2011); *see also id.* ("There is no broadly accepted answer to these questions, and it is not necessarily the case that ethics committees and courts should employ the same interpretive tools in the same manner."); *cf.* Bruce A. Green, Doe v. Grievance Committee*: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 558 (1989) [hereinafter Green, *Doe v. Grievance Committee*] ("Courts are not obliged to interpret unclear rules so as to carry out the intent of either the ABA members who drafted them or the judges who subsequently adopted them. Consistent with their traditional authority to regulate the bar, courts can and should act as policy-makers when they interpret ambiguous provisions of the *Code of Professional Responsibility*."); *id.* at 534 n.178 ("Taken together, the *Doe* and *Hammad* decisions suggest the Second Circuit's inability, as a court, to agree upon, enunciate, and apply a uniform set of principles governing the interpretation of disciplinary rules.").

4. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2023) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Rule 8.4(g),[5] which prohibits various forms of discrimination and harassment. Each of these rules provides a model for a wider examination of different interpretive approaches to ethics rules, grounded in different attitudes toward the features and functions of ethics codes.[6] Specifically, the debate revolving around Rule 4.2 illustrates competing approaches to interpreting a rule that appears clearly articulated but, if applied as stated, would defy the similarly clear purpose of the rule,[7] while Rule 8.4(g) has elicited sharply contrasting approaches to the interpretation and application of broadly articulated ethics rules.[8]

Part II of the Article identifies several differences between legal ethics codes and other sources of law, illustrated both through the process of drafting, enacting, and implementing ethics codes, and through the function that ethics rules play within the legal system. In particular, Part II examines the unique roles of the ABA, which promulgates model ethics rules, and courts, which enact and implement ethics codes that have the authority of law. Drawing upon the unique features and functions of ethics codes, Part II delineates a number of possible approaches to the interpretation of ethics rules, evaluating potential advantages and disadvantages to each approach.

Different approaches to interpreting ethics rules may have significant implications for understanding and applying the ethical obligations of lawyers across a broad range of scenarios. Accordingly, building on the framework established in Part II, Part III and Part IV of the Article consider the impact of different interpretive approaches in the context of two ethics rules that have been the subject of current and ongoing controversy and debate. Without relitigating the cases and the issues, the Article identifies and explores different methodological approaches underlying these different views.

---

5. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023) ("It is professional misconduct for a lawyer 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 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.").

6. *See* Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 5 AM. B. FOUND. RES. J. 939, 952 (1980) ("Rules can govern the practice of law effectively only if they lend themselves sound interpretation by lawyers and enforcers and promote sound enforcement. In my view, the Code of Professional Responsibility caused or at least contributed to serious problems of interpretation and enforcement.").

7. *See infra* Part III.

8. *See infra* Part IV.

Part III examines the applicability of Rule 4.2, the no-contact rule, to the pro se lawyer. This Part explores the issue through the prism of a 2022 Indiana Supreme Court decision,[9] and a 2022 ABA Formal Opinion,[10] both of which include majority and dissenting opinions expressing sharply different responses. This analysis suggests that differing views on the question of the applicability of Rule 4.2 to the pro se lawyer may depend, more broadly, on different views as to whether an ethics rule should be interpreted primarily on the basis of the text of the rule or, alternatively, with a focus on the purpose of the rule. In turn, each of these views may be impacted and influenced by underlying attitudes toward the unusual nature of ethics codes.

Part IV of the Article explores Rule 8.4(g), which has been the subject of substantial controversy and debate among the ABA, courts, and scholars.[11] Here too, the analysis considers recent case law, including a 2022 decision of the United States District Court for the Eastern District of Pennsylvania[12] and a 2021 decision of the Supreme Court of Colorado,[13] as well as another recent ABA Formal Opinion, issued in 2020.[14] This analysis suggests that different views toward Rule 8.4(g) may reflect more general differences toward the place of broad ethics rules in codes of legal ethics, which may again illustrate different approaches to the interpretation of ethics rules.[15] Once again, the salient—and unusual—features and functions of ethics codes impact and influence underlying attitudes toward Rule 8.4(g).[16]

Finally, the Article concludes that, while divisions over the interpretation

9. *See In re* Steele, 181 N.E.3d 976, 981 (Ind. 2022).

10. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 (2022).

11. *See infra* Part IV.

12. *See* Greenberg v. Goodrich, 593 F. Supp. 3d 174, 209 (E.D. Pa. 2022) ("Though other aspects of Rule 8.4(g) address conduct, the Rule on its face restricts speech.").

13. *See In re* Abrams, 488 P.3d 1043, 1053 (Colo. 2021) ("The Rule does not extend to any speech that legitimately furthers a client's interest or relates to the advocacy of policy or political goals, no matter how controversial. Further, so long as a lawyer refrains from discriminatory language, Colo. R. Prof. Conduct 8.4(g) does not prohibit the criticism of judicial officers.").

14. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 (2020).

15. *See generally* Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003) (addressing critique against broad ethics provisions and suggesting a framework for interpreting broad ethics rules).

16. *See id.* at 535 ("[M]any scholars have expressed reservations about the extent to which ethics regulations, which include a number of broad provisions, may properly be conceptualized as having attained a legislative form."); *see also id.* at 538 ("Defenders of general rules in ethics codes have emphasized the need for and utility of general rules in regulating the ethical conduct of lawyers.").

of ethics rules may not prove inherently problematic, the relative lack of attention to the examination of interpretive approaches to ethics rules remains striking, particularly in light of the central role of the rules both in the regulation of lawyers and in the expressions of the ethical norms of the legal profession. Thus, without expecting or proposing uniformity, the Article represents an effort to promote further discussion and consideration of interpretive attitudes and approaches to ethics codes and ethics rules, encompassing issues of vital importance to the legal community.

II. THE NATURE AND FUNCTION OF LEGAL ETHICS CODES

Legal ethics codes are different from other sources of law, in part because they originate in the ABA Model Rules of Professional Conduct,[17] which is itself a code like no other.[18] The Model Rules are drafted by a private organization—a lobbying organization, of sorts[19]—composed of lawyers and thus

17. *See* MODEL RULES OF PROF'L CONDUCT Preamble & Scope ¶ 15 (AM. BAR ASS'N 2023) ("The [Model Rules of Professional Conduct] presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.").

18. For classic—and often critical—discussions of the functions and features of the of the ABA Model Rules of Professional Conduct and the earlier ABA Model Code of Professional Responsibility see, e.g., Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 639–40 (1981). *See also* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 243 (1985); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 689 (1981); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 677–78 (1989).

19. *See* Green, *Doe v. Grievance Committee*, *supra* note 3, at 544 ("The ABA is in an equivalent position to a private lobbying group that drafts a proposed bill and provides the draft to a member of Congress. Even if that proposal is ultimately signed into law *in haec verba*, a court must interpret that law in light of the intent of Congress when it enacted the law, and not the intent of the lobbying group which drafted it."). For discussions of the promotion of lawyers' self-interest often found in ethics codes, see sources cited *supra* note 18. *See also* Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165, 166 (2007) ("[The] American bar has engaged in a number of efforts to improve both the ethical conduct and the reputation of lawyers."); David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CALIF. L. REV. 1825, 1825 (2004) (discussing how the Rules influence a lawyer's decision to disclose client financial misconduct); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1708 (1998) ("An important, though not the only, function of ethical rules is reducing agency costs between lawyers and clients.").

vested with no legal authority.[20] In some ways, the Model Rules evoke parallels to the Model Penal Code (MPC) or the Restatements, similarly promulgated by a private organization, the American Law Institute (ALI).[21] Yet, the ABA goes further than the ALI, issuing formal opinions through which the ABA Standing Committee on Ethics and Professional Responsibility interprets the rules.[22] The opinions seem to operate in something of a shadow universe, as they likewise carry no legal authority.[23]

Despite the lack of legal authority, however, the Model Rules are indeed

20. *See* Green, *Doe v. Grievance Committee*, *supra* note 3, at 544 ("As between the intent of the ABA committee that drafted the Code and that of the superior court judges who adopted the Code, it is quite clearly the intent of the state judges that is of paramount importance. Although the ABA committee's understanding of a disciplinary rule may be a guide to the state judges' intent, particularly insofar as that understanding was known to the superior court judges at the time they adopted the Code, the ABA drafters' intent is not controlling. A court has no obligation to carry out the intent of the ABA as it would the intent of a legislature that enacted an ambiguous statute.").

21. *See The Story of ALI*, AM. L. INST., https://www.ali.org/about-ali/story-line/ (last visited Oct. 12, 2023).

22. *See Ethics Opinions*, AM. B. ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/ (last visited Oct. 12, 2023).

23. *See* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 747–48 (2002) ("Even if one focuses on published opinions, it is a mistake to view the ABA committee as typical. It is, in fact, unique, in that it limits its role to giving advice about model rules. In contrast, state and local bar associations give advice about rules that are not simply models, but that serve as the law for lawyers in the state. They do something that the ABA cannot do: They interpret real rules in the legal and practical context in which they are applied. . . . The ABA committee could not have answered the same questions in this way. It might say what model rules mean in the context of its idea of the average state law and the average state law practice, but it could not consider enforceable law in the context in which that law is applied, interpreted and enforced. This being so, for a lawyer or a court in any particular jurisdiction, it would make more sense to seek guidance in the opinions of the ethics committees of that jurisdiction than in the ABA opinions."); *see also* Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 326 (1997) ("In actuality, however, ABA opinions are binding upon no one. ABA opinions represent the views of a small committee of a private association, and they construe that private association's *Model Rules* and *Model Code*. The power to determine whether and to what extent either of these model documents will be put into force in any state is exercised by a state authority, most commonly the state's highest court.").

Scholars have critiqued the interpretive methods and conclusions found in ABA ethics opinions and have questioned the influence the opinions have had on the law. *See, e.g.*, Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 71–72 (1981); Hellman, *supra*, at 317 (suggesting that "besides fomenting uncertainty regarding specific issues, the cavalier approach to interpretation employed over time by the ABA Ethics Committee threatens to undercut the Bar's respect for the legitimacy of the 'ethics rules' as binding constraints on the practice of law.").

highly influential—unusually so—in their impact on the law.[24] Although the MPC and Restatements likewise have an impact on the law, here too, the Model Rules differ, both in degree and in the means of legal influence.[25] For example, both the MPC and the Restatements, when they are prescriptive, impact the law only when, and to the extent, that legislatures and judges adopt and apply particular provisions.[26] In contrast, every state in the country has adopted an ethics code largely following the entirety of the Model Rules—and before it, the ABA Model Code of Professional Responsibility—with varying and often relatively limited degrees of departure.[27]

---

24. *See supra* notes 17–23 and accompanying text (discussing the Model Rule's impact on the law); *cf.* Tom Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?*, 39 WILLAMETTE. L. REV. 1031, 1056–58 (2003) (analyzing converging and diverging areas between the ABA Model Rules and the Oregon Code and proposing several rules to be adopted while others to be rejected.).

25. *See* Green, *supra* note 23, at 747 (noting the Model Rules "limits its role to giving advice" while "state . . . associations give advice about rules that are not simply models.").

26. For discussions of the impact of the MPC, see, e.g., Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 297 n.25 (2012); Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. L. REV. 229, 229 (1997); Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 23–24 (2001); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 319–41 (2007).

For discussions of the influence of Restatements, see, e.g., Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 432 n.41 (2004) (citing sources); Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2119 (2002); Norman L. Greene, *The American Law Institute: A Selective Perspective on the Restatement Process*, 62 HOW. L.J. 511, 513–14 (2019); Herbert P. Williams, *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567, 567 (1998*)*; *Symposium, Did the First Restatement Implement a Reform Agenda?*, 32 S. ILL. U. L.J. 1, 1–3 (2007).

27. *See* Green, *supra* note 23, at 746–47 ("The ABA is, of course, the largest and most nationally representative bar association and its ethics committee's primary contribution is the publication of opinions. In one sense, its committee's pronouncements about the meaning of the disciplinary rules would seem to be the most important ones. After all, the ABA has played the leading role in codifying professional standards and promoting them nationwide. The ABA's work product does not, in itself, govern lawyers. But courts, in determining what disciplinary rules to adopt, have been greatly influenced, directly and indirectly, by the ABA Model Rules."); Hellman, *supra* note 23, at 324–26 ("One widely available source of interpretive guidance regarding the *Model Rules* is the published opinions of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. This ten-person committee periodically issues interpretations of the *Model Rules* and *Model Code* by applying their provisions to concrete factual situations posed as hypothetical problems. These opinions, especially those designated as 'formal opinions,' are quite influential; they are 'frequently cited by courts and other rule enforcement tribunals, by state and local ethics committees, and in treatises and law school casebooks.' Because most states' ethics rules are derived from an ABA-promulgated

Moreover, in adopting and applying provisions of the MPC and Restatements, legislatures and courts utilize the ordinary lawmaking process, typically implemented as part of the legislative and judicial roles.[28] Ethics codes, however, are enacted by the courts in each state, which operate in quasi-legislative roles while exercising the inherent authority to regulate the practice of law within their jurisdictions.[29] At the same time, judges maintain the ordinary judicial function and authority to interpret and adjudicate ethics rules, thus essentially serving the functions of both legislators and interpreters of the same body of law.[30]

---

document, either the *Model Rules* or the *Model Code*, state ethics authorities frequently rely on the ABA Ethics Committee's construction of the rules. When state and local authorities have not officially construed a particular rule, lawyers are taught to treat ABA ethics opinions as one of the best sources of guidance available.") (citations omitted).

28. *See generally* Robinson & Dubber, *supra* note 26, at 319 (remarking how courts readily utilize the Model Penal Code); Balganesh, *supra* note 26, at 2119 (noting how restatements "have played a prominent and influential role as legal texts that courts routinely rely on").

29. *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 462–63 (1996) ("Traditionally, courts have been the principal lawmakers for lawyers. Over the past quarter century, pursuant to their supervisory authority over the legal profession, courts have filled this role by promulgating and enforcing sets of rules drafted by bar associations. Thus, in judicial proceedings within a particular state, lawyers' conduct is typically governed by a set of rules adopted by that state's judiciary based on a version of either the ABA *Model Rules of Professional Conduct* . . . or the predecessor ABA *Model Code of Professional Responsibility* . . . . "); *id.* at 462–63 n.7 ("For most of the past quarter century, the scope of the courts' inherent authority to regulate lawyers was considered to be extremely expansive. To be sure, rules of conduct are subject to the limits of constitutional provisions such as the First Amendment . . . as well as express statutory limits. Subject to that caveat, however, courts have assumed that they have authority to impose upon lawyers virtually any standard of conduct that might plausibly be justified based on any of a variety of interests, including the need to protect clients and prospective clients, the attorney-client relationship, the integrity of judicial proceedings, or the need to promote public respect for the courts or the legal profession.") (citation omitted); *see also id.* at 463 n.7 ("'This court has exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship . . . [.] The sources of this power are this court's inherent judicial power emanating from the constitutional separation of powers . . . the traditional inherent and essential function of attorneys as officers of the courts, . . . and this court's exclusive original jurisdiction of attorney disciplinary proceedings.'") (quoting Succession of Wallace, 574 So. 2d 348, 350 (La. 1991)); Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 290 n.99 (2006) (citing sources).

30. *See* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 71 (1996) ("As lawmakers, courts promulgate rules of conduct, or disciplinary rules, such as those contained in the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, and adopt additional legal standards relating to lawyers' conduct in ad hoc or common-

Perhaps most significantly and most basically, by their nature and their function, both the ABA Model Rules and ethics codes adopted by courts differ substantially, in a number of ways, from other laws. First, "[u]nlike general laws, ethics rules . . . are aimed directly and exclusively at lawyers."[31] Second, unlike most statutes, ethics rules often include official comments delineating the "scope and underlying purpose of ethics provisions."[32] Third, though

law fashion in the course of adjudication."); *id.* at 71 n.3 ("Another judicial role . . . is as law-interpreter. Courts interpret disciplinary rules and other law governing lawyers in the course of reviewing disciplinary decisions or resolving issues of professional conduct that arise in litigation."); Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 73–74 (2009) ("[T]he primary regulation of lawyer conduct still consists of ethics codes and other court-supervised law. State supreme courts are responsible for promulgating disciplinary codes and local court rules governing lawyers practicing in their jurisdictions. Trial courts apply or supplement these standards when, in the exercise of supervisory authority over lawyers and litigation, they disqualify or sanction lawyers engaged in cases before them. When presiding over civil-liability cases brought against lawyers by their former clients or by third parties, trial and appellate courts interpret and develop common-law standards governing lawyers' professional conduct. The civil-liability standards may draw on the relevant ethics rules and sometimes provide a context in which to interpret them, but do not always do so. Finally, courts—ultimately the highest state courts—interpret and apply ethics rules in the context of overseeing disciplinary proceedings brought against lawyers for alleged misconduct.").

The unusual role of courts in both enacting and interpreting ethics codes finds parallels in the Jewish legal system, which incorporates judicial functions of both legislation and interpretation. *See* SAMUEL J. LEVINE, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916, 917–18 (1999), *in* JEWISH LAW AND AMERICAN LAW, VOLUME 1: A COMPARATIVE STUDY 63, 64–65 (2018) [hereinafter LEVINE, JEWISH LAW]; LEVINE, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L. Q. 508 (1997), *in* JEWISH LAW, at 62; LEVINE, *Miranda, Dickerson, and Jewish Legal Theory: The Constitutional Rule in a Comparative Analytical Framework*, 69 MD. L. REV. 78 (2009), *in* JEWISH LAW, at 147–48. For possible parallels to the judicial role in the context of the Federal Rules of Evidence, see generally Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911 (2022). For a discussion of interpretive questions, similar to those discussed in this Article, that arise in the application of the rules of evidence, see generally Cynara Hermes McQuillan, *Limiting Limited Liability: Requiring More Than Mere Subsequence Under Federal Rule of Evidence 407*, 102 B.U. L. REV. 2497 (2022).

31. Levine, *supra* note 1, at 28; *see* Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 859 (2019); Levine, *supra* note 15, at 573 (discussing how various ethical rules—like manipulating funds and communications with judges—are specific to lawyers); People v. Morley, 725 P.2d 510, 516 (Colo. 1986) (en banc) (noting that "[s]ince a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer," while also citing several cases demonstrating rules exclusively limiting lawyers' conduct).

32. *See* Levine, *supra* note 1, at 28; *see also* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT § 10 (2005) ("The Comments also frequently illustrate or explain applications of the rules, in order to

ethics codes consist of legal rules, these rules are designed, by definition, to embody, express, and articulate ethical principles.[33] "In contrast, most other laws serve a variety of societal functions—perhaps, at times, including the promotion of ethical values—but ethical considerations play a less central role in the development and formulation of these laws."[34] Finally, and relatedly, ethics codes serve the unique function of providing a basis for attorney discipline, which constitutes both an arguably quasi-criminal form of punishment

provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules."); Amir Shachmurove, *A Devilishly Daring Gambit: A Partial Roadmap Through the Federal Common Law of Disqualification in a Newly Modeled World*, 70 S.C. L. REV. 261, 271–72 (2018) ("[C]ourts look upon the Model Rules and their drafters' official comments as 'instructive' when interpreting the relevant state's 'analogous' provisions."); *id.* at 272 n.55 ("'[W]hile the commentary to the [Model R]ules have [sic] not been formally adopted in this state, the commentary is instructive in exploring the underlying policy of the rules.'") (quoting Teja v. Saran, 846 P.2d 1375, 1378 n.4 (Wash. Ct. App. 1993)) (alterations in original); Atasi Corp. v. Seagate Tech., 847 F.2d 826, 832 n.9 (Fed. Cir. 1988) ("The Model Rules have not been adopted by California or the Northern District of California but Rule 1.10 relating to imputed disqualification and the official comments thereto are instructive in the instant appeal."); *In re* Seare, 493 B.R. 158, 182–83 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014) ("The Nevada Rules of Professional Conduct in turn are based on, and largely identical to, the ABA Model Rules of Professional Conduct. The State of Nevada has not adopted the official comments to the ABA Model Rules; however, the comments 'may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the . . . comments.'") (quoting NEV. RULE OF PROF'L CONDUCT 1.0A (2011)); Strawser v. Exxon Co., U.S.A., 843 P.2d 613, 618 n.6 (Wyo. 1992) ("When Wyoming adopted the Model Rules, it also adopted the Official Comments to each rule. While the Official Comments are 'intended as guides to interpretation' and to 'explain and illustrate the meaning and purpose of the Rule,' the 'text of each Rule is authoritative.'") (quoting WYO. RULES PROF'L CONDUCT § 1.2 (2006)).

33. *See* Levine, *supra* note 1, at 15–16, 29; *see also* Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545, 1563–65 (2008) (considering lawyer regulation in terms of "expressive law" theory); Levine, *supra* note 19, at 202 ("[I]n place of a reluctant adherence to ethics rules out of a fear of possible enforcement, the community of lawyers must be willing to undertake a sincere commitment to ethical conduct, premised upon a shared sense of ethical values and principles."); Nelson P. Miller & Joan Vestrand, *Of Shining Knights and Cunning Pettifoggers: The Symbolic World of the Model Rules of Professional Conduct*, 110 PA. ST. L. REV. 853, 858 (2006) ("Individual rules, subsets of rules, and the Rules as a whole create a symbolic view of lawyers, clients, adversaries, and the legal system that is based on collective assumptions made by the Rules' drafters about each of these categories."); Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 1004–05 (1995) ("The lawyer's moral duty to obey the law rests primarily on the concept of consent . . . . The obligation binds because it is self-imposed, self-chosen . . . . Lawyers *do* stand in a moral relationship with the legal system and *do* possess duties of fidelity to that system.").

34. Levine, *supra* note 1, at 29.

and an official assessment of the attorney's ethical standing.[35] In short, "the ethical component of an ethics rule is central to the essence of the rule."[36]

These distinctive—and rather unusual—features of ethics codes may impact approaches to the interpretation of ethics rules. For example, one interpretive approach might adopt the position that because ethics rules represent the efforts of both the organized bar and state courts to broadly promote ethical values, judges and lawyers should interpret the rules in a way that broadly promotes justice.[37] Another approach might endorse a purposive interpretation of ethics rules that is more limited in scope, such as when the interpretation is consistent with official comments to the rule, or when a purposive reading promotes ethical behavior among lawyers.[38] These approaches, which would prove unusual in the context of interpreting other laws, might be further justified by the unusual judicial role in enacting and interpreting ethics

35. *See* Green, *supra* note 30, at 71 ("Courts regulate lawyers by making and enforcing much of the law governing lawyers' professional conduct. . . . As law-enforcers, courts establish disciplinary mechanisms to which allegations of lawyer misconduct may be referred. Courts also sanction lawyers for wrongdoing that arises in the course of litigation.").

36. Levine, *supra* note 1, at 29; *see, e.g.*, Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 23 (1997) ("[S]o-called 'ethical' or 'moral' obligations are reflected in the rules of professional conduct just as other aspects of the 'law of lawyering' are strongly rooted in common morality."); *id.* at 23 n.13 (citing sources); Levine, *supra* note 1, at 4–5 n.10 (citing sources); Samuel J. Levine, *Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 285, 293–94 (2011).

37. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 138 (1998); William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1368–69 (2008); *see also* Geoffrey C. Hazard, Jr., *The Morality of Law Practice*, 66 HASTINGS L.J. 359, 370 (2015) (examining the ways in which a justice-driven approach to advocacy may improve litigation and equity efforts). For more extensive discussions, including critiques, of Simon's model see, e.g., Deborah L. Rhode, *In Pursuit of Justice*, 51 STAN. L. REV. 867 (1999); Heidi Li Feldman, *Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice*, 97 MICH. L. REV. 1472 (1999); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 37–45 (2003); Levine, *supra* note 1 and accompanying text; W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 1–123 (1999).

38. *See, e.g.*, Levine *supra* note 1, at 28–29; *see also* Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1215 (2009) (referring to the lawyer's—and the client's— "civic obligations both under the law and beyond the law"); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 11 (2005) ("[S]hould the justness of the client's objectives be evaluated exclusively under a strictly legal standard, or should lawyers also refrain from pursuing judgments that violate the 'spirit of the law' . . . ?").

codes,[39] perhaps calling for the recognition—on both practical and normative grounds—that judges have broad authority and discretion to interpret the rules in a way that may stretch or possibly contradict the substance of the rule.[40] Yet another approach might altogether disregard the distinct—and distinctive—nature and features of ethics codes, instead treating ethics rules like ordinary statutes, thereby subject to ordinary methods of statutory interpretation.[41]

---

39. *Cf.* Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) (citations omitted) ("We begin our analysis by noting that what is at issue is a disciplinary rule, not a statute. In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, we are of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. . . . [W]e are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake.").

40. *See* Green, *Doe v. Grievance Committee*, *supra* note 3, at 536 ("When a court interprets an ethical rule, it need not and should not limit itself to the traditional tools of statutory interpretation. The court is not, after all, construing a statute. In the case of a statute, the court must attempt to divine the legislature's intent because judges are not allowed to make statutory law, only to interpret it. However, when a state court interprets an ethical rule, it is not usually attempting to ascertain the will of a legislature. On the contrary, in most states the judiciary itself promulgates the ethical rules pursuant to its inherent authority to regulate the practice of lawyers who appear before it. In essence, the court is attempting to ascertain and implement its own intent. Because the court is not constrained to implement the will of the legislature, but is operating in an area of law in which it has a special expertise and authority, it should have far greater latitude in interpreting ethical rules than it would have in interpreting legislation. Particularly when those who drafted and enacted the ethical rule gave no attention to the question whether the rule extended to the type of case before the court, the court should feel free to approach the question as a maker, not interpreter, of law. In other words, the court should determine the scope of the rule in much the same way that the drafters would have determined it.") (quoting Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 314–15 (1988)); Bruce A. Green, *The Lawyer as Lover: Are Courts Romanticizing the Lawyer-Client Relationship?*, 32 TOURO L. REV. 139, 159 n.105 (2016) ("[C]ourts are not obligated to defer to the drafters' intent in interpreting disciplinary rules, as they would ordinarily be in interpreting statutes. Rather, because courts themselves promulgate the disciplinary rules, they have latitude to interpret the rules to effectuate their view of sound regulatory policy.").

41. *See, e.g.*, Robert P. Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 688 (1977) ("Although not arguing for an unsophisticated 'plain meaning' philosophy in interpreting the Code, I would argue that the Disciplinary Rules were meant to be read and interpreted as a statute.").

It should be noted that other considerations may impact the application of any of these approaches, or a combination thereof, to a particular ethics rule or a particular set of facts. *See* Levine,

In turn, each of these interpretive approaches may have advantages or disadvantages *vis-à-vis* one another. For example, interpreting ethics rules in a manner that promotes justice carries the appeal of embracing ethical ideals, thereby incorporating one of the primary goals of ethics codes.[42] At the same time, however, an overly idealistic reading of ethics rules may often contradict both the clear language of the rules and fundamental elements of the American adversarial system, which operates under the proposition that rather than requiring individual private lawyers to promote justice, justice will emerge by requiring lawyers to represent—zealously—the best interests of their clients.[43] A more limited purposive interpretive approach, though perhaps not as noble in spirt, manages to maintain the advantages of promoting ethical goals, while largely remaining within the contours of the adversary system.[44] Still, a purposive reading, even when premised upon official comments to the rules, may, at times, contradict the language of the rules, if not occasionally, notions of zealous advocacy.[45]

As something of a corollary to these views, an approach that emphasizes broad judicial discretion to interpret ethics rules has the additional advantage of taking into account both the practical and normative implications of the unusual judicial function of enacting, interpreting, and enforcing the rules.[46] On the other hand, this approach seems to accept a substantial degree of unpredictability and inconsistency in the interpretation and application of ethics

supra note 1, at 2–3 (discussing the potential difficulties of applying a primarily justice-driven approach to all legal and ethical evaluations). Moreover, like most models, these approaches are presented as archetypes, of sorts, in largely simplified form. *See generally* Robin West, *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, 51 STAN. L. REV. 973 (1999) (arguing that Simon's proposal to implement a justice-focused approach to litigation will be inconsistent in application and overly simple when dealing with complex disputes). More complex approaches may incorporate aspects of more than one approach, to differing degrees. *See, e.g.*, Levine, *supra* note 1, at 2–3 (explaining that despite its facial appeal, Simon's justice-centered approach will be burdensome to implement outside of narrowly tailored areas where it is ripe for success, such as managing professional compliance for lawyers).

42. *See* West, *supra* note 41, at 973 (discussing the facial appeal of the justice-forward advocacy approach despite vastly disparate views about what constitutes justice among legal professionals and scholars).

43. *See* Levine, *supra* note 36, at 286; *see also* Samuel J. Levine, *Judicial Rhetoric and Lawyers' Roles*, 90 NOTRE DAME L. REV. 1989, 1999–2000 (2015) (discussing the implications of judges' emphasis on morality and general notions of ethics when the American legal system incentivizes adversarial, client-centered advocacy).

44. Levine, *supra* note 43, at 1989, 1999.

45. *See* Levine, *supra* note 1; Levine *supra* note 19; Levine *supra* note 15; Levine, *supra* note 37.

46. *See* Green, *Doe v. Grievance Committee*, *supra* note 3, at 536.

rules, depending on the goals and preferences of individual courts.[47] In addition to raising fundamental concerns over a lack of clear ethical guidance for the practice of law, interpreting ethics rules in an overly flexible manner also raises concerns revolving around the quasi-criminal imposition of professional discipline, implicating principles of fairness, notice, and basic due process.[48]

Finally, and conversely, an interpretive approach that treats ethics rules like other statutes, with an emphasis on the language of the rules, has the advantages and disadvantages of ordinary modes of statutory construction, including the benefits of relative predictability and uniformity.[49] Of course, differences in methodology arise in the context of interpreting other statutes as well, but the contours and limits of interpretation remain substantially bounded, which may be an important consideration when the ramifications of

47. *See id.* at 549 n.214.

48. *See, e.g.*, *id.* at 538–39 ("[I]t is generally recognized that disciplinary proceedings are quasi-criminal in that they may result in sanctions against an attorney, including the loss of livelihood. It could, therefore, be expected that disciplinary rules would be construed strictly in the context of disciplinary proceedings."); Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 6 (2010); *In re* Thalheim, 853 F.2d 383, 388 (5th Cir. 1988) ("Attorney disbarment and suspension cases are quasi-criminal in character. Accordingly, the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the person charged. Moreover, the same principle of construction follows from the fact that it was the court that drafted these rules. The court wrote its own rules; it must abide by them.") (citations omitted); *cf. In re* Haley, 126 P.3d 1262, 1273 (Wash. 2006) (Sanders, J., concurring) ("[T]he rule of lenity requires a strict and narrow construction exempting self-represented lawyers."). *But see, e.g.*, *id.* at 1277 (Alexander, C.J., dissenting) ("[T]his court has long rejected the notion that attorney discipline is penal, and the concurrence cannot point to any discipline case in which we have applied the rule of lenity to resolve ambiguity in the attorney's favor."). Indeed, notwithstanding the real impact of discipline, potentially including suspension or disbarment, professional discipline is arguably different in kind from criminal punishment.

A further factor that might be considered, stemming from yet another unusual feature of ethics codes, lies in their general unenforcement and underenforcement. *See, e.g.*, David Luban, *Ethics and Malpractice*, 12 MISS. C. L. REV. 151, 152 (1991) (making the "routine observation that the codes are drastically underenforced"); *see also* Levine, *supra* note 36. For a recent discussion of selective enforcement of disciplinary rules, see Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 151–96 (2022).

49. A full consideration of the features and merits of different forms of statutory construction is beyond the contours of this Article. For a few notable examples of scholarship in this area, see, e.g., Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027 (2022); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883 (2008).

interpretation may include discipline.[50] Notwithstanding these gains, however, something seems inextricably lost, as well, in failing to acknowledge the differences between ethics rules and other laws, particularly the unusual manner in which ethics codes are enacted and the values they are intended to embody and represent.

These different approaches to interpreting ethics rules may have significant implications for understanding and applying the ethical obligations of lawyers across a broad range of scenarios.[51] As an illustration, the next Part of this Article considers an ethics rule that contains language that appears clear on its face, but that, in light of its ostensible purpose, may be subject to different interpretations based on different interpretive approaches. Specifically, this Part explores the impact of different interpretive approaches on Rule 4.2, the no-contact rule, as applied to the pro se lawyer.

III. RULE 4.2

A. *Background*

Rule 4.2, the "no-contact" rule, provides a salient example of an ethics rule that, on its face, appears unambiguous.[52] Nevertheless, when applied to particular set of circumstances, implementing the plain language of the rule would run counter to the apparent or clear purpose of the rule.[53] Model Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the

50. *See In re Thalheim*, 853 F.2d at 388 (noting that disciplinary rules are to be read strictly, resolving any ambiguity).

51. *See* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 368 (1996) (discussing the application of Rule 4.2 to government prosecutors); Yvette Ostolaza & Ricardo Pellafone, *Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites*, 11 J. HIGH TECH. L. 56, 56 (2010) (discussing Rule 4.2 in an online communication context).

52. *See, e.g.*, Angela O'Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 520 (2010) (stating that "[t]he language of [Rule 4.2] is unambiguous" when applied to communications on social media).

53. *See In re* Steele, 181 N.E.3d 976, 981 (Ind. 2022) (Slaughter, J., dissenting) ("[T]he Court's interpretation of [Rule 4.2] . . . would twist our understanding of the client-lawyer relationship under our rules of professional conduct . . . and lead to counterintuitive outcomes.").

> consent of the other lawyer or is authorized to do so by law or a court order.[54]

The no-contact rule, prohibiting a lawyer from communicating with a represented client absent permission from that client's lawyer, serves a number of purposes that are essential to workings of the adversarial system of justice.[55] As the first comment to the rule notes, on a basic level,

> [t]his Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.[56]

Indeed, in most cases—when all clients are represented by attorneys—the no-contact rule operates in a manner that is consistent with both its language and its purpose, preventing lawyers from taking unfair advantage of other lawyers' clients.[57]

Yet, the straightforward and seemingly simple language of the rule may conceal and ignore more complex realities of legal practice that go beyond the contours of the rule.[58] In fact, courts and commentators have grappled with

54. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2023).

55. Humco, Inc. v. Noble, 31 S.W.3d 916, 920 (Ky. 2000); Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?*, 68 MO. L. REV. 813, 816 (2003).

56. MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 1 (AM. BAR ASS'N 2023).

57. *In re* Uttermohlen, 768 N.E.2d 449, 451 (Ind. 2022); Featherstone v. Schaerrer, 34 P.3d 194, 201 (Utah 2001) (quoting Wright v. Grp. Health Hosp., 691 P.2d 564, 567 (Wash. 1984)).

58. *See, e.g.*, George M. Cohen, *Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients*, 87 TUL. L. REV. 1197, 1200–01 (2013); David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 GEO. J. LEGAL ETHICS 283, 293–94 (1995); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 806 (2009); Levine, *supra* note 1 and accompanying text; Little, *supra* note 51, at 368; Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 864–65 (2014); Ostolaza & Pellafone, *supra* note 51, at 59, 78; Carl A. Pierce, *Variations on a Basic Theme: The ABA's Revision of Model Rule 4.2 (Part I)*, 70 TENN. L. REV. 121, 121–200 (2002); Carl A. Pierce, *Variations on a Basic Theme: The ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 321–89 (2003) [hereinafter Pierce, *Variations on a Basic Theme (Part II)*]; Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part III)*, 70 TENN. L. REV. 643, 643–736 (2003); Ira P. Robbins, *Sham Subpoenas and Prosecutorial Ethics*, 58 AM. CRIM. L. REV. 1, 46 (2021); Scott L. Sternberg, *Contrasting Professional Conduct Rule 4.2 with the First Amendment Right to Petition*, 62 LA. B. J. 94, 96–97 (2014).

the challenge of interpreting and applying the rule in a variety of situations for which the language of the rule provides insufficient guidance.[59] On one level, these examples may suggest that the rule remains altogether inadequate in regulating contact between a lawyer and a represented client. Accordingly, prominent scholars have proposed revisions to the rule that would expand upon and clarify the prescriptions of the current rule.[60]

On the other hand, it need not prove surprising that an ethics rule—or, for that matter, a statute—would directly address more common cases, leaving the outcome in less common scenarios to the interpretation, and perhaps the discretion, of decision makers who have the ability to evaluate the specific—and potentially unusual or exceptional—facts of the case.[61] Indeed, no set of rules, regardless of how extensive and detailed, could possibly cover every scenario that might arise, bringing about the inevitable need for further consideration and analysis.[62]

Still, Rule 4.2 may stand out in the extent to which it leaves open basic questions that the rule might have been expected to cover, including a scenario that is not very unusual: the question of whether a pro se lawyer may make contact with a represented client without the consent of that client's lawyer.[63]

---

59. *See, e.g.*, Jessica J. Berch & Michael A. Berch, *May I Have a Word with You: Oops, Have I Already Violated the No-Contact Rule?*, 6 PHX. L. REV. 433, 439–51 (2013); Green, *supra* note 29, at 530–31; Hazard & Remus Irwin, *supra* note 58; Stephen J. Langs, *Legal Ethics—The Question of Ex Parte Communications and Pro Se Layers Under Model Rule 4.2—Hey, Can We Talk?*, 19 W. NEW ENG. L. REV. 421, 425–426 (1997); Levine, *supra* note 1 (citing sources); Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 2, 6–7 (2011); Davis G. Yee, *The Professional Responsibility of Fair Play When Dealing with A Pro Se Adversary*, 69 S.C. L. REV. 377, 378 (2017).

60. *See, e.g.*, Hazard & Remus Irwin, *supra* note 58, at 838; Pierce, *Variations on a Basic Theme (Part II)*, supra note 58.

61. *See* Levine, *supra* note 15, at 559, 561; Green, *Doe v. Grievance Committee*, *supra* note 3, at 537 n.185.

62. *See generally* Levine, *supra* note 15, at 540 (indicating that by their nature, ethics codes are "necessarily and inherently incomplete"). *Cf.* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1328 n.85 (1995) ("It might be possible to adopt a highly specific code of professional conduct, which all lawyers must obey . . . [that] might instruct lawyers in how to balance competing interests in all situations," but "[v]irtually all existing codes . . . avoid that approach, probably for good reason."); *In re* Rinella, 677 N.E.2d 909, 917 (Ill. 1997) (Freeman, J., concurring in part and dissenting in part) ("As a practical matter, there could never be a set of rules which contemplates every aspect of the many encounters between an attorney and a client."); *In re* Illuzzi, 632 A.2d 346, 349–50 (Vt. 1993) (referring to the "impossibility of enumerating every act that might constitute a violation of professional standards").

63. *See* Levine, *supra* note 1, at 17 (discussing that Rule 4.2 "leave[s] unanswered the question of

As it turns out, this scenario has occurred with such regularity that several courts have addressed this question, expressing a number of different views,[64] prompting the ABA to issue a recent Formal Opinion, which likewise contained divergent views among the members of the ABA Standing Committee on Ethics and Professional Responsibility.[65] The different responses to this question reflect different underlying approaches to interpreting ethics rules, specifically in the context of a rule that presents language that, at once, is seemingly unambiguous on its face, yet when applied to a given scenario, likely contradicts the underlying purpose of the rule.[66]

As many courts and scholars have observed, the language of Rule 4.2, referencing a lawyer who is "representing a client," most likely excludes a lawyer appearing pro se.[67] If so, under the plain language of the rule, a pro se lawyer should be permitted to contact a represented client without obtaining permission from the client's lawyer.[68] Yet, despite the clear textual support for such a reading, the result would, just as clearly, serve to undermine the purpose of the rule. After all, functioning as a party to the case does not negate the pro se lawyer's legal knowledge and experience, which carries the potential for overreaching "interference . . . with the client-lawyer relationship," and "disclosure of information relating to the representation."[69] If anything, lawyers may prove more susceptible to taking unfair advantage of a vulnerable adversarial client when acting in their own self-interest rather than on behalf of a client.[70]

Given such a stark divide between the language of the rule and its purpose, an interpretive approach to ethics rules premised on promoting justice

whether a lawyer who is proceeding *pro se* may communicate with another person involved in the matter, without obtaining consent from that person's lawyer").

64. *See* Levine, *supra* note 1, at Part II (citing sources); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 (2022) (citing sources).

65. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 (2022) (concluding that Rule 4.2 applies to pro se lawyers, while the dissenting opinion opines that it does not apply to pro se lawyers representing themselves).

66. *See In re* Steele, 181 N.E.3d 976, 981 (Ind. 2022) (Slaughter, J., dissenting).

67. *See, e.g.*, Pinsky v. Statewide Grievance Comm., 578 A.2d 1075, 1079 (Conn. 1990) (holding that the pro se "plaintiff was not 'representing a client'" when they were representing themselves).

68. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 (2022); *see* Levine, *supra* note 1, at 101 (citing sources).

69. MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 1 (AM. BAR ASS'N 2023).

70. *See* Levine, *supra* note 1, at 4 (arguing the spirit of Rule 4.2 is to protect clients from an attorney's overreaching).

would presumably apply the no-contact rule to the pro se lawyer.[71] Such an approach may render the language of the rule somewhat secondary—if not largely immaterial—in light of an overarching vision of the lawyer's duty to see that justice is done.[72] In the context of the pro se lawyer, the substantial potential for injustice would thus weigh in favor of prohibiting unauthorized contact with the adversarial client.[73] In practice, though, few—if any—courts or lawyers are likely to adopt an approach that imposes a duty on private lawyers to act primarily to promote justice.[74]

Instead, most judges and lawyers recognize, both on a normative level and as a practical matter, the adversarial system operates under the expectation that a lawyer will zealously represent the interests of the client, rather than acting in the interest of achieving a broader sense of justice.[75] Indeed, the conundrum over interpreting and applying Rule 4.2 to pro se lawyers is grounded, in part, on the very real concern—if not expectation—that a lawyer who is functioning as a party to a case may act overzealously, and possibly unethically.[76] Thus, the very practical question arises as to the appropriate interpretation of Rule 4.2 when the language of the rule contrasts starkly with the purpose of the rule.

B. Case Law

Most courts addressing this question have adopted—albeit, at times, somewhat uneasily—a purposive interpretive approach to Rule 4.2, applying the no-contact rule to the pro se lawyer, so as to protect represented clients

71. *See id.* at 21 ("expanding upon the obligations expressly mandated" in Rule 4.2 by applying the no-contact rule to the pro se lawyer).

72. *See id.* at 21–22 (expanding ethical obligations under the no-contact rule is not the same as applying the spirit of Rule 4.2 to subvert its mandates).

73. *See id.* at 22 (imposing additional ethical obligations on the pro se lawyer "further safeguards an attorney-client relationship").

74. *See id.* at 9 (arguing that adopting an approach based on "promoting justice" blurs "the distinction between the role of the private lawyer and those of the prosecutor and judge, who are charged, respectively with the responsibility to serve justice and to mete out justice").

75. *See id.* at 2 (advocating for a client's best interests precludes an attorney from "focusing on the spirit and purpose" of Rule 4.2).

76. *See id.* at 19 (arguing that extending Rule 4.2 restrictions to pro se lawyers better serves the rule's policy objectives).

against possible abuses of power.[77] For example, in *In re Steele*,[78] decided last year, the attorney facing discipline argued that, when proceeding pro se, he was permitted to send an email to the adversarial client because, "in reference to Rule 4.2's prefatory clause, he assert[ed] he was not 'representing a client' but rather was representing himself."[79] The Indiana Supreme Court rejected the lawyer's argument, relying in large part on "[m]any of [its] disciplinary precedents [that] have found professional misconduct in connection with an attorney's pro se litigation . . . several [of which] have involved professional conduct rules with language similar to Rule 4.2's prefatory clause."[80]

However, the court's resort to prior authority is somewhat evasive of the substance of the lawyer's argument. If anything, the court's response merely begs the question as to why the earlier decisions dispensed with the plain wording of the rule—which the court labeled merely "prefatory language"—in favor of the rule's ostensible purpose.[81]

Indeed, in its support of the prior decisions, the court largely avoided the language of the rule. Instead, tellingly, the court explained that "[t]hese results make eminent sense from a policy view; after all, the harms wrought by an attorney[] . . . are the same whether the attorney is representing himself, representing someone else, or being represented by someone else."[82] As something of an afterthought, the court added that "[t]hese cases also implicitly recognize that self-representation is still representation, and an attorney who proceeds pro se in a matter functionally occupies the roles of both

77. *See id.* at 20 (considering the "general purpose of attorney discipline," concluding Rule 4.2 should apply to pro se lawyers); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 (2022) (acknowledging that "compelling policy arguments" support applying Rule 4.2 to pro se lawyers but dissenting from majority opinion and applying textualist interpretation).

78. 181 N.E.3d 976 (Ind. 2022).

79. *Id.* at 978.

80. *Id.* at 978–99 (finding attorney violated state Rule 4.2 by acting as both a client and a lawyer); *see also In re* Dempsey, 986 N.E.2d 816, 817 (Ind. 2013) (suspending respondent from the practice of law for violating Rule 3.1 by making frivolous legal arguments, among other violations); *In re* Richardson, 792 N.E.2d 871, 873 (Ind. 2003) (sanctioning attorney for violating state Rules 4.4 and 8.4 by falsely answering interrogatories); *In re* Thomas, 30 N.E.3d 704, 708 (Ind. 2015) (finding attorney violated state Rule 3.3(a)(1) by failing to list his trust in bankruptcy schedule); *In re* Usher, 987 N.E.2d 1080, 1087 (Ind. 2013) (rejecting attorney's argument that his conduct was not sanctionable because he acted as a litigant through represented counsel, finding several violations of professional conduct rules).

81. *See Steele*, 181 N.E.3d at 979.

82. *Id.*

attorney and client."[83]

The majority opinion, however, does not explain how the language of the rule comports with this reasoning. The court simply concluded that "[w]e do not think a different result obtains, or should obtain, under Rule 4.2" because "[t]he overarching purposes of the rule are 'to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship.'"[84] Thus, like most courts,[85] the Indiana Supreme Court applied a purposive approach to interpreting Rule 4.2—as well as other ethics rules—even when the court's application of the rule apparently contradicted the language of the rule.

The court's analysis, representing the views of four of the justices of the Indiana Supreme Court, prompted a dissenting opinion by Justice Slaughter, who instead offered a textualist interpretation of the rule.[86] As Justice Slaughter put it, the rule, "by its terms, applies only to lawyers who are 'representing a client.'"[87] Noting that "[u]nder the Court's interpretation of this rule, 'client' and 'lawyer' may be one and the same person," Justice Slaughter retorted that "to treat them as the same person would twist our understanding of the client-lawyer relationship under our rules of professional conduct and stretch the word 'client' beyond its plain meaning."[88]

To be sure, Justice Slaughter acknowledged that "[o]n policy grounds, I understand the Court's desire to protect non-lawyers represented by counsel from pro se lawyers who may try to take advantage of the nonlawyer's lack

83. *Id.*

84. *Id.* (quoting *In re* Baker, 758 N.E.2d 56, 58 (Ind. 2001)).

85. *See id.* at 980 (citing *In re* Hodge, 407 P.3d 613, 654–55 (Kan. 2017)); Medina Cty. Bar Ass'n v. Cameron, 958 N.E.2d 138, 1441 (Ohio 2011); *In re* Haley, 126 P.3d 1262, 1269 (Wash. 2006) (holding that, as a matter of first impression, a pro se lawyer is representing a client for purposes of local Rule 4.2 but dismissing attorney's violation, finding the rule "impermissibly vague as to its applicability to *pro se* attorneys"); *In re* Schaefer, 25 P.3d 191, 200 (Nev. 2001) (applying the state's equivalent of Rule 4.2 to attorneys proceeding pro se and rejecting counsel's void for vagueness argument), *modified on reh'g*, 31 P.3d 365 (Nev. 2001); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241, 260 (Tex. App. 1999); Runsvold v. Idaho State Bar, 925 P.2d 1118, 1120–21 (Idaho 1996); Sandstrom v. Sandstrom, 880 P.2d 103, 109 (Wyo. 1994) (holding Rule 4.2 is designed to protect litigants, finding they do not lose that right simply because "opposing counsel is also a party to the litigation"), *reh'g denied*; *In re* Segall, 509 N.E.2d 988, 990 (Ill. 1987) (applying state equivalent of Rule 4.2 to attorney proceeding pro se), *reh'g denied*.

86. *See Steele*, 181 N.E.3d at 981 (Slaughter, J., dissenting).

87. *Id.* (Slaughter, J., dissenting).

88. *Id.* (Slaughter, J., dissenting).

of legal education, experience, or sophistication."[89] Still, he insisted, "while this is a desirable policy goal, . . . Rule 4.2 does not clearly apply to pro se lawyers."[90] Finally, Justice Slaughter advised that

> [i]f we wish to achieve this policy goal, we should rewrite the rule so it actually says what the Court believes it should say: "No lawyer representing a client **or proceeding on the lawyer's own behalf** in a matter shall communicate about the subject of the matter with a person the lawyer knows to be represented by another lawyer in the matter, unless . . . . "[91]

Thus, the majority and dissenting opinions in *Steele* illustrate fundamentally different approaches to the interpretation of ethics rules. The majority confers substantial authority to the discretion of judges, opting to interpret the rule in a manner that conforms with the rule's purpose, in preference to its language.[92] Although the court does not explain the basis for such authority on the part of judges, one plausible explanation for this approach might focus on the nature of ethics codes as an unusual form of judicial rulemaking, and thus subject to broad judicial interpretive license.[93] The dissent, in contrast, treats ethics codes like other forms of legislation, interpreting the rule as stated and deferring to the language employed by the rule makers—who, in this instance, happen to be judges as well.[94] Notably, unlike other instances of judicial deference to statutory language, the Indiana Supreme Court has the authority to amend the law, as indicated by the dissent's suggestion that "we should rewrite the rule . . . ."[95] Nevertheless, unless and until the court enacts such a change, the dissent insisted, the correct approach to the rule requires a

89. *Id.* (Slaughter, J., dissenting).

90. *Id.* (Slaughter, J., dissenting).

91. *Id.* (Slaughter, J., dissenting). Indeed, in some states, no-contact rules expressly address the pro se lawyer. *See, e.g.*, Levine, *supra* note 1, at 17 n.72 (citing sources).

92. *See Steele*, 181 N.E.3d at 979 ("The overarching purposes of the rule are 'to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship[.]'").

93. *See, e.g.*, Green, *Doe v. Grievance Committee*, *supra* note 3, at 535–36 (discussing judicial exercise of discretion when interpreting disciplinary rules).

94. *See id.* at 539 (stating that legislation is "subject to traditional techniques of statutory construction"); *Steele*, 181 N.E.3d at 981–82 (Slaughter, J., dissenting) (applying textualist construction to Rule 4.2).

95. *Steele*, 181 N.E.3d at 981 (Slaughter, J., dissenting).

textualist interpretation rather than a purposive interpretation.[96]

C. ABA Formal Opinion 502

The division between the interpretive approaches in *Steele* mirrors similar divisions among and within many courts that had previously addressed the application of the no-contact rule to the pro se lawyer.[97] More recently, the ABA finally took up the question and issued a Formal Opinion, likewise including sharply contrasting approaches.[98] A close reading of the opinion suggests that the fault line among members of the ABA Standing Committee on Ethics and Professional Responsibility, though similar to the divisions among judges, may provide further insight into the methodologies and attitudes that inform the interpretation of ethics rules.[99]

The opinion opens its analysis with the declaration that "as applied to pro se lawyers the scope of [Model Rule 4.2] is less clear."[100] Therefore, the opinion continues, "[i]nterpretation of the Rule in this circumstance involves consideration of both its plain language and policy purposes."[101] In light of this introduction, the opinion might have been expected to accept the proposition that the plain language of the rule excludes the pro se lawyer, and then proceed with a discussion of whether the purpose of the rule should nevertheless outweigh the rule's wording. Instead, the opinion states that "both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers."[102]

---

96. *Id.* (Slaughter, J., dissenting).

97. *See* Levine, *supra* note 1, at 17 (discussing how Rule 4.2 does not explicitly address whether a pro se lawyer can communicate with the adverse client, resulting in "a strikingly diverse range of opinions"); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 at 5 (2022) (acknowledging varying opinions concerning whether a pro se lawyer can communicate directly with represented clients).

98. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 at 3 (2022) (writing for the majority of members, that Rule 4.2 applies to pro se lawyers because pro se lawyers "represent themselves as 'a client,'"). *But see id.* at 7 (Armitage, M. & Eagleson, R., dissenting) (disagreeing with the majority view, stating that Rule 4.2 clearly precludes application to pro se lawyers because representing oneself is different than representing a client).

99. *See id.* at 3 (balancing Rule 4.2 against policy goals to conclude that pro se lawyers may directly communicate with adverse parties). *But see id.* at 8 (2022) (Armitage, M. & Eagleson, R., dissenting) (agreeing with majority's end result, but arguing that Rule 4.2 be rewritten to apply to pro se lawyers).

100. *Id.* at 3.

101. *Id.*; *see also id.* at n.11 (citing Levine, *supra* note 1; Raymond, *supra* note 59).

102. *Id.* at 3; *see also* MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2023).

To be sure, most of the opinion focuses on the purpose of the rule, observing that "such communications are 'ripe with potential for overreaching and exploitation,' and that 'the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se.'"[103] Still, regarding the language of the rule, the opinion concedes, at most, that "[t]he first clause of Model Rule 4.2— 'In representing a client, a lawyer shall not . . . .'—may be seen as creating an ambiguity as applied to lawyers representing themselves."[104] Ultimately, however, rather than addressing any "ambiguity" in the language of the rule, the opinion relied entirely on a purposive interpretation, adding categorically that "[t]he conclusion of many jurisdictions is more persuasive and consistent with the purposes of Model Rule 4.2."[105]

Two of the ten members of the ABA Standing Committee on Ethics and Professional Responsibility dissented, taking the majority to task for its interpretive analysis.[106] Indeed, the dissent responded bluntly and directly to the majority's approach: "I cannot agree that 'both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers.'"[107] Instead, paying close attention to the text of the rule, the dissent insisted that "[w]hile the *purpose* of the rule would clearly be served by extending it to self-represented lawyers, its language clearly prohibits such application."[108]

The dissent noted that the "majority opinion thoughtfully and candidly discusses the split of authority interpreting the rule" and further acknowledged that "[i]t is not uncommon for ethics committees to weigh in when there is such a split."[109] In a sharply worded critique, however, the dissent added that "it is, I hope, unusual for a committee to nullify plain language through interpretation, especially when the committee has jurisdiction to propose rule amendments."[110] The dissent continued along these lines, adopting an interpretive approach that takes the text of the rule seriously, akin to legislative

103. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 at 3 (2022) (citations omitted).
104. *Id.* (emphasis omitted).
105. *Id.*
106. *Id.* at 6–8 (Armitage, M. & Eagleson, R., dissenting).
107. *Id.* at 6 (Armitage, M. & Eagleson, R., dissenting).
108. *Id.* at 6–7 (Armitage, M. & Eagleson, R., dissenting).
109. *Id.* at 7 (Armitage, M. & Eagleson, R., dissenting).
110. *Id.* (Armitage, M. & Eagleson, R., dissenting).

statutes.[111]

The dissent is particularly notable for its dismissive denunciation of the majority's purposive interpretive approach, which it characterized as a "mode of rule construction that I cannot endorse."[112] According to the dissent, "[s]elf-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."[113] Furthermore, interpreting the rule in a manner similar to other forms of statutory interpretation, the dissent found that the majority's "approach to construing the rule's language renders the phrase 'in representing a client' surplusage, contrary to a basic canon of construction."[114] As the dissent asked, succinctly and rhetorically, "[d]oes the text mean what it actually says . . . [o]r, does it mean what we wish it said?"[115]

The dissent was no less vehement—and rather caustic—in responding to the majority's reliance on judicial and ethics opinions that had interpreted the no-contact rule to include pro se lawyers, declaring that "[i]t is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule."[116] The dissent remained unimpressed by the "[n]umber of opinions" that had adopted the majority's approach, which it deemed "not convincing if the analysis is not persuasive," because—again putting it bluntly—"error compounded is still error."[117] In fact, the dissent identified a number of judicial opinions to the contrary, including one judge's designation of the purposive approach to extend the no-contact rule to pro se lawyers as an "ingenious bit of legal fiction."[118]

In addition to criticizing the majority's approach as inconsistent with basic principles of statutory construction, the dissent raised particular concerns about the application of a purposive interpretive approach in light of central functions of ethics codes: to provide professional guidance for lawyers

111. *Id.* (Armitage, M. & Eagleson, R., dissenting).
112. *Id.* (Armitage, M. & Eagleson, R., dissenting).
113. *Id.* (Armitage, M. & Eagleson, R., dissenting).
114. *Id.* (Armitage, M. & Eagleson, R., dissenting).
115. *Id.* at 7–8 (Armitage, M. & Eagleson, R., dissenting).
116. *Id.* at 7 (Armitage, M. & Eagleson, R., dissenting).
117. *Id.* (Armitage, M. & Eagleson, R., dissenting).
118. *Id.* (Armitage, M. & Eagleson, R., dissenting) (quoting *In re* Haley, 126 P.3d 1262, 1272 (Wash. 2006) (Sanders, J., concurring)).

and, potentially, to provide grounds for professional discipline.[119] As the dissent noted, "[w]hen an attorney consults the rule, it is highly unlikely that the phrase 'in representing a client' will be considered to include self-representation."[120] Accordingly, a lawyer who looks to rules for guidance will likely—highly likely, in this reading—understand Rule 4.2 to exclude the pro se lawyer.[121] Moreover, the dissent continued, "[i]f the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.'"[122]

In short, the dissent contended, both the language of the rule and the official comment to the rule strongly suggest—indeed, clearly indicate—that as a party to the case, a pro se lawyer will be permitted to make contact with a represented client without receiving permission from the client's lawyer.[123] Thus, the dissent posed another rhetorical question: "Given this apparent clarity, what will tip off the attorney that further research is required?"[124] The dissent responded with a non-answer to its own non-question: "The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions."[125] Finally, the dissent added, the specter of disciplining a pro se attorney, who has relied upon and complied with both the clear meaning of the rule and the official comment, raises serious concerns of due process.[126]

As a closing point, like the dissenting opinion in *Steele*,[127] the dissenting members of the ABA Standing Committee on Ethics and Professional Responsibility emphasized that, in place of a creative—and, in their estimation, unpersuasive—interpretive approach, the appropriate mechanism for

119. *See* sources cited *supra* note 48 and accompanying text.

120. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 at 7 (2022) (Armitage, M. & Eagleson, R., dissenting).

121. *See In re* Haley, 126 P.3d 1262, 1264 (Wash. 2006) (noting that "because of the specific language of RPC 4.2 . . . Mr. Haley could have harbored a sincere belief that contacts with a represented opposing party were not prohibited"); *see also* Langs, *supra* note 59, at 423 (noting the confusion over whether "Rule 4.2 governs pro se attorneys engaged in ex parte communications" and that Rule 4.2's application has been "left unanswered by various court interpretations").

122. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 at 7 (2022) (Armitage, M. & Eagleson, R., dissenting) (quoting MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 4 (AM. BAR ASS'N 2023)).

123. *Id.* at 6–8 (Armitage, M. & Eagleson, R., dissenting).

124. *Id.* at 7 (Armitage, M. & Eagleson, R., dissenting).

125. *Id.*

126. *Id.* at 8; *see also* sources cited *supra* note 48 and accompanying text.

127. *See supra* Section III.A.

changing the meaning of the rule would be to change the language of the rule.[128] The dissent warned that "[b]y leaving this rule in place, we are also leaving in place a trap" for the pro se lawyer who follows the language of the rule.[129] Thus, the dissent concluded that "[t]he rule should be amended to achieve the result advocated for in the majority opinion."[130]

Taken together, *In re Steele* and ABA Formal Opinion 502, both recently decided, illustrate the current and continuing debate and uncertainty over the applicability of the no-contact rule to the pro se lawyer. More broadly, and more importantly, the divisions among and amidst courts and the ABA reflect long-standing differences about the interpretation of ethics rules, grounded in different interpretive approaches and reflecting, in turn, many of the salient—and unusual—features and functions of ethics codes.[131] The next part of this Article turns to another ongoing legal ethics debate, revolving around the interpretation and application of broad ethics rules, examined through the prism of another area of current controversy, Rule 8.4(g).

IV. RULE 8.4(g)

A. Background

As something of a complement to—or, perhaps, a mirror image of—the continuing debate over the applicability of Rule 4.2 to the pro se lawyer, the ABA, scholars, and courts have engaged in a continuing debate over the contours—even the validity—of Rule 8.4(g), likewise grounded , in large part, in competing approaches to the nature and function of ethics codes and the interpretation and application of ethics rules.[132] Unlike the divisions over Rule

128. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 502 at 8 (2022) (Armitage, M. & Eagleson, R., dissenting) (citing Pierce, *Variations on a Basic Theme (Part II)*, *supra* note 58, at 324–29; Raymond, *supra* note 59, at 37; Hazard & Remus Irwin, supra note 58, at 831).

129. *Id.* (Armitage, M. & Eagleson, R., dissenting).

130. *Id.* (Armitage, M. & Eagleson, R., dissenting).

131. *See* Levine, *supra* note 1, 17–22 (discussing how the debate surrounding Rule 4.2 displays various approaches to interpreting legal ethics, such as the letter of the law and the spirit of the law approaches).

132. *See, e.g.*, Greenberg v. Goodrich, 593 F. Supp. 3d 174 (E.D. Pa. 2022); Greenberg v. Haggerty, 491 F. Supp. 3d 12 (E.D. Pa. 2020); Matter of Abrams, 488 P.3d 1043 (Colo. 2021); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 (2022); ABA Comm. on Ethics & Prof'l Responsibility, Notice of Public Hearing: Draft Proposal to Amend Model Rule 8.4 (2016); Dennis Rendleman,

4.2, however, which revolve around the potentially broad interpretation and application of a narrowly articulated rule to scenarios beyond the specific language of the rule, the controversy over Rule 8.4(g) centers on the interpretation and application of a broadly articulated rule to specific unenumerated

The Crusade Against Model Rule 8.4(g), ABA NEWS: YOUR ABA (Oct. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/; MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023); Handel Destinvil, *ABA Committee Proposes New Model Rule of Professional Conduct*, ABA NEWS: PRACTICE POINTS (Jan. 17, 2016), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/aba-committee-proposes-new-model-rule-professional-conduct/; ABA Comm. on Ethics and Prof'l Responsibility, Draft Proposal to Amend Model Rule 8.4 (2015); Dennis A. Rendleman, *ABA Model Rule 8.4(g): Then and Now*, ABA: FEATURE (Jan. 20, 2023), https://www.americanbar.org/groups/government_public/publications/public-lawyer/2023-winter/aba-model-rule-8-4-g-then-now/#44.

For just a few notable examples of scholarship on these issues, see, e.g., Michael Ariens, *Model Rule 8.4(g) and the Profession's Core Values Problem*, 11 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 180, 183–232 (2021); Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 31–76 (2018); Ashley Badesch, *Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497 (2018); Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 629–42 (2019); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) the First Amendment and "Conduct Related to the Practice of Law,"* 30 GEO. J. LEGAL ETHICS 241, 241–65 (2017) [hereinafter Blackman, *Reply: A Pause for State Courts*]; George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J. L., ETHICS & PUB. POL'Y 135, 135–83 (2018); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 201–68 (2017); Ashley Hart, *Sexism "Related to the Practice of Law": The ABA Model Rule 8.4(g) Controversy*, 51 IND. L. REV. 525, 525–55 (2018); Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE 1, 1–21 (2017); Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women From Harassment*, 96 U. DET. MERCY L. REV. 579, 579–601 (2019); Root Martinez, *supra* note 31; Meredith R. Miller, *Going Beyond Rule 8.4(g): A Shift to Active and Conscious Efforts to Dismantle Bias*, 10 J. RACE, GENDER & ETHNICITY 23, 23–38 (2021); Jack Park, *ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?*, 22 CHAP. L. REV. 267, 267–83 (2019); Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 121–69 (2021) [hereinafter Tarkington, *Reckless Abandon*]; Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 TEX. REV. L. & POL. 41, 41–96 (2019); Andrew E. Taslitz & Sharon 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, 781–840 (1996); Symposium, *The Challenges of Constructing ABA Model Rule 8.4(g)*, 50 HOFSTRA L. REV. 501 (2022); Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activity*, WASH. POST (Aug. 10, 2016, 8:53 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for- lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2.

scenarios.[133] Thus, if different views toward Rule 4.2 may reflect, more generally, different approaches to the interpretation of a plainly stated ethics rule in light of its apparent purpose, then different views toward Rule 8.4(g) may reflect more general differences toward the place of broad ethics rules within codes of legal ethics. Here too, the unusual nature of ethics codes, characterized by a number of features and functions rarely found in other sources of law, impacts and influences attitudes toward Rule 8.4(g).[134]

The origins and evolution—the legislative history, as it were—of Model Rule 8.4(g) illustrate the unusual and complex characteristics of ethics codes.[135] As the ABA Standing Committee on Ethics and Professional Responsibility noted in a 2015 Memorandum,[136] early efforts to address important issues of harassment and discrimination in the legal profession included a 1998 amended comment to Model Rule 8.4, providing that:

> 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.[137]

As the ABA Memorandum explains, however, "addressing [these] issues in a Comment . . . did not make manifestations of bias or prejudice such as discrimination or harassment a separate and direct violation of the Model Rules . . . because statements in the Comments are not authoritative."[138] In fact, the Memorandum quotes the Preamble and Scope to the Model Rules for

133. *See* Tarkington, *Reckless Abandon, supra* note 132, at 121 (noting that Model Rule 8.4(g), as written, "reaches far beyond prohibiting sexual harassment and unlawful discrimination" and encroaches upon protected speech and advocacy, resulting in an overly broad application).

134. *See* Dent, *supra* note 132, at 142–57 (discussing the interpretation issues of Rule 8.4(g) and the different opinions about the rule).

135. *See generally id.* (discussing the history, interpretation, and challenges of Rule 8.4(g) and comparing it to other ethics rules).

136. *See* ABA Comm. on Ethics & Prof'l Responsibility, Draft Proposal to Amend Model Rule 8.4 (2015).

137. *See id.* at 2–3.

138. *Id.* at 1.

the proposition that "[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules[,]" and that "[c]omments are intended as guides to interpretation, but the text of each Rule is authoritative."[139] Therefore, the Memorandum concludes, the proposed Model Rule 8.4(g) "moves beyond the [c]omment to craft a distinct rule within the black letter of the Model Rules of Professional Conduct . . . ."[140]

The ABA's characterization of the relationship between the text of the rule and the comment is notable on a number of grounds. First, the Committee's strong endorsement of the centrality and primacy of the text of the rule, accompanied by a corresponding diminution of the value of the comments, seems somewhat surprising.[141] After all, in instances such as the recent opinion addressing Model Rule 4.2, the Committee has adopted a purposive interpretive approach that relies on policy considerations in preference to the plain language of the rule.[142] Indeed, most judicial opinions interpreting Rule 4.2 likewise emphasized that because ethics rules are not ordinary statutes, they should be interpreted and applied in a manner that goes beyond the text of the rule.[143] If so, an official comment to Model Rule 8.4 would seem sufficient to serve as a basis to interpret the rule in accordance with its purpose and, potentially, to impose discipline.

Second, more generally, the Committee's analysis is notable for what it says about the role of the ABA in promulgating the Model Rules and what it demonstrates about the unusual nature of ethics codes. Though the Memorandum carefully parses the language of Model Rule 8.4 and its impact on the disciplinary process, in reality, the Model Rules have no legal authority, and the ABA does not impose discipline.[144] At the same time, as a practical matter, the ABA often remains highly influential in its impact on courts, which have legal authority to enact, interpret, and apply ethics rules, including the authority to impose discipline.[145] The Memorandum thus appears to represent the ABA's attempt to exhibit leadership on issues of harassment and discrimination, to the point of not only providing a model rule to address these issues,

139. *Id.*
140. *Id.*
141. *See generally id.* (discussing the Committee's opinion on Rule 8.4(g) and the comments regarding the rule).
142. *See supra* Section III.C.
143. *See In re* Steele, 181 N.E.3d 976, 981 (Ind. 2022) (Slaughter, J., dissenting).
144. *See supra* Part II.
145. *See supra* Part II.

but offering guidance for an interpretive approach to the rule.[146]

As the Memorandum further details, however, during intervening years following the 1998 amended comment to Mode Rule 8.4, twenty-four jurisdictions adopted ethics rules that "in the black letter of their rules address bias, discrimination or harassing behavior by a lawyer. These rules vary—some addressing the issue very broadly, some more narrowly."[147] Thus, while the ABA has shown admirable determination to respond to problems of discrimination and harassment, the timing of the ABA's response seems to undermine any claim to leadership in these efforts. If anything, the ABA's actions seem to have been prompted by the progress and leadership demonstrated among the states.[148]

In any event, in August 2016, the ABA adopted Model Rule 8.4(g), which states that:

> It is professional misconduct for a lawyer 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 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.[149]

The promulgation of Model Rule 8.4(g) has been met with extensive commentary, including a number of criticisms, among both the practicing bar and legal scholars.[150] First, perhaps the most common critique of Model Rule 8.4(g) is premised on the argument that the conduct proscribed in the rule is

146. *See* ABA Comm. on Ethics & Prof'l Responsibility, Draft Proposal to Amend Model Rule 8.4 at 6 (2015) (showing the Committee's response to the opinions on Rule 8.4(g) and their comments regarding those opinions and how to approach the rule).

147. *Id.*; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Draft Proposal to Amend Model Rule 8.4 (2016) (showing the draft redlining); ABA Comm. on Policy Implementation, Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf.

148. *See* Root Martinez, *supra* note 31, at 851–52 (discussing how the states were attempting to make laws for harassment and discrimination and then the ABA tried to make a rule for all states to adopt).

149. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023).

150. *See supra* note 132 and accompanying text.

overly broad, if not inherently ambiguous, and therefore, in principle, the rule is not suitable to serve as the basis for discipline.[151] As a corollary to this concern, the rule is said to violate various constitutional rights, including First Amendment protections—such as freedom of speech and possibly freedom of religion—as well as due process rights.[152] Indeed, questions over the constitutionality of the rule have resulted in substantial resistance to the rule among courts, bar associations, and scholars, while still others have worked to defend the rule's current constitutionality or to revise the rule in a way that would comply with constitutional requirements.[153] Second, some argue, even if, in principle, applying the rule as a basis for discipline would not be improper, in practice, due to its lack of precision, the rule is unlikely to be enforced or enforceable.[154] Finally, and somewhat conversely, others argue that the rule is unnecessary because, to the extent that it legitimately and practically serves as a basis for discipline, the misconduct that would trigger the application of the rule is covered in other rules.[155]

The ongoing discussions and controversies surrounding Model Rule 8.4(g) further reflect the unusual nature, purpose, and function of ethics codes and, accordingly, complex questions revolving around the interpretation and application of ethics rules. In particular, ethics codes often include a number of rules that, like Model Rule 8.4(g), are comprised of broad provisions and, therefore, have likewise been the subject of criticism among both courts and scholars.[156] In contrast, proponents of broad ethics rules have argued that they

151. *See* Tarkington, *Reckless Abandon, supra* note 132, at 151 (discussing how Rule 8.4(g) is not a valid basis for discipline).

152. *See* Dent, *supra* note 132, at 140, 158–79.

153. *See* Root Martinez, *supra* note 31, at 854.

154. *See id.* at 857–58 (describing how the nature of ethics rules raises concerns among scholars about the enforceability of such rules).

155. *See* Blackman, *Reply: A Pause for State Courts*, *supra* note 132, at 250–52 (describing that the Model Rules already prohibit misconduct by attorneys, violations of which are subject to discipline).

156. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 87 (1986) ("[I]f anything is clear, it is that many provisions of the lawyer codes are plainly imprecise.") ("Unnecessary breadth is to be regretted in professional rules that can be used to deprive a person of his or her means of livelihood through sanctions that are universally regarded as stigmatizing."); Matthew Kim, *For Appearance's Sake: An Empirical Study of Public Perceptions of Ethical Dilemmas in the Legal Profession*, 83 OHIO ST. L.J. 529, 537–39 n.40–59 (2022) (citing sources); Levine, *supra* note 15 (citing sources); Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 940 (1980) ("[O]n some subjects that were dealt with in the [Disciplinary Rules], but in terms so general as to require heroic interpretive effort, the Model Rules are not appreciably more specific—better written and with fewer internal inconsistencies, but not more specific."); Serena

may properly serve as a basis for discipline,[157] may express the values of the profession,[158] and may provide a means for reinforcing the application of other

Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 593 (1991) (describing "the substantial indeterminacies left in the structure of professional ethics by both the Rules and the Code"); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 480–81 (1990) (describing the ABA Model Code of Professional Responsibility as "rife with vague and ambiguous terms," but finding that, while the Model Rules' "self-conscious[] attempt to bring more determinacy to the field of professional responsibility by adopting a rule-like structure . . . . has eliminated some of the more pervasive ambiguities, vagueness and open-endedness remain").

157. *See, e.g.*, Jerry Cohen, *Appropriate Dispositions in Cases of Lawyer Misconduct*, 82 MASS. L. REV. 295, 297 (1997); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO L. REV. 699, 710, 719 (1998); Kim, *supra* note 156, at 535; Levine, *supra* note 15, at 539; Jon J. Lee, *Catching Unfitness*, 34 GEO. J. LEGAL ETHICS 355, 359 (2021); Alex B. Long, *Of Prosecutors and Prejudice (or "Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?"*), 55 U.C. DAVIS L. REV. 1717, 1724 (2022); Root Martinez, *supra* note 31, at 854; People v. Morley, 725 P.2d 510, 516 (Colo. 1986) (en banc) ("Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer."); *id.* (citing sources); Comm. on Prof'l Ethics v. Durham, 279 N.W.2d 280, 284, 510 (Iowa 1979) (rejecting a challenge to broad ethics provisions in part because "the Code of Professional Responsibility was written for lawyers by lawyers"); Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988) (quoting *In re* Snyder, 472 U.S. 634, 645 (1985)) (finding that "[t]he traditional test for vagueness in regulatory prohibitions is whether 'they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest'" and that, therefore, "[t]he particular context in which a regulation is promulgated . . . is all important" and noting that the regulation "applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'"); *In re* Keiler, 380 A.2d 119, 126 (D.C. 1977) (noting that the regulation "was written by and for lawyers" and explaining that "[t]he language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."); Att'y Grievance Comm'n v. Goldsborough, 624 A.2d 503, 511 (Md. 1993).

158. In fact, ethics codes contain many provisions that are rarely enforced, if not unenforceable, such as rules that are discretionary. *See, e.g.*, MODEL RULES OF PROF'L. CONDUCT r. 1.5(b) (AM. BAR ASS'N 2023) ("The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing . . . . "); MODEL RULES OF PROF'L. CONDUCT r. 1.6(b) (AM. BAR ASS'N 2023) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . . "). Rules may also be aspirational. *See, e.g.*, MODEL RULES OF PROF'L. CONDUCT r. 6.1 (AM. BAR ASS'N 2023) ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."). They may also be largely declaratory in nature. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 2023) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."). Yet, some of these rules capture and express some of the most basic elements of the professional responsibility of lawyers. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2013). At a minimum, Model Rule 8.4(g) similarly captures the commitment among the

ethics rules.[159] Thus, whatever the merits of different sides of the arguments over Model Rule 8.4(g)—which, as adopted by states,[160] takes differing forms and thus may be individually susceptible to differing arguments—the attitudes underlying the arguments may again illustrate different approaches to the interpretation of ethics rules.

B. ABA Formal Opinion 493

The considerable scholarly and public discussion—and criticism—of Model Rule 8.4(g), along with other "events in the legal profession and in the broader community,"[161] prompted the ABA Committee on Ethics and Professional Responsibility, in 2020, to issue Formal Opinion 493.[162] The opinion, which responded directly to many of the objections that had been leveled against the rule, while implicitly answering others, was largely premised on treating ethics rules as different from other laws and, accordingly, treating their interpretation and application differently from those of other statutes.[163] Relying on a substantial body of case law and referencing other broad ethics rules, the opinion concluded that Model Rule 8.4(g) should be understood by employing "various interpretative principles and applying them in an

organized bar to reject outright various forms of harassment and discrimination. *Cf.* Root Martinez, *supra* note 31, at 855–56; Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543, 570 (2022) (citing the view that "the rule expresses the commitment of the organized Bar and, where the rule is adopted, of state courts to the values or principles animating the rule—namely, that people are entitled to equal dignity regardless of their race, sex, religion, etc., and should not be subject to gratuitously hurtful comments targeted at these attributes.").

Somewhat ironically, if not paradoxically, some point to limited enforcement of Rule 8.4(g) as evidence of the limited danger it poses to First Amendment rights. *See, e.g.*, *In re* Abrams, 488 P.3d 1043, 1053 (Colo. 2021) ("The narrow tailoring of Rule 8.4(g) is demonstrated by the limited number of times that OARC has charged violations of the Rule since its adoption in 1993. In nearly thirty years, only four other lawyers have been sanctioned for violating this Rule, and each of these instances involved conduct like that at issue here.").

159. *See, e.g.*, Samuel J. Levine, *Disciplinary Regulation of Prosecutorial Discretion: What Would A Rule Look Like?*, 16 OHIO ST. J. CRIM. L. 347, 349 (2019); Levine, *supra* note 15, at 541–42 (citing sources). *Cf.* Att'y Grievance Comm'n of Md. v. Maiden, 279 A.3d 940, 951 (Md. 2022).

160. *See* ABA Comm. on Policy Implementation, Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf.

161. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 at 1 n.3 (2020).

162. *See id.* at 1–14.

163. *See supra* Part II.

objectively reasonable manner."[164]

At the outset, the opinion acknowledged—unequivocally and unapologetically—that Model Rule 8.4(g) "does impose a higher standard on lawyers than that expected of the general public."[165] Indeed, the opinion further explained, ethics codes are grounded in the proposition, stated in the Preamble to the Model Rules of Professional Conduct, 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."[166] As such, the broader responsibilities incorporated in Model Rule 8.4(g) are justified by the recognition that "[h]arassment and discrimination damage the public's confidence in the legal system and its trust in the profession."[167] Thus, one element of the opinion's response to the rule's critics invoked the unique functions of ethics rules, not merely to regulate the work of lawyers, but to promote justice by protecting the integrity of the justice system.[168]

The opinion remained similarly unapologetic regarding the broad language of the rule, again emphasizing differences between ethics rules and other areas of law.[169] Though mindful of free speech and free exercise concerns, the opinion observed that

> [i]dentifying the proper balance between freedom of speech or religion and laws against discrimination or harassment is not a new problem . . . . [t]he scope of [Model] Rule 8.4(g) is no more or less reducible to a precise verbal formula than any number of regulations of lawyer speech or workplace speech that have been upheld and applied by courts.[170]

164. *See* ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 493 at 11 (2020).

165. *Id.* at 5.

166. *Id.* (quoting the Preamble of the MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2019)).

167. *See id.* at 11.

168. *See id.* at 10–11 (explaining the rules have survived constitutional challenges on vagueness, overbreadth, and rights violations because such rules, and a broad interpretation of those rules, are necessary to discourage conduct that "undermine[s] confidence in our system," "erode[s] the very foundation upon which justice is based," and "tarnishes the image of the profession as a whole") (internal citations omitted).

169. *See id.* at 7, 10, 13 (finding that broad standards are necessary to "govern professional conduct" and avoid limiting application of ethical standards to specific situations, highlighting the broad definition of "harassment" within the meaning of Rule 8.4(g), and citing an example of a violation involving a lawyer supervising a law student).

170. *Id.* at 9.

In fact, the opinion pointed out, "[c]ourts have consistently upheld professional conduct rules similar to [Model] Rule 8.4(g) against First Amendment challenge."[171]

For example, the opinion cited a United States Supreme Court decision upholding the imposition of discipline on a lawyer for "conduct unbecoming a member of the bar of the court," because "a lawyer's court-granted license 'requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice,'"[172] as well as a Kentucky Supreme Court opinion stating that "regulation of lawyer speech 'is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of "[t]he license granted by the court."'"[173] Therefore, the opinion explained, ethics rules are more likely than other regulations to withstand free speech challenges.[174] Indeed, as the opinion further added, "[t]here are also other Model Rules that curtail attorney speech but are uniformly understood as proper regulatory measures."[175] The opinion's emphasis on courts' authority to license and regulate lawyers highlights additional salient features of ethics rules, which originate through judicial enactment and serve to protect the integrity of the judicial administration of justice.[176]

As to concerns regarding vagueness and overbreadth, the opinion cited a number of judicial opinions emphasizing yet another unique aspect of ethics codes.[177] Unlike most laws, ethics rules are directed specifically at the

171. *Id.*

172. *Id.* (quoting *In re* Snyder, 472 U.S. 634, 644–45 (1985)).

173. *Id.* (quoting Ky. Bar Ass'n v. Blum, 404 S.W.3d 841, 855 (Ky. 2013)).

174. *See id.* at 9–10.

175. *Id.* at 9–10 n.49 (citing "for example, the following: Rule 1.6 (generally prohibiting disclosure of 'information relating to the representation of a client'); Rule 3.5(d) (prohibiting a lawyer from 'engag[ing] in conduct intended to disrupt a tribunal'); Rule 3.6 (restricting a lawyer's ability to comment publicly about an investigation or litigation matter in which the lawyer is participating or has participated when the lawyer knows or reasonably should know that the comments 'have a substantial likelihood of materially prejudicing an adjudicative proceeding'); Rule 4.1 (prohibiting a lawyer from 'knowingly mak[ing] a false statement of material fact or law to a third person'); and Rule 7.1 (limiting communications about a lawyer or a lawyer's services to those that are truthful and not otherwise misleading)").

176. *See supra* notes 132–160 and accompanying text.

177. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 at 10 (2020) (citing cases that found the Model Rules need not be so precise and must be broad to properly govern attorney conduct).

community of lawyers,[178] and accordingly, broad ethics rules are often found to provide sufficient guidance to satisfy concerns over notice and due process.[179] The opinion noted, for example, that Model Rule 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice" has "withstood constitutional challenges based on vagueness and overbreadth arguments."[180] As one court put it: "The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen."[181] In the words of another court:

> The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." . . . The particular context in which a regulation is promulgated therefore is all important . . . . The regulation at issue herein only applies to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession."[182]

The opinion went on to cite *In re Holtzman*, one of the most significant cases explaining the validity—if not the necessity—of broad ethics rules.[183] The New York Court of Appeals upheld the constitutionality of a rule prohibiting "conduct that adversely reflects on [the lawyer's] fitness to practice law,"[184] observing that, "[a]s far back as 1856, the Supreme Court acknowledged that 'it is difficult if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be

178. *See* sources cited *supra* note 31.

179. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 at 9 (2020) (explaining the relevance of constitutional principles to provisions of ethical duties, including notice and specificity).

180. *Id.* at 10.

181. *Id.* (quoting *In re* Keiler, 380 A.2d 119, 126 (D.C. 1977), *overruled on other grounds by In re* Hutchinson, 534 A.2d 919 (D.C. 1987)) (emphasis omitted).

182. *Id.* (quoting Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988) and citing Att'y Grievance Comm'n of Md. v. Korotki, 569 A.2d 1224, 1235 (1990) (professional conduct rule for lawyers need not "meet the standards of clarity that might be required for rules governing the conduct of laypersons")) (citations omitted).

183. *In re* Holtzman, 577 N.E.2d 30, 33 (N.Y. 1991).

184. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 at 10 (2020) (quoting *Holtzman*, 577 N.E.2d at 33).

removed.' . . . Broad standards governing professional conduct are permissible and indeed often necessary."[185]

Finally, the ABA opinion added, "[t]he Model Rules are rules of reason, and whether conduct violates [Model] Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective."[186] Accordingly, the opinion adopted an interpretive approach that views Model Rule 8.4(g) as providing appropriately broad guidelines, to be interpreted and applied by courts in a discretionary manner, as grounds for imposition of discipline. In short, "[u]sing these various interpretative principles and applying them in an objectively reasonable manner, a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law."[187]

C. Case Law

In addition to ABA Formal Opinion 493, which analyzed Model Rule 8.4(g), two courts have recently issued opinions addressing similar state ethics rules: the United States District Court for the Eastern District of Pennsylvania, which held in *Greenberg v. Goodrich*,[188] that Pennsylvania Professional Rule of Conduct 8.4(g)[189] violated the First Amendment, and the Supreme Court of Colorado, which, in *Matter of Abrams*,[190] upheld the constitutionality of Colorado Rule of Professional Conduct 8.4(g).[191] Although it should be noted

185. *Id.* (quoting *Holtzman*, 577 N.E.2d at 33; *Ex Parte* Secombe, 60 U.S. 9, 14 (1857)) (citations omitted).

186. *Id.* at 14.

187. *Id.* at 11.

188. 593 F. Supp. 3d 174 (E.D. Pa. 2022) *rev'd on other grounds* Greenberg v. Lehocky, 81 F.4th 376 (3d Cir. 2023) (reversing the district court's judgment for lack of standing); *see also* Greenberg v. Haggerty, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

189. PA. R. PROF. CONDUCT 8.4(g) (2021) ("It is professional misconduct for a lawyer to . . . 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. 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 advice or advocacy consistent with these Rules.").

190. 488 P.3d 1043 (Colo. 2021).

191. COLO. R. PROF. CONDUCT 8.4(g) (2019) ("It is professional misconduct for a lawyer to . . . 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.").

from the outset that the precise contours of the rules addressed in these cases vary from one another—and, for that matter, from Model Rule 8.4(g)—in a number of respects,[192] more broadly, the divergent decisions in the cases reflect divergent underlying attitudes toward ethics codes.

The court's analysis in *Greenberg*, which is significantly different from the analysis in ABA Formal Opinion 493, reads not as a mirror image of the ABA opinion, but more as emanating from an alternate universe, grounded in a fundamentally distinct approach to the nature, function, and interpretation of ethics rules. The court's opinion opens with a nod, of sorts, to the ABA and its efforts to take a strong stand against harassment and discrimination through the promulgation of Model Rule 8.4(g):

> This Court fully commends and supports the aims and intentions of the [ABA] in its creation of the ABA Model Rule 8.4(g) as a statement of an ideal and as a written conviction that we must be constantly vigilant and work towards eliminating discrimination and harassment in the practice of law.[193]

Yet, the court's praise of the ABA is tempered—for practical purposes, nearly nullified—by its immediate emphasis on the ABA's absence of legal authority.[194] On a somewhat patronizing note, the court found, at most, that:

> If the ABA were to apply the Model Rule as a standard to maintain good standing for its voluntary members, it would indeed be the gold standard. It is a measure that most members of the ABA would aspire to, as would the vast number of those in the profession not represented by the ABA.[195]

Having dispensed with the ABA as merely providing voluntary—albeit, admirably aspirational—guidance, the court drew a sharp contrast to the real world of the law, stating in no uncertain terms that "[w]hen, however, the

192. *See Abrams*, 488 P.3d at 1053 n.3 (noting that "Colorado's Rule 8.4(g) is significantly narrower than the American Bar Association's Model Rule 8.4(g)," and finding that "[t]he Model Rule does not contain the limiting factors that narrow the reach of Colorado's Rule 8.4(g) to a permissible scope."); *see also* ABA Comm. on Policy Implementation, Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf.

193. *Greenberg*, 593 F. Supp. 3d at 181.

194. *Id.* at 181–82.

195. *Id.* at 181.

ABA standard is adopted by government regulators and applied to all Pennsylvania licensed lawyers, as in this instance by the Disciplinary Board of the Supreme Court of Pennsylvania . . . it must pass constitutional analysis and muster."[196] Continuing along these lines, the court further distinguished and diminished "[t]he ABA's power over its voluntary membership," which it characterized as "of an immensely different kind, quality, and force than that of the government over its constituents."[197] In short, "[t]he government cannot approach free speech in the same manner in which the ABA may choose to do so with its voluntary membership."[198]

Although the court was undoubtedly correct in identifying a formal distinction between the ABA Model Rules, which have no legal authority, and rules enacted by courts with the force of law, the court's reliance on this distinction to summarily dismiss the relevance of the ABA may be overly formalistic. After all, the relationship between the ABA's proposed rules and the rules adopted by courts goes beyond the voluntary/government dichotomy.[199] The ABA remains highly influential and unusually—if not exceptionally—successful, in the extent to which, as a private organization, its pronouncements provide much of the substance of the legal doctrine regulating the practice of law.[200] And of course, the ABA recognizes that it does not have the power to discipline lawyers, yet the Model Rules are intended not merely as a voluntary guide for lawyers, but as a guide for courts in their exercise of the legal authority to impose discipline.[201] Finally, the focus on the authority to impose discipline as the distinguishing feature between the Model Rules and rules adopted by courts, though likewise formally accurate, seems to ignore the reality that ethics rules are notoriously underenforced and that discipline is relatively sparingly imposed.[202] Nevertheless, the court found the formal lack of authority on the part of the ABA determinative of the inconsequential nature of the Model Rules and the irrelevance of the ABA *vis-à-vis*

196. *Id.*
197. *Id.* at 181–82.
198. *Id.* at 182.
199. *See* ABA Comm. on Policy Implementation, Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf. (listing the variations of the ABA Model Rule 8.4 in all the states, and showing that many states adopted the ABA Model Rules without any alteration).
200. *See supra* Part II.
201. *See supra* Part II.
202. *See* Green, *supra* note 30, at 115.

the workings of courts and the disciplinary process.[203]

Not surprisingly, the court applied a similarly formalistic interpretive approach to Pennsylvania Professional Rule of Conduct 8.4(g), rendering the rule similar to other forms of legislation and, accordingly, applying a First Amendment analysis similar to the analysis of statutes that regulate other professions.[204] Although the court acknowledged that the government "has an important interest in regulating licensed attorneys and their conduct related to the fair administration of justice," the court rejected the Disciplinary Board's contention that "the state has broad authority to regulate professional speech and thus Rule 8.4(g) should not be subject to strict constitutional evaluation."[205] Instead, the court relied heavily on the United States Supreme Court's opinion in *National Institute of Family and Life Advocates v. Becerra*,[206] which did not "recognize[] 'professional speech' as a separate category of speech."[207]

The court's analysis was thus premised on equating legal ethics codes with other forms of legislation, and judicial regulation of the legal profession with other forms of governmental professional regulation—and, by extension, equating regulation of lawyers' speech with regulation of speech of other professions, grouped together under the broad category of "professional speech."[208] An alternative approach, adopted in ABA Formal Opinion 493,[209] might emphasize the distinct features of ethics codes, including their enactment by judges and the function they serve in regulating lawyers.[210] These distinctions, which underly correspondingly distinct interpretive approaches to ethics rules,[211] might likewise suggest distinctions in the scope of the authority of Rule 8.4(g) to regulate speech.[212] Nevertheless, the court rejected the Disciplinary Board's arguments, which cited Supreme Court cases

203. *See Greenberg*, 593 F. Supp. at 208–10.
204. *See id.*
205. *Id.* at 208.
206. 138 S. Ct. 2361 (2018).
207. *Greenberg*, 593 F. Supp. 3d at 208 (quoting *Becerra*, 138 S. Ct. at 2371).
208. *Id.*
209. *See* ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 493 at 7–9, 11 (2020).
210. *See id.* at 3–4, 7–9, 11 (explaining cases that showcase the enactment by judges).
211. *See supra* Part II.
212. See ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 493 at 11 (2020).

upholding other broad restrictions on lawyers' speech.[213]

Indeed, the court disregarded distinctions between legal ethics rules and other forms of professional regulation, while denying the significance of the unique roles of lawyers and the particular importance of safeguarding the public's confidence in the integrity of the legal system.[214] Instead, the court drew analogies to regulations of doctors and bankers, concluding with the sweeping declaration that "[t]his notion of public distrust used as an anchor for government regulation could conceivably extend to every industry in which the state has licensing authority and serve as an invitation to those regulatory agencies to engage in censoring unfavorable speech, deemed subjectively unworthy of those in their industry."[215]

The court applied a similar interpretive approach in holding that Pennsylvania Professional Rule of Conduct 8.4(g) was both overbroad and impermissibly vague.[216] The court rejected the argument that "the Amendments are . . . confined to harassment or discrimination that prevents the administration of justice," because, interpretating "the plain language of the regulation" the court found "no provision in the plain language of the Amendments that limits the regulation."[217] Whatever the merits of the court's analysis, the court's method of interpretation again notably treats an ethics rule akin to an ordinary statute, focusing on its "plain language" rather than allowing for the possibility of more discretionary methods of interpretation on the part of courts, based in common understandings within the community of lawyers.[218]

In fact, the court's vagueness analysis relies primarily on express comparisons to criminal laws that were found to be unconstitutionally vague because they failed to provide fair notice or because they were subject to

213. *See Greenberg*, 593 F. Supp. 3d at 203 (discussing the Disciplinary Board's references to Fla. Bar v. Went For It, 515 U.S. 618 (1995) and Gentile v. State Bar of Nev., 501 U.S. 1030 (1991)). The court also cited the Disciplinary Board's reference to *In re* Abrams, 488 P.3d 1043 (Colo. 2021). *Id.* at 203–04.

214. *See id.* at 214–15; *see also* ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 493 at 14 (2020) (discussing the important role lawyers have in maintaining the public's vote of confidence in the system).

215. *Greenberg*, 593 F. Supp. 3d at 214.

216. *See id.* at 218–25. The court held that the amendments to Pennsylvania Rule of Professional Conduct 8.4(g) "do not provide fair notice of the prohibited conduct to Pennsylvania attorneys, and . . . invite imprecise enforcement from the Office of Disciplinary Counsel and the Board," therefore making the rule unconstitutionally vague and overbroad. *Id.* at 222.

217. *Id.* at 218–19.

218. *See* sources cited *supra* note 157 and accompanying text.

arbitrary enforcement.[219] The court harshly characterized the Office of Disciplinary Counsel's interpretations of the rule as "made-up definitions," because they were "unlike other definitions of harassment in similar contexts."[220] Likewise, the court criticized the comment to the rule, which provided a definition of "discrimination" that the court found to have "minimal, if any, connection to the substantive law of discrimination and harassment statutes."[221] In short, the court found, "[t]he Amendments' definition of harassment bears little to no similarity to the criminal statute's definition."[222]

Here too, however, though the court's analysis may be convincing on its own terms, the court's conclusions seem premised on the methodologically questionable presumption that ethics rules should be subject to the same interpretive approach as criminal or civil statutes. Although the court retreated from an outright comparison to criminal law, conceding that it initially relied on a case in which "the context . . . was a criminal statute,"[223] it nevertheless insisted that "there must be some guidance to ensure consistent application of the regulation, even in the civil context."[224] Thus, the court refused to entertain the option of interpreting ethics rules as neither criminal statutes nor civil statutes, but rather as reflections of the ethics and values of the legal community, which have been found to provide sufficient notice and guidance for enforcement in the context of other broad ethics rules.[225]

In sharp contrast, in *Matter of Abrams*,[226] the Supreme Court of Colorado considered Colorado Rule of Professional Conduct 8.4(g),[227] by employing an interpretive approach along the lines of the approach adopted by the ABA Standing Committee on Ethics and Professional Responsibility.[228] To be sure, the contours of the Colorado rule differ from the Pennsylvania rule at issue in

219. *See Greenberg*, 593 F. Supp. 3d at 224 (applying the Supreme Court's reasoning, which found a criminal statute unconstitutionally vague, in the civil context as well, finding that "there must be some guidance to ensure consistent application of the regulation, even in the civil context.").

220. *Id.* at 222–23.

221. *Id.* at 223.

222. *Id.*

223. *Id.* at 224.

224. *Id.*

225. *See* sources cited *supra* note 157 and accompanying text.

226. 488 P.3d 1043, 1049 (Colo. 2021) ("[W]e conclude that Rule 8.4(g) does not violate the U.S. Constitution, and that the [Office of the Presiding Disciplinary Judge's] evidentiary rulings were not an abuse of his discretion.").

227. *See* COLO. R. PROF. CONDUCT 8.4(g).

228. *See* ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 493 (2020).

Greenberg and, in significant respects, from Model Rule 8.4(g).[229] Notwithstanding these differences, however, the Colorado Supreme Court's decision displays an underlying understanding of ethics rules similar to the attitude set forth in ABA Formal Opinion 493.[230]

Indeed, like ABA Formal Opinion 493, the *Abrams* court focused on the nature and function of ethics rules in regulating the legal profession and protecting the integrity of the legal system.[231] While acknowledging the importance of protecting lawyers' First Amendment rights, the court nevertheless emphasized that:

> [T]his inquiry must be attuned to the vital role that the justice system plays in our society and the state's unique interests in regulating the legal profession. We have previously recognized that the state's interest "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.'"[232]

Developing the point at length, the court further explained:

> It is well-established that the state has a compelling interest in regulating the legal profession both to protect the public and to ensure public confidence in the integrity of the system. Relatedly, the state has a compelling interest in eliminating expressions of bias from the legal profession, to promote public confidence in the system, and to ensure effective administration of justice. This also protects clients and other participants in the justice system from discrimination and harassment.[233]

Applying this framework to the interpretation of Colorado Rule of Professional Conduct 8.4(g), the court rejected the overbreadth argument, holding

229. *See* sources cited *supra* note 192 and accompanying text.

230. *See* ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 493 (2020).

231. *See Abrams*, 488 P.3d at 1050 (concluding that Rule 8.4(g) "serves the state's compelling interests in regulating the conduct of attorneys during the representation of their clients, protecting clients and other participants in the legal process from harassment and discrimination, and eliminating expressions of bias from the legal process").

232. *Id.* at 1051 (citing *In Re* Green, 11 P.3d 1078, 1086 n.7 (Colo. 2000) (quoting *In re* Primus, 436 U.S. 412, 422 (1978))).

233. *Id.* at 1053.

that "[t]here is no question that a lawyer's use of derogatory or discriminatory language that singles out individuals involved in the legal process damages the legal profession and erodes confidence in the justice system."[234] Thus, the court invoked the purpose and function of the rule to interpret the rule in a way that supported the imposition of discipline against First Amendment claims.[235]

Finally, with respect to the argument that the rule was impermissibly vague, again like ABA Formal Opinion 493, the court employed an interpretive approach that views ethics rules as rules of reason, rather than as criminal statutes.[236] Specifically, "[i]f a reasonable person of ordinary intelligence would find that Abrams's conduct was clearly proscribed by Rule 8.4(g), then he cannot successfully attack the Rule as impermissibly vague."[237] Under this standard, the court concluded that "[a]ny objective person would find that Abrams's specific use of an anti-gay slur in communicating with his clients about the presiding judge violated Rule 8.4(g)."[238]

V. CONCLUSION

Taken together, the recent and ongoing controversies over the interpretation and application of Rule 4.2[239] and Rule 8.4(g)[240] reflect more general and more extensive divisions, among and amidst courts, bar associations, and the scholarly community, over the interpretation of ethics rules. In turn, divisions over interpretive approaches reflect different underlying attitudes toward the role and nature of ethics rules, stemming from the salient and unusual features and functions of ethics codes, which set them apart, in significant respects, from other sources of law.[241] Accordingly, through a close examination of both case law and ABA Formal Opinions addressing Rule 4.2 and Rule 8.4(g), this Article provides a framework to consider and analyze different approaches to the interpretation of ethics rules.

234. *Id.*
235. *Id.* at 1051–53 (analyzing the First Amendment claims brought against Rule 8.4(g), concluding that the claims must be balanced against the state interest in regulating attorney conduct to "preserve the justice system or to protect clients").
236. *Id.*
237. *Id.* at 1058.
238. *Id.*
239. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2023).
240. MODEL RULES OF PROF'L CONDUCT r. 8.2(g) (AM. BAR ASS'N 2023).
241. *See supra* Part II.

To be sure, divisions over the interpretation of ethics rules may not prove particularly troubling or problematic. After all, sharp differences punctuate the interpretation of other sources of law as well, from constitutions to statutes, growing out of the adoption of various interpretive methodologies and approaches.[242]

Nevertheless, the relative lack of attention to the examination of interpretive approaches to ethics rules remains striking.[243] Among other features and functions, in addition to serving as grounds for professional discipline, ethics rules are designed, by definition, to embody, express, and articulate ethical principles central to the community of lawyers.[244] As such, the interpretation of ethics rules plays a crucial role both in the regulation of lawyers and in expressing the ethical norms of the legal profession.[245] Thus, without expecting or proposing uniformity, this Article represents an effort to promote further discussion and consideration of interpretive attitudes and approaches to ethics codes and ethics rules, encompassing issues of vital importance to the legal community.

242. *See generally* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015) (detailing the contours of differing modes of constitutional interpretation and their consequences).

243. *See* sources cited *supra* note 3 and accompanying text.

244. *See generally* MODEL RULES OF PROF'L. CONDUCT pmbl. (AM. BAR ASS'N 2023) ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.").

245. *See supra* Part II.

***