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Attorneys, the Internet, and Hate Speech: An Argument for an Amended Model Rule 8.4

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Attorneys, the Internet, and Hate Speech: An Argument for an Amended Model Rule 8.4

By Jefferey Ogden Katz & Alexander I. Passo

ABSTRACT

Since the invention of the internet, our lives have changed dramatically. Conveying ideas and information to broad audiences has become much simpler, as all types of ideas are now shared—including hateful ones targeted at minority groups.

The internet is a bastion for hate speech within the United States. There are countless discriminatory posts circulated online daily, often by those who are meant to protect us. Unfortunately, attorneys frequently take part in this. National headlines have been made due to attorneys' and judges' controversial online posts, frequently targeting minorities. This has become a problem, as public perception of these professions is undermined when this occurs. Attorneys as administrators of justice should not make public discriminatory statements, as our legal system must be color blind. When officers of the court make discriminatory statements, this conduct runs afoul of what our legal system is working to create—a United States where all its citizens feel equally protected by the law as granted by the Fourteenth Amendment.

This article first analyzes the First Amendment and hate speech. It then provides a summary of how attorneys' First Amendment rights have been constitutionally restricted in comparison to the general public. In conclusion, this article argues that a new Model Rule should be adopted by the American Bar Association (ABA) that prohibits attorneys from posting hate speech and suggests several possible formulations for this rule.

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I. INTRODUCTION

The introduction of the internet and its prolific use has had a tremendous impact on the world. Work has become more efficient, information has become more accessible, and people gather remotely to exchange ideas. All of this is attributable in some part to the copious use of the internet in the modern world.

One obvious feature of the internet is the ability to communicate with others. Forums, blogs, message boards, and chat rooms are now part of internet users' daily lives. The ability to communicate via these online

features enables users to express themselves, provide opinions, and interact in cyber communities.

There are apparent positive aspects because the internet enables people to instantaneously connect with others. For example, individuals who may be suffering from depression can seek help in a community that empathizes with and guides them to seek help. An academic can collaborate with a colleague a thousand miles away on a project instantaneously. Or, citizens of a country can come together and have a large-scale town hall debate on important political issues.

In these circumstances, with the good comes the bad. Communication, which perhaps is the cornerstone of the internet, is akin to speech. With speech, there is always the possibility an individual may use it to discriminate, harass, intimidate, or otherwise use it in an abusive manner towards others. Thus, while the internet facilitates increased communication, it may also facilitate increased discrimination, harassment, and other abuse.

There has been a great deal of debate over how to remedy this problem because unregulated internet speech has had damaging results on individuals' lives. National headlines have been created because of the ease with which negative pictures and thoughts can be conveyed instantly to a large-scale audience. However, regulating speech on the internet in the United States is not a simple task because free speech is a fundamental right indoctrinated in the US Constitution in its very First Amendment.

This article will analyze whether legal professionals can be disciplined for making discriminatory and misogynistic remarks online, or whether disciplining an attorney for this conduct would run afoul of the First Amendment. The first section of this article will provide some examples of attorney conduct online that should trigger discipline. The second section will provide a background of the First Amendment, protected versus unprotected speech, and when protected speech may still be regulated. The third section will explain why the United States has a growing hate speech

problem online due to its First Amendment protections and will argue that attorneys should not be permitted to contribute to this problem.

The fourth section of the article will lay out examples of when attorneys' First Amendment rights have been held to be permissibly regulated, as well as a history of a prior proposal to modify the ABA Model Rules to prohibit attorneys from engaging in discriminatory conduct. The final section of the article will provide several options for language to be adopted in the Model Rules to prohibit this conduct and will conclude by selecting and explaining the best option.

II. ONLINE LEGAL COMMUNITIES AND FORUMS

Attorneys use the internet. There are countless blogs, websites, listservs, and forums that attorneys participate in frequently. And, the percentage of attorneys who use the internet socially continues to grow. In 2010, the ABA's Legal Technology Survey indicated that 56 percent of attorneys responding to it participated in an online community or social network.¹ According to the 2013 survey, 81 percent of responding lawyers indicated they use social networks.² In all likelihood, this percentage will continue to grow as time progresses.

Unfortunately, there have been numerous occasions where attorneys and even judges have utilized these online outlets with the intent to specifically harm one another, make unprofessional remarks, and engage in discriminatory and sexist statements.³ Most likely, this is because the internet provides the illusion that they have made these statements anonymously. These individuals would assuredly not publish these comments with their names attached. But, with the impression of

¹ J. Randolph Evans & Shari Klevens, *Law, Ethics and the Internet: Applying Ethical Rules to Social Media is, of Necessity, Already Underway*, DAILY REPORT (Aug. 13, 2013).

² *Id.*

³ See *infra* notes 8, 15, 23, and 29.

anonymity, disparaging remarks are freely let loose without much forethought by users.⁴

Numerous examples exist of these types of situations occurring within the legal community. For instance, AutoAdmit.com holds itself out as “the most prestigious” law forum on the internet, but racist and misogynistic statements are germane in its threads.⁵ Allegedly, the website’s primary purpose is to disseminate information about law schools and law firms.⁶ However, law professor Brian Leiter once remarked on his blog that AutoAdmit in fact is just “a massive forum for bizarre racist, anti-Semitic, and viciously sexist postings, mixed in with posts genuinely related to law school.”⁷

The website gained notoriety when a defamation lawsuit was filed against 28 “John Does” who used the website and made statements about two separate females.⁸ Brittan Heller, a Yale Law School student at the time, and Heide Iravani, a Phi Beta Kappa graduate from the University of North Carolina, initiated this lawsuit against the anonymous AutoAdmit

⁴ See John Suler, *The Online Disinhibition Effect*, 7 CYBER-PSYCHOLOGY & BEHAVIOR 321, 321–26 (2004).

⁵ See *The Most Prestigious Law School Discussion Board in the World*, AUTOADMIT, <http://www.autoadmit.com> (“The most prestigious law school discussion board in the world”) (last visited Aug. 9, 2014); see also, LORI ANDREWS, *SOCIAL NETWORKS AND THE DEATH OF PRIVACY: I KNOW WHO YOU ARE AND I SAW WHAT YOU DID* 103 (2011) (The term “AutoAdmit” is derived from a law school applicants’ high metrics consisting of LSAT and GPA, which thereby guarantees that they will be admitted to a top law school).

⁶ *Id.*

⁷ Brian Leiter, *Penn Law Student, Anthony Ciolli, Admits to Running Prelaw Discussion Board Awash in Racist, Anti-Semitic, Sexist Abuse*, LEITER REPORTS (Mar. 11, 2005), http://leitereports.typepad.com/blog/2005/03/penn_law_studen.html.

⁸ ANDREWS, *supra* note 5, at 103 (noting AutoAdmit had an inordinate amount of threads with racist and sexist words within them: “In 2005, only 150 threads discussed UCLA, just over 100 were about ‘clerkships,’ and around 100 were about ‘Georgetown.’ In contrast AutoAdmit contained about 250 threads with the word ‘nigger,’ 300 threads with the word ‘bitches,’ almost 300 threads with the word ‘cunt,’ 350 threads about Jews (the majority derogatory), and over 200 threads about ‘fags[.]’”).

users due to numerous disturbing derogatory messages posted on the website pertaining to them specifically.⁹

For instance, when referring to Ms. Heller, one user posted, “I’ll force myself on [Ms. Heller], most definitely,” and “I think I will sodomize her. Repeatedly.”¹⁰ Another user stated that she had herpes.¹¹ In regards to Ms. Iravani, the AutoAdmit posters repeatedly made comments stating that she was impregnated after her father raped her.¹² And, another user created a moniker of the University of North Carolina law school dean at the time and posted that Ms. Iravani had sex with him for a passing grade in her Civil Procedure class.¹³

While it cannot be proven these individuals were licensed attorneys, in all likelihood, attorneys do engage in similar conduct on AutoAdmit. One of the administrators of the website once disclosed that the posters in a single thread were cumulatively linked to “virtually every firm in the Vault Top 50”—which are arguably considered the most prestigious law firms in the United States.¹⁴ Consequently, it is very likely that many attorneys do indeed participate on this forum.

Recently, another public debate emerged on whether attorneys should face state bar sanctions as a result of pseudo-anonymous racist comments.¹⁵ One poster using the moniker “dybbuk” made several sexist and harassing comments about a University of Denver law professor named Nancy

⁹ *Id.*

¹⁰ *Id.* at 102.

¹¹ *Id.*

¹² *Id.* at 103.

¹³ *Id.*

¹⁴ Posting of Great Teacher Onizuka (Nov. 29, 2006, 6:30 PM), http://www.xoxoht.com/thread.php?thread_id=535893&mc=164&forum_id=2#7096421 (“Speaking of IPs, it seems like virtually every firm in the Vault Top 50 is represented in the IP logs for this thread right now”).

¹⁵ Debra Cassens Weiss, *Blogging law prof requests ethics probe of ‘dybbuk’ commenter*, ABA JOURNAL, (Jan. 7, 2014), available at http://www.abajournal.com/news/article/blogging_law_prof_files_ethics_complaint_against_pd_after_concluding_he_was/.

Leong.¹⁶ Ms. Leong identified at least seventy times “dybbuk” posted about her on five different websites.¹⁷ As part of these comments, “dybbuk” wrote two long plays that included Ms. Leong using drugs and made overly sexual remarks about her.¹⁸ Ms. Leong was able to identify who ‘dybbuk’ was by reading his previous posts that included enough information when linked together to uncover his identity.¹⁹ Allegedly this individual is a male federal public defender in Illinois.²⁰ After unmasking ‘dybbuk,’ Ms. Leong subsequently filed an ethical complaint with the Illinois Attorney Registration and Disciplinary Commission (ARDC) as a result of his postings.²¹ In her complaint to the Illinois ARDC, she stated that “dybbuk’s ‘sexualized comments about [her] appearance and other disparaging remarks made [her] concerned for [her] safety.’”²²

In another extreme example, Paul Caston, a Mississippi lawyer, was linked with the anonymous online identity “GENERAL_LEE” on the Anti-Semitic Vanguard News Network website.²³ Mr. Caston has posted on this website over 3,500 times over the course of a decade.²⁴ While on this website, he opined on his beliefs that African-Americans were objects, animals, or things.²⁵

Attorneys are not the only individuals in the legal community who have been placed in the crosshairs as a result of their anonymous postings on forums—judges too have drawn national attention for their internet

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Ryan Lenz, *Hatewatch Investigation: Mississippi Lawyer Tied to Online Racist Screeds*, SOUTHERN POVERTY LAW CENTER (Sept. 20, 2013, 8:15 AM), <http://www.splcenter.org/blog/2013/09/20/hatewatch-investigation-mississippi-lawyer-tied-to-online-racist-screeds/>.

²⁴ *Id.*

²⁵ *Id.*

comments. But, judges, unlike attorneys, are provided less free speech protection as a result of swearing to abide by the Code of Judicial Ethics.²⁶ For instance, ABA Model Code of Judicial Conduct Rule 3.1 broadly prohibits judges from engaging in extrajudicial activities that “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”²⁷ Further, ABA Model Code of Judicial Conduct Rule 3.6 prohibits judges from any affiliation with organizations that practice invidious discrimination.²⁸

On March 3, 2014, an Arkansas Circuit Court judge withdrew from a race for a seat on the Arkansas Court of Appeals as a result of his sexist and discriminatory forum comments being unmasked.²⁹ Judge Mike Maggio for several years posted on tigerdroppings.com, a Louisiana State University sports fan website, under the name of “beauxjudge.”³⁰ While on the website, he openly disclosed, via postings, that he was indeed a judge.³¹

A portion of Judge Maggio’s comments on the website were sexist. For example, Judge Maggio posted, “[w]omen look at 2 bulges on a man, one in the front of the pants or second one in the back pocket. Whichever one is bigger they can do without the other.”³² In another post, Judge Maggio made remarks about Charlize Theron’s adoption of an African American baby that could be perceived as racist.³³ On yet another occasion, he commented that you don’t see many doctors with names that appear to be associated with African Americans.³⁴ After his identity was revealed, Judge

²⁶ ABA MODEL CODE OF JUDICIAL CONDUCT CANON 3B(5) (2013) (prohibiting a judge from bias or prejudice predicated upon discrimination).

²⁷ ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.1 (2012).

²⁸ ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2012).

²⁹ Joe Patrice, *Judge Caught Making Racist, Sexist Comments On Internet Board*, ABOVE THE LAW (March 4, 2014, 11:47 AM), <http://abovethelaw.com/2014/03/judge-caught-making-racist-sexist-comments-on-Internet-board/>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

Maggio attempted to prevent further discovery of his comments and began deleting them from the website.³⁵ The Judicial Discipline and Disability Board acknowledged that it was investigating whether Judge Maggio indeed was the poster of these comments, and whether he was in violation of any ethical rules.³⁶

This type of conduct by actors in the legal community draws up the question of whether it should be permissible. The potential negative impacts of this speech by these individuals substantially outweigh the positives. However, as the next section of this Article will explain in detail, the First Amendment protects discriminatory and misogynistic speech, and therefore it is difficult to regulate this conduct in most circumstances.

III. FIRST AMENDMENT BACKGROUND

One may wonder why there are not more measures in place to prevent discriminatory and misogynistic speech. However, it is important to understand that the First Amendment provides citizens the fundamental right of free speech. Under the First Amendment, before hate speech can be restricted, a two-step analysis must be conducted. First, a court must determine whether hate speech falls within a category of speech the Supreme Court has deemed unprotected. Second, if hate speech does not fall within such a category, then there must be consideration of whether hate speech can be regulated pursuant to the standard free speech analysis.

The First Amendment is one of the most well-known and discussed fundamental constitutional rights, and it provides US citizens the freedom of speech. Specifically, the First Amendment states that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

³⁵ *Id.*

³⁶ *Id.*

peaceably to assemble, and to petition the Government for a redress of grievances.³⁷

Because of the First Amendment, individuals are able to freely practice their religion, participate in groups, criticize the government in distributed publications, and speak publicly or anonymously.³⁸

One of the principle reasons the First Amendment was incorporated in the Bill of Rights was the governmental suppression of speech and press that existed in English society.³⁹ While the constitutional framers' intent when drafting this fundamental right has been bogged down in modernity from a quagmire of theories, ironically, one argument for the protection is to promote tolerance.⁴⁰ Underlying this argument is the ideology that ideas and theories should not be stifled by the government simply because they are not backed by the majority of a nation.

This theory is reflected in the Supreme Court's current test for determining whether the government is suppressing speech. In *Abrams v. United States*, Justice Oliver Wendell Holmes penned a famous dissent arguing that the First Amendment should foster a country with a "free trade in ideas[.]"⁴¹ While this principle was first uttered in Holmes's dissent, it has been adopted as a credible rationale in subsequent First Amendment precedent. The Supreme Court has often held that the government cannot regulate speech based simply upon content, or when a particular view point is silenced.⁴²

³⁷ U.S. CONST. amend. I.

³⁸ The Supreme Court's position on public criticism of the government has vacillated throughout the years. See *Talley v. California*, 362 U.S. 60, 65 (1960) (holding that a ban on anonymous handbills was unconstitutional).

³⁹ See generally, ZECHARIAH CHAFFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941).

⁴⁰ See generally, LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

⁴¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁴² See *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content"); see also, *R.A.V. v. City of St.*

In a 1992 Supreme Court decision, Justice Kennedy explicitly explained,

[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.⁴³

Accordingly, when courts review a governmentally content-based or view-point-based regulation, they must apply the strict scrutiny test.⁴⁴ In order for a content-based or view-point-based discriminatory regulation to be constitutional, the government must show that the regulation (1) furthers a compelling state interest, and (2) the regulation is narrowly tailored to achieve that end.⁴⁵ The strict scrutiny test is a very difficult burden for the government to satisfy and generally when it is triggered the regulation will be struck down as unconstitutional.

While the plain language of the First Amendment appears in nature to be absolute, the Supreme Court has never supported an absolutist position. The Court has expressly “reject[ed] the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are ‘absolutes.’”⁴⁶ In fact, virtually only one Justice has ever taken the position

Paul, 505 U.S. 377, 380, 382 (1992) (“[c]ontent-based regulations are presumptively invalid”).

⁴³ *Turner Broadcasting Sys. v. F. Communication Comm.*, 512 U.S. 622, 641 (1994).

⁴⁴ *See, Boos v. Barry*, 485 U.S. 312, 334 (1988).

⁴⁵ *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“For the State to enforce content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”).

⁴⁶ *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961).

the First Amendment is absolute.⁴⁷ Not surprisingly, it was Justice Black—an absolutist.⁴⁸

Furthermore, the Court has never departed from its reasoning that speech uttered for the purpose of criminal conduct or to incite immediate violence and chaos is not protected by the First Amendment.⁴⁹ In *Brandenburg v. Ohio*, the Court defined when the government could punish speech made with the purpose of inciting illegal behavior.⁵⁰ In *Brandenburg*, a Ku Klux Klan leader was convicted because of an Ohio law prohibiting criminal syndicalism.⁵¹ This leader was arrested for incitement of violence due to a film of him at a Ku Klux Klan rally—which included his racist and anti-Semitic speech along with a display of a number of firearms.⁵² This landmark Supreme Court opinion, which overruled several other prior opinions, created a stringent test for incitement.⁵³ For speech that incites illegal behavior to be unprotected, three elements must be found: (1) an imminent harm; (2) a likelihood of producing illegal action; and (3) an intent to cause imminent illegality.⁵⁴

⁴⁷ See Hugo Black, *The Bill of Rights*, 35 N.Y.U. 865, 874, 879 (1960) (“The phrase ‘Congress shall make no law’ is composed of plain words, easily understood. . . . The language is absolute[.]”); see also, *Konigsberg*, 366 U.S. at 56 (Black dissenting joined by Douglass) (here Justice Douglass also adopted the absolutist position).

⁴⁸ *Konigsberg*, 366 U.S. at 56.

⁴⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 445–49 (1969). See also W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CON. L. Q. 305 (citing *R.A.V.*, 505 U.S. at 380) (conceding that burning cross in back yard of African-American family can be prosecuted as a terroristic threat or damage to property); *Texas v. Johnson*, 491 U.S. 397, 406–07 (1989) (suggesting that flag burning could be prosecuted under a statute prohibiting outdoor fires); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“First Amendment does not preclude regulation of commercial conduct”); *Brandenburg*, 395 U.S. at 456 (Douglas, J. concurring) (“‘The Line between what is permissible and not subject to control and what may be made subject to regulation is the line between ideas and overt acts’”).

⁵⁰ See *Brandenburg*, 395 U.S. at 457–58.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Additionally, the First Amendment offers no protection for speech that constitutes a “‘true’ threat.”⁵⁵ *Brandenberg* is intrinsically related to the true threat test, as it involves speech promoting violence. In 2003, the Supreme Court in *Virginia v. Black* explained what constitutes a true threat.⁵⁶ Justice O’Connor stated in her plurality opinion that true threats are

those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . [the speaker] need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.⁵⁷

Further, she indicated intimidation is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”⁵⁸

Another type of unprotected speech is “fighting words.”⁵⁹ The Supreme Court in *Chaplinsky v. New Hampshire* expressly held that speech that constitutes “fighting words” was unprotected by the First Amendment.⁶⁰ In *Chaplinsky*, the Court recognized two separate instances where speech could be considered “fighting words”: (1) when the speech was likely to cause a violent response against the speaker, and (2) when the insulting speech would likely inflict immediate emotional harm.

Furthermore, the Supreme Court has held that the First Amendment does not protect people from common law tort actions as a result of their speech.

⁵⁵ See *Watts v. United States*, 394 U.S. 705, 708 (1969); see also *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 773 (1994) (holding that threats to individuals are not protected under the First Amendment, but speech that may cause distress or be disagreeable to individuals is protected).

⁵⁶ See generally *Virginia v. Black*, 538 U.S. 343 (2003).

⁵⁷ *Id.* at 359–60 (internal citations omitted).

⁵⁸ *Id.* at 360.

⁵⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁶⁰ *Id.*

For instance, the First Amendment does not protect an individual from liability if they make defamatory remarks about another person.⁶¹ However, the statements made must be false and non-opinionated, and must not fall within one of the First Amendment exceptions—for example, certain statements about a public figure.⁶²

A. *Hate Speech and the First Amendment*

Defining hate speech is a difficult task. Perhaps the simplest definition of hate speech is discriminatory and derogatory statements or symbolic actions that target a specific group. Examples of hate speech are: racial slurs, overtly sexist comments, and physical actions such as burning crosses in the front yards of African Americans or spray-painting swastikas on a Jewish family's residences.

Currently, hate speech is protected under the First amendment.⁶³ In order for hate speech to be unprotected, it must fall within one of the First Amendment exceptions. Traditionally, the most successful arguments that speech is not protected by the First Amendment are the “true threat” doctrine, or the *Chaplinsky* “fighting words” exception in regulating speech that may be considered “hate speech.”⁶⁴

There has been scholarly debate over whether hate speech should be considered protected speech under the First Amendment.⁶⁵ Perhaps the most compelling argument for the permissibility of regulating racist and sexist speech is that hate speech should be considered akin to unprotected conduct

⁶¹ See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

⁶² *Id.*

⁶³ See *Brandenburg*, 395 U.S. 116 (1966); *R.A.V.*, 505 U.S. 377 (1992).

⁶⁴ See *Brandenburg*, 395 U.S. 116 (1966); see also, *Chaplinsky*, 315 U.S. at 571–72 (1942) (Fighting words are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

⁶⁵ See generally, e.g., Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

(i.e., tort action) in that it conflicts with the constitutional value of equality.⁶⁶ However, this type of argument has yet to make any traction within the court system.

Public college campuses, bastions for diverse and divergent thoughts, are participants in this debate because they construct codes prohibiting hate speech.⁶⁷ In the past, when these codes are challenged for their constitutionality, the colleges and universities argue the codes are constitutional because they are within the “fighting words” constitutional exception category.⁶⁸ But, this more than likely has changed after the Supreme Court’s decision in *R.A.V. v. City of Saint Paul*.⁶⁹ In that case, the Supreme Court was presented with the issue of whether the City’s speech ordinance was constitutional under the “fighting words” exception.⁷⁰ The ordinance criminalized the

plac[ing] on public or private property a symbol . . . including but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.⁷¹

Ultimately, in *R.A.V.*, the Supreme Court determined that the ordinance was narrowed only to prevent fighting words in limited circumstances (the protection of targeted minority groups) and therefore it was unconstitutional.⁷² Notably, in its opinion the Court stated that the City of Saint Paul could prohibit cross burning if the statute was drafted in a manner consistent with the First Amendment.⁷³ This would entail drafting a

⁶⁶ See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 180 (1982).

⁶⁷ See generally Lawrence, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

⁷⁰ *Id.*

⁷¹ *Id.* at 380.

⁷² *Id.* at 394.

⁷³ *Id.* at 396 (“St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire”).

statute that prohibits this conduct generally, as opposed to isolating and protecting only minority groups.

As aforementioned in the previous sections in this article, attorneys make statements on the internet that are categorized as hate speech. While hate speech is generally permissible pursuant to First Amendment protection, a question arises as to whether speech should be permissible if it is harmful. The next section of this article explains what problems arise from hate speech on the internet and why hate speech is particularly harmful to professional groups, such as attorneys.

IV. PROBLEMS ARISING IN THE UNITED STATES BECAUSE OF EXISTING INTERNET HATE SPEECH LEGAL FRAMEWORK

In contrast to many other countries, the United States provides hate speech a constitutional protection.⁷⁴ After World War II, many European countries passed laws and signed international agreements prohibiting hate speech.⁷⁵ For example, the International Convention on the Elimination of All Forms of Racial Discrimination explicitly provides in Article 4 that parties

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c)

⁷⁴ See Louis Henkin, *Group Defamation and International Law*, in GROUP DEFAMATION AND FREEDOM OF SPEECH 123 (Monroe Freedman & Eric Freedman, eds., 1995).

⁷⁵ Christopher Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE 781, 785–86 (2005).

Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.⁷⁶

Over 150 nations signed the Convention, including the majority of the members of the Council of Europe.⁷⁷ Interestingly, the United States also ratified the Convention; however, it did so with the reservation that it would refuse to undertake any measures that would violate its First Amendment.⁷⁸

Hate speech falls within the category of protected speech of the First Amendment.⁷⁹ Laws cannot be promulgated restricting it if they are restricting one view point as opposed to another.⁸⁰ Furthermore, anonymous speech over the internet is also provided the highest degree of First Amendment protection.⁸¹ Because of the United States' current protection of internet hate speech, hate speech dedicated websites and forums run rampant online. The Southern Poverty Law Center in 1998 determined that 163 hate sites existed on the internet.⁸² In 2005, this number exploded to 524.⁸³ These numbers are only indicative of websites that are dedicated to discrimination. It does not take into account individual discriminatory comments that are as freely posted as blog comments or forum postings.

This has simply become a problem. Individuals are harmed as a result of hate speech online. And, it is even arguably chilling another individual's

⁷⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966).

⁷⁷ See Blarcum, *supra* note 75, at 786.

⁷⁸ *Id.*

⁷⁹ See *supra* note 64.

⁸⁰ See, e.g., *Perry Educ. Ass'n.*, 460 U.S. at 45.

⁸¹ *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

⁸² *Number of Hate Sites Increase Online: Hate groups find a home on the Net*, SOUTHERN POVERTY LAW CENTER (1998), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/1998/winter/163-and-counting> (last visited Aug. 23, 2014).

⁸³ Mark Potok, *Hate Groups Increase Numbers, Unite Against Immigrants*, SOUTHERN POVERTY LAW CENTER (2006), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/spring/the-year-in-hate-2005> (last visited Aug. 23, 2014).

speech if specifically directed at a targeted individual.⁸⁴ For example, in 2007, a former Technorati Top 100 blog on the subject of how to design user-friendly software was shut down as a result of repeated cyber harassment directed at the creator.⁸⁵ Kathy Sierra, the blogger who hosted this site, continuously received threats and explicit sexual posts directed towards her on the site, which inevitably led her to fear for her safety and negatively affected her mental health.⁸⁶ At one point, Ms. Sierra was even afraid of going into her backyard.⁸⁷ Commenters demeaned her by posting her photograph next to a noose and, doctoring a photo to show her face muzzling red lace panties.⁸⁸ Moreover, one commenter actually posted her home address and social security number.⁸⁹

Should this be allowed to occur? Current First Amendment legal precedent generally permits cyber-harassment of this sort.⁹⁰ This should change. But, in the meantime, in circumstances similar to “dybbuk” and Professor Leong, when an attorney is the commenter, can state bar associations prohibit this conduct? In examining this question, it is important to consider two questions: (1) whether an individual who engages in this conduct is fit to practice law; and (2) whether this conduct is detrimental to the image of the profession.

⁸⁴ ANDREWS, *supra* note 5, at 102.

⁸⁵ *Id.* (citing Alex Pham, *Cyber-bullies' Abuse, Threats Hurl Fear into the Blogosphere*, LOS ANGELES TIMES, March 31, 2007, at C1, available at <http://articles.latimes.com/2007/mar/31/business/fi-Internet31>).

⁸⁶ *Id.* (citing Pham, *supra* note 85).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (citing Dylan Tweney, *Kathy Sierra Case: Few Clues, Little Evidence, Much Controversy*, WIRED (April 16, 2007), available at www.wired.com/techbiz/people/news/2007/04/kathysierra); Cathy Seipp & Kathy Sierra, *Wild in the Blog-o-sphere*, FISHBOWL LA BLOG (March 27, 2007), www.mediabistro.com/fishbowl/cathy-seipp-and-kathy-sierra-wild-in-the-blog-o-sphere_b3903.

⁹⁰ There has been considerable debate in several states and Congress in adopting statutes which will criminalize certain conduct which can be defined as cyber-harassment.

V. ATTORNEYS' FIRST AMENDMENT RIGHTS

As any other citizen of the United States, an attorney is provided the same rights under the Constitution—including the First Amendment. Therefore, attorneys' speech is protected and cannot be restricted unless certain conditions apply. Regulating attorneys' discriminatory or harassing remarks online, or elsewhere, similar to remarks by other citizens, is difficult under the existing First Amendment precedent. But, attorneys' speech has been limited, despite their First Amendment rights, in manners that differ from limitations on speech by the general public in some circumstances. For instance, attorneys can be sanctioned for making disparaging remarks about the judiciary and have additional restrictions imposed on them for commercial speech.⁹¹ Thus, a proposed measure restricting attorneys from engaging in hate speech, regardless of the First Amendment, may still be constitutional.

A. *Limitations on Attorneys' Free Speech*

The nature of attorneys' profession requires more restrictions on their speech in contrast to the general public. Ethical rules adopted by states that otherwise would be considered unconstitutional are still upheld as constitutional in the context of attorneys if they "are justified by a state's interest in preserving public confidence in the judiciary and ensuring fair and impartial adjudications."⁹² Justice Cardozo acknowledged this principle in *In re Rouss*, by stating that membership to the bar is a privilege burdened with conditions.⁹³ In that case, an attorney elected to use his Fifth Amendment right by refusing to testify on an issue that would be self-

⁹¹ See *infra* notes 96, 99, & 103.

⁹² Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 169 (2008).

⁹³ *In re Rouss*, 116 N.E. 782, 783 (1917).

incriminating, and later was disciplined for asserting this constitutional right by his state bar.⁹⁴

In re Rouss is just one example of courts recognizing that an attorney can be disciplined by their respective state bar association for otherwise constitutionally protected speech.⁹⁵ State bar associations follow this principal when limiting attorneys' otherwise fundamental rights in circumstances where a compelling interest exists to maintain the integrity of the profession. The following subsections of this article provide explicit rules and examples of restrictions on attorneys' First Amendment rights.

1. Speech Critical of the Judiciary—Model Rule 8.2

The ABA adopted a model rule prohibiting attorneys from making false statements and negative comments against the judiciary.⁹⁶

Pursuant to Model Rule 8.2,

(a) [a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

Comment 1 of Model Rule 8.2 provides that an attorney may not speak or act in a manner that will “unfairly undermine public confidence in the administration of justice.”⁹⁷ In fact, many states will even sanction attorneys for statements pertaining to judges that constitute mere opinion—i.e., attorneys' opinions about the intelligence of a judge or a judge's character.⁹⁸

⁹⁴ *Id.*

⁹⁵ *Id.* (Holding that the New York State Bar Association's disbarment of an attorney who did not provide testimony against himself was permissible).

⁹⁶ See MODEL RULES OF PROF'L CONDUCT R. 8.2 (2013).

⁹⁷ *Id.*

⁹⁸ See Margaret C. Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1569 (2009); see *contra*, *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (holding that an attorney

Furthermore, the forum in which the statement was made is irrelevant in determining whether an attorney has violated the rule.⁹⁹

Rule 8.2 extends to statements that have been made orally in private conversation or in public.¹⁰⁰ Logically, the rule has been extended to the virtual world to cases in which attorneys criticize judges on the internet. For instance, a Florida attorney was disciplined after describing a judge on her blog as an “‘evil, unfair witch’ with an ‘ugly condescending attitude.’”¹⁰¹ As a result of this comment, the Florida Bar reprimanded the attorney and required her to pay \$1,250.¹⁰²

One of the principle reasons that the ABA adopted Rule 8.2 was to protect the public’s perception of judicial integrity from being impugned.¹⁰³ In a United States Court of Appeals for the Seventh Circuit opinion, Chief Judge Easterbrook held that attorneys simply do not receive the same First Amendment rights in regard to political debate as ordinary citizens.¹⁰⁴ With this stance, the Seventh Circuit upheld the disbarment of an attorney in federal courts due to his statements about judges’ character.¹⁰⁵ The attorney in this case was disbarred by the State of Illinois for making baseless accusations that judges had committed criminal acts and other wrongs.¹⁰⁶

However, there have been many criticisms of this rationale because the judiciary essentially has entrenched itself from intra-professional criticism; even in instances of potential judicial abuse, attorneys are restrained from making public comments.¹⁰⁷ Irrespective of these criticisms, it is well

can only be punished for critical speech against the judiciary if it is shown that the speech was made with actual malice).

⁹⁹ See Tarkington, *supra* note 98, at 1621.

¹⁰⁰ *Id.* at 1569–70.

¹⁰¹ Tresa Baldas, *Lawyers Critical of Judges Fight For Rights*, NAT’L L.J. (Feb. 9, 2009), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428070373>.

¹⁰² *Id.*

¹⁰³ See Tarkington, *supra* note 98, at 1570.

¹⁰⁴ *In re Michael Palmisano*, 70 F.3d 483 (7th Cir. 1995).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Tarkington, *supra* note 98, at 1601–02, 1609.

established currently that attorneys can be prohibited by their state bar associations from making negative comments against the judiciary.¹⁰⁸

2. Advertising and Solicitation

Commercial speech has long been recognized as falling within the category of protected speech.¹⁰⁹ Advertising and soliciting individuals to use one's services or product therefore are considered protected speech. States have attempted to curtail attorneys' advertising and solicitation of new clients by promulgating state bar rules prohibiting certain types of conduct.¹¹⁰ However, the Supreme Court has routinely held that attorneys cannot be prohibited from engaging in truthful, non-deceptive advertising of their services.¹¹¹

In contrast, the Court has held that state ethical rules prohibiting attorneys from in-person solicitation of clients for profit are acceptable.¹¹² The Court held that the distinction between the two is that states possess a "compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct."¹¹³ It reasoned that in-person solicitation has the inherent risk that an attorney will deceive and pressure a potential client, as there is no way to monitor the attorney's communication with that client.¹¹⁴

¹⁰⁸ *Id.* at 1569–70, 1574.

¹⁰⁹ *See generally* Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding a Virginia law prohibiting pharmacists from advertising price of drugs unconstitutional). However, it should be noted that commercial speech is provided a lesser degree of protection. *See* Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) ("[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

¹¹⁰ *See generally* Kyle Perkins, *Advertising: The Marketing of Legal Services in the Twenty-First Century*, 35 GONZ. L. REV. 99 (2000); Mitchel Winick, et. al, *Attorney Advertising on the Internet: From Arizona to Texas-Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH L. REV. 1489 (1996).

¹¹¹ *See generally* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

¹¹² *See generally* Ohralik, 436 U.S. 447.

¹¹³ *Id.* at 462.

¹¹⁴ *Id.* at 465.

These model rules have been applied to attorneys' speech online as well.¹¹⁵ Internet communications are analogous to telephone communications and in-person conversations due to the conveyance of instantaneous messages. Consequently, some state bar associations have prohibited attorneys from communicating with individuals by these means under solicitation rules.¹¹⁶

3. Administration of Justice—Model Rules 3.5(a) and 3.6(a)

Attorney speech pertaining to pending cases is classified as protected.¹¹⁷ But, the Court has held that an attorney can constitutionally be sanctioned if her or his remarks about pending cases will substantially prejudice an adjudicatory proceeding.¹¹⁸ Underlying this rationale is the principle that as licensed officers of the court, attorneys have a duty to aid in the fair administration of justice.¹¹⁹ Based upon this rationale, it is clear that an attorney's speech about proceedings or about a judge in a detrimental manner could have a negative impact on the fair administration of justice. Courts have held that attorneys' speech in this context is permissibly chilled in some circumstances.¹²⁰

This principle is memorialized in Model Rule 3.5(a).¹²¹ Model Rule 3.5(a) prevents lawyers from communicating with judges, jurors, or

¹¹⁵ See THE FLORIDA BAR STANDING COMMITTEE ON ADVERTISING, *Guidelines for Networking Sites*, FLORIDA BAR (Apr. 16, 2013), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/\\$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18BC39758BB54A5985257B590063EDA8/$FILE/Guidelines%20-%20Social%20Networking%20Sites.pdf?OpenElement) ("Invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer's page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are solicitations in violation of Rule 4-7.18(a).").

¹¹⁶ *Id.*

¹¹⁷ *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

¹¹⁸ *Id.* at 1034.

¹¹⁹ See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (overturning a conviction because the trial had a "carnival atmosphere" and the jury was exposed to publicity).

¹²⁰ See *Tarkington*, *supra* note 98, at 1569 (indicating that an attorneys' opinionated speech about the judiciary can even be restricted).

¹²¹ See MODEL RULES OF PROF'L CONDUCT R. 3.5(a) (2013).

prospective jurors in a manner that would hinder a court's impartiality.¹²² Additionally, Rule 3.6(a) prohibits attorneys from making statements to the press that will likely prejudice trials.¹²³

The Supreme Court considered the constitutionality of these rules after Nevada adopted a similar provision.¹²⁴ In *Gentile v. State Bar of Nevada*, an attorney argued that the "substantial likelihood" threshold currently in place to determine whether an attorney's speech is protected in regard to adjudicatory proceedings was too burdensome and instead should be replaced by a "clear and present danger" threshold.¹²⁵ However, the Court disagreed and held that "the substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."¹²⁶

Rule 3.5(a) extends outside of attorneys' personal involvement in the representation of their clients, which illustrates that attorneys can be disciplined outside the scope of their professional actions. For example, in 2009 the California Bar Disciplinary Commission sanctioned a San Diego attorney who had posted information on his personal blog about a trial on which he was serving as a juror.¹²⁷ In his postings, he included case details.¹²⁸ As a result of these postings, the trial verdict was eventually

¹²² *See id.* ("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law . . .").

¹²³ *Id.* R. 3.6(a) ("A lawyer who is participating or has participated in a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter").

¹²⁴ *See generally Gentile*, 501 U.S. at 1030.

¹²⁵ *See id.*

¹²⁶ *Id.* at 1074.

¹²⁷ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, THE NEW YORK TIMES, Sept. 12, 2009, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

¹²⁸ *Id.*

vacated and the case was remanded to the lower court.¹²⁹ Because he was an attorney himself, the disciplinary committee suspended his license for 45 days, placed him on a two-year probation period upon reinstatement, and ordered him to pay \$14,000 in legal fees incurred by the parties in the underlying case.¹³⁰

4. Disclosure of Confidential Information—Model Rule 1.6

The relationship between an attorney and a client is unique. Necessary privileges and fiduciary duties have been indoctrinated within the profession in order for attorneys to effectively do their jobs. One of the bedrock privileges in the profession, which is commonly known—but frequently misunderstood—is the attorney-client confidentiality privilege. This privilege has been memorialized in Model Rule 1.6, which states that an attorney cannot disclose confidential information of a client without that client's informed consent (with limited exceptions).¹³¹ If attorneys violate this rule, they will face ethical sanctions by their state disciplinary commission. Consequently, here too, is another example of a limitation on an attorney's First Amendment rights due to the nature of the profession.

With the explosion of technology and the internet, Model Rule 1.6 has been a hot topic recently. Confidential information is not kept under lock and key as in the past with physical files. Law firms have become targets of hackers for the valuable information that they keep—bank account numbers, social security numbers, corporate trade secrets, etc.¹³² Beyond this, however, attorneys have also unbelievably taken to the internet pseudo-anonymously and have disclosed confidential information about their clients.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ MODEL RULE OF PROF'L CONDUCT 1.6 (2013).

¹³² Jennifer Smith, *Client Secrets at Risk as Hackers Target Law Firms*, WALL STREET J. (Jun. 25, 2012), <http://blogs.wsj.com/law/2012/06/25/dont-click-on-that-link-client-secrets-at-risk-as-hackers-target-law-firms/>.

For example, from 2007 to 2008, Kristine Peshek, an Illinois assistant public defender of 19 years lost her job for disclosing confidential information on her blog about some of her clients.¹³³ In one post, Ms. Peshek disclosed a client's jail identification number and stated that he was stupid for falling upon his sword for his brother on a controlled substance possession charge because "he's no snitch."¹³⁴ In another post, she wrote:

Dennis, the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.¹³⁵

As a result of these statements, the Illinois Attorney Disciplinary Commission determined that the attorney's conduct violated the ethical rules of conduct as it was both prejudicial to the administration of justice and an unauthorized disclosure of confidential information. She was suspended for sixty days.¹³⁶

5. Admission to a State Bar Association—The Case of Matthew F. Hale

In 1998, the Illinois State Bar Commission on Character and Fitness was presented with an unusual situation.¹³⁷ Matthew Hale, a freshly minted graduate from the University of Southern Illinois Law School passed the Illinois bar examination.¹³⁸ It was now the Commission's job to analyze

¹³³ In re Peshnek, M.R. 23794, 09 CH 89 (Ill. 2010).

¹³⁴ In re Kristine Ann Peshek, Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Aug. 25, 2009), <https://www.iardc.org/09CH0089CM.html>.

¹³⁵ *Id.*

¹³⁶ In re Peshnek, M.R. 23794, 09 CH 89 (Ill. 2010).

¹³⁷ Jason O. Billy, *Confronting Racist at the Bar: Matthew Hale, Moral Character, and Regulating the Marketplace of Ideas*, 22 HARV. BLACKLETTER L.J. 25, 25–26 (2006), available at <http://www3.law.harvard.edu/journals/hjrej-articles/archive/vol22/billy.pdf>.

¹³⁸ *Id.*

whether this individual possessed the moral integrity to be admitted in Illinois to practice law.

While this is usually a routine decision the Commission faces, occasionally it will come across individuals with violent felonies or a pattern of dishonesty. Matthew Hale's application was unique. He was an outspoken leader of the Klu Klux Klan.¹³⁹ But, Hale informed the Commission that he would follow laws in existence mandating equality. Nevertheless, the Inquiry Panel for the Committee on Character and Fitness was left with a tough question—whether in spite of his racist beliefs, Hale possessed the “requisite character and fitness” to be admitted to the Illinois Bar.

In a two to one decision, the Inquiry panel denied Hale admission to the Illinois Bar as a result of his racist beliefs.¹⁴⁰ However, the Inquiry Panel did not make this decision lightly. It recognized that denying Hale admission to the Bar based upon his hate speech and his association with a fringe political group may raise First Amendment questions. The Inquiry Panel reasoned that when balancing Hale's interest with the State's, their decision would be upheld under existing First Amendment analysis scrutiny.¹⁴¹ Principally, the Panel concluded that lawyers are dedicated to preserving certain “fundamental truths,” and one such truth is racial equality.¹⁴² As Matthew Hale's outspoken beliefs were in sharp opposition to this fundamental truth, the Panel determined that it would be constitutional to reject his admission to the Bar to protect the State's interests in preserving the integrity of the bar and the laws of the State.¹⁴³

¹³⁹ *Id.*

¹⁴⁰ *In re Hale*, Comm. of Character & Fitness (1st Dis. App. Ct. 1998), *reprinted in* GEOFFREY C. HAZARD, ET. AL, *THE LAW AND ETHICS OF LAWYERING* 875 (3d ed. 1999).

¹⁴¹ *See Billy*, *supra* note 137, at 31.

¹⁴² *Id.*

¹⁴³ *Wendel*, *supra* note 49, at 316–17.

Interestingly, groups in direct contrast to Hale's ideology disagreed with this decision.¹⁴⁴ Notably, a large Jewish civil rights organization, the Anti-Defamation League, disagreed with Hale's denial. One regional Director of the organization stated, "[w]e are repulsed by Matt Hale, but we respect the principle of speech and believe he is entitled to the opportunity to spew his venom without restriction."¹⁴⁵ The concern with this decision was that perhaps the tables would turn one day, and that radical minority groups would be prohibited under the same rationale.¹⁴⁶ However, the Inquiry Panel's decision aligns with prior Supreme Court decisions where it has upheld a states' denials of bar membership as a result of the individuals' affiliation with groups with ideologies that run afoul of existing constitutional tenets.¹⁴⁷

The Matthew Hale example draws an interesting parallel with a proposal prohibiting attorneys from engaging in conduct that is considered to be discrimination or sexually biased harassment. Throughout the profession's history, good moral character has been considered a requirement for the practice of law.¹⁴⁸ The Supreme Court in *Konigsberg v. State Bar of California* essentially held that state bar associations indeed could impose a requirement of good moral character in evaluating whether applicants could be admitted to the bar.¹⁴⁹

If state bar associations can initially impose a requirement of good moral character when considering whether individuals should be admitted to practice in their respective jurisdictions, should they be able to discipline attorneys who fall below this standard? The most comparable model rule to

¹⁴⁴ See Billy, *supra* note 137, at 31.

¹⁴⁵ *Id.*

¹⁴⁶ See, e.g., Adrienne Drell, *Jewish Group Protests Denial of Law License for Anti-Semite*, CHI. SUN-TIMES, Feb. 10, 1999, at 14; Elli Wohlgelemerter, *Spreading Hate on the Net*, JERUSALEM POST, Jul. 9, 1999, at 6B.

¹⁴⁷ See generally *Konigsberg*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82 (1961).

¹⁴⁸ See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985).

¹⁴⁹ See Billy, *supra* note 137, at 28.

the requirement of possessing good moral character is Model Rule 8.4, which was enacted to maintain the integrity of the profession.¹⁵⁰ Model Rule 8.4 defines attorney misconduct.¹⁵¹ However, Model Rule 8.4 is not promulgated to regulate all types of behavior by attorneys; instead, it limits itself to defining what is considered “professional misconduct.”¹⁵² Generally, when attorneys engage in misogynistic and racist speech on the internet, they are exhibiting this behavior on their free time. Therefore, this Model Rule would not apply because attorneys are engaging in conduct that is outside the scope of their professional duties.

VI. THE AMERICAN BAR ASSOCIATION SHOULD MODIFY MODEL RULE 8.4

In order to reign in attorneys’ hate speech, the ABA should modify its Model Rule 8.4 to explicitly state that attorneys are prohibited from engaging in or manifesting intentional discriminatory comments to harass. While this measure may seem drastic, and at odds with the First Amendment, the model rule will be beneficial towards maintaining the public’s general perception that the legal profession is indoctrinated with the notion of civility. Furthermore, other similar efforts have been made in prohibiting discriminatory conduct by lawyers.¹⁵³

Such a model rule, if adopted by state bar associations, likely would be constitutional despite the First Amendment due to the compelling interest of the profession to protect its image.¹⁵⁴ In the case of Matthew Hale, the Inquiry Panel analyzed that scenario under the lens of free-speech

¹⁵⁰ See MODEL R. OF PROF’L CONDUCT 8.4 (2013). The subtitle of Model Rule 8.4 is “*Maintaining the Integrity of the Profession*.”

¹⁵¹ *Id.*

¹⁵² See *id.*

¹⁵³ E.g., Andrew 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, 783 (1996).

¹⁵⁴ See *In re Rouss*, 116 N.E. at 783 (stating the practice of law is a privilege which in turn comes with additional burdens).

limitations in the context of government-run work places.¹⁵⁵ Consequently, when analyzing whether a limitation on speech is constitutional, the government's interest "must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."¹⁵⁶ However, *Pickering v. Board of Education* demonstrates that an individual's fundamental right of free speech must still be weighed with a state's compelling interests.¹⁵⁷ Applying this analysis to the proposed change to Model Rule 8.4, state bar associations have a compelling interest in maintaining the public's perception of the integrity of the profession in order to facilitate a system with the purpose of administering justice neutrally.

Comments and statements made online by an individual in a profession may damage the integrity of her or his professional group affiliation. For example, Amanda Tatro, a mortuary-science student, posted updates on her social network page about her cadaver, which she had named "Bernie."¹⁵⁸ In one such posting, Tatro stated she was, "looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar."¹⁵⁹ Eventually, Tatro's University became aware of these postings and her administrators disciplined her by requiring her to take a clinical ethics class, requiring her to undertake a psychiatric evaluation, and placing her on academic probation.¹⁶⁰ Tatro challenged her university's discipline on First Amendment grounds.¹⁶¹ The court, however, disagreed because Tatro had

¹⁵⁵ See Billy, *supra* note 137, at 30.

¹⁵⁶ *Elrod v. Burns*, 427 U.S. 347 (1976).

¹⁵⁷ *Pickering v. Bd. Of Education of Township High School District 205*, 391 U.S. 563 (1968).

¹⁵⁸ ANDREWS, *supra* note 5, at 84 (citing *Tatro v. U. of Minnesota*, 2011 WL 2672220 (Minn. App. 2011)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

undermined the public's perception of a profession that is dependent upon its trust.¹⁶²

The Tatro case illustrates that courts can find that a professional institution can restrict speech to maintain the public perception of the profession—this falls within the category of a compelling interest. It is well recognized that attorneys have a unique role in society and have the burden of higher professional ethical standards.¹⁶³ This burden simply comes with the privilege of being an officer of the courts. This is an understanding individuals appreciate at the time they apply for admission to the bar, and when they are sworn in under oath before their respective state supreme courts to practice law.

A. History of the Prior Proposal

In 1992, a report commissioned by the ABA in regard to whether there was evidence of racial and ethnic bias in the justice system concluded such bias does exist within the system.¹⁶⁴ The report recommended that

[n]o lawyer should intentionally engage in racially or ethnically discriminatory acts in the practice of his or her profession. The Task Force recommends that the ABA consider amending its Model Rules of Professional Conduct to make acts of racial and ethnic discrimination while acting in one's professional capacity sanctionable and unprofessional conduct.¹⁶⁵

After this report was issued at the 1994 midyear ABA meeting, a recommendation was offered to modify Model Rule 8.4 to prohibit attorneys' discriminatory conduct by considering it as professional

¹⁶² *Id.*

¹⁶³ See *In re Rouss*, 116 N.E. at 783 (stating that the practice of law is a privilege which in turn comes with additional burdens); see generally, MODEL RULES OF PROFESSIONAL CONDUCT (2013).

¹⁶⁴ See TASK FORCE ON MINORITIES AND THE JUSTICE SYSTEM, ACHIEVING JUSTICE IN A DIVERSE AMERICA, ABA (1992).

¹⁶⁵ *Id.*

misconduct under the Rule.¹⁶⁶ Eventually the ABA Standing Committee determined that it would be a mistake to incorporate such a broad, sweeping prohibition in the Model Rules.¹⁶⁷ The Committee's reasoning for this determination rested on the constitutionality of prohibiting such speech due to First Amendment protections.¹⁶⁸ The Committee believed that "a disciplinary rule to control lawyer speech would undoubtedly run afoul of the First Amendment."¹⁶⁹ The next section of this Article explains why revisitation of this issue is due.

B. Revisitation of this Issue Is Due

A new rule prohibiting attorneys from engaging in discriminatory and misogynistic speech should be adopted. The proliferation of hate speech and sexist remarks online is a growing and serious issue. Attorneys engage in this conduct, which has sullied the professional image. The ramifications of this type of speech published online for the whole world to view are real and serious—people are injured, reputations are tarnished, and damages occur.¹⁷⁰

The best way of curtailing this behavior by attorneys is by defining it as an act of professional misconduct pursuant to Model Rule 8.4. If this is done, and states will subsequently adopt the suggested model rule, and attorneys will likely be deterred from engaging in this conduct online. Currently, the reach of the ABA's Model Rule 8.4 is very narrow in regard to what is considered professional "misconduct." Of note, however, the rule does not limit itself to attorneys' conduct wholly within the scope of their professional duties. Professional misconduct for attorneys includes

¹⁶⁶ David Isbell, MATERIALS RELATING TO LAWYERS' DISCRIMINATORY CONDUCT AND THE FIRST AMENDMENT 1 (1995).

¹⁶⁷ Taslitz, *supra* note 153, at 784–85.

¹⁶⁸ *Id.*

¹⁶⁹ ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, THE ABA TAKES A STAND AGAINST MANIFESTATIONS OF BIAS OR PREJUDICE: A RECOMMENDATION FOR A POLICY RATHER THAN A DISCIPLINARY RULE, ABA 3 (1994).

¹⁷⁰ See *supra*, notes 9, 22, 86, & 130.

behaving in a dishonest manner and engaging in any conduct that is prejudicial to the administration of justice.¹⁷¹

The intent of Model Rule 8.4 is depicted in its comments. The Model Rule is drafted in order to discipline attorneys who engage in conduct that reflects adversely on their fitness to practice law.¹⁷² Comment 3 of Model Rule 8.4 considers it professional misconduct for an attorney to engage in conduct that evidences a bias or prejudice based upon an individual's "race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status."¹⁷³ However, Model Rule 8.4 is only applicable to an attorney's conduct within their professional scope. When the previously modified model rule was suggested in the 1994 mid-year meeting, the Committee was operating under a false presumption that it would be unable to constitutionally draft such a rule.¹⁷⁴ This is untrue. Attorneys can have their First Amendment rights limited in some circumstances as admission to practice is a privilege—those who want to exercise their full First Amendment rights may give up the privilege of practicing law.

This is evidenced by the present constitutionality of Model Rule 8.4 (the prohibition of adverse remarks about the judiciary) despite the Rule's clear content and view-point discrimination.¹⁷⁵ Moreover, the Hale scenario raises an interesting parallel with the issues presented here—discriminatory remarks as a basis for discipline.

Similar to the Illinois Inquiry Panel's reasoning, state bar disciplinary commissions should be able to discipline individuals who make racist and sexist comments. State bar associations and their respective state supreme

¹⁷¹ MODEL RULES OF PROF'L CONDUCT R. 8.4(c)–(d) (2013).

¹⁷² See *generally id.* at R. 8.4 cmt. 1–4 (2013) ("Many kinds of illegal conduct reflect adversely on fitness to practice law"; "A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers").

¹⁷³ *Id.* at R. 8.4 cmt. 3 (2013).

¹⁷⁴ See ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, *supra* note 169.

¹⁷⁵ Day, *supra* note 92, at 183–84.

courts have a compelling interest in maintaining the public image of a profession that is linked with integrity and upholding the law.¹⁷⁶ Public racist and sexist remarks run directly contrary to this effort—and should be prohibited similarly to negative remarks made about the judiciary. Akin to Model Rule 8.4’s prohibition of negative comments pertaining to the judiciary, a prohibition on public discriminatory and misogynistic comments made by attorneys could be upheld as constitutional if analyzed under the First Amendment.

C. *A New Proposal for Modification*

In determining what the new proposed language of Model Rule 8.4 should be, there are other templates. For example, in 1996, Andrew Taslitz and Sharon Styles-Anderson proposed a modification of ABA Model Rule 8.4.¹⁷⁷ They supported this proposal by arguing for an amendment drafted narrowly to restrict attorney speech that is discriminatory with the intent to intimidate while acting as a legal professional.¹⁷⁸ This is a good start; however, it is too conservative of a rule in the modern context, considering the realities the modern world faces as a result of the global proliferation of daily internet use.

Instead, the ABA should adopt a broad rule that considers an attorney’s discriminatory direct harassment of all individuals misconduct under Model Rule 8.4. One option is drafting a new sub-category for Model Rule 8.4. This new sub-category would be added to Model Rule 8.4 in defining what is considered professional misconduct. This sub-category, (g), would state, “Engage in speech that is discriminatory based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.”

¹⁷⁶ See generally, *In re Rouss*, 116 N.E. at 783 (stating that the practice of law is a privilege which in turn comes with additional burdens).

¹⁷⁷ See generally, Taslitz, *supra* note 153.

¹⁷⁸ *Id.*

If incorporating a whole new subcategory is not considered the best option, the existing Model Rule 8.4 Comment 2 can be edited to broadly prohibit this conduct.¹⁷⁹ This is a simpler alternative, as all that must be done is eliminate the present language, which prohibits this conduct only when it is “in the course of representing a client[.]”

In the last proposed alternative, if the ABA does not wish to directly address racist and sexist comments by prohibiting the conduct in the Model Rule, it can instead adopt language that more broadly encompasses all conduct that may raise an issue of whether an individual is fit to practice law. For example, New York has adopted a rule that prohibits attorneys from “conduct that adversely reflects on the lawyer’s fitness as a lawyer.”¹⁸⁰ This is a rather discretionary rule and casts a wide net of all misconduct, and it would be reasonable for a state bar disciplinary commission to determine that an attorney who repeatedly harasses another individual online to be unfit to practice law.¹⁸¹ This last alternative is the best option for the ABA and is what should be adopted.

¹⁷⁹ MODEL RULES, *supra* note 171, at R. 8.4 cmt. 2 (“Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’ That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”).

¹⁸⁰ NEW YORK RULES OF PROF’L CONDUCT R. 8.4, cmt. 3 (2013).

¹⁸¹ Milan Markovic, *Law Professor Files Ethics Complaint Against Scamblogger*, LEGAL ETHICS FORUM (December 28, 2013), available at <http://www.legalethicsforum.com/blog/2013/12/law-professor-files-ethics-complaint-against-scamblogger.html>.

D. Model Rule 8.4 Should Be Broadened

Simply, the broad formulation of Model Rule 8.4 that defines misconduct as any conduct that is dishonest or prejudicial to the administration of justice is the most constitutional solution for addressing the problem of attorneys participating in hate speech. While the latter proposals are likely constitutional due to the compelling interest of maintaining the public image of the bar, to be safe, the ABA can circumvent the issue of drafting a rule that can run afoul of the First Amendment by indirectly attacking this conduct. Constructing a broad Rule 8.4 with language akin to New York's promulgated version will prevent a challenge of its constitutionality in this circumstance, as a result of it being a content-based restriction similar to *R.A.V.*¹⁸² An express prohibition of discriminatory remarks is analogous to the legislation at issue in *R.A.V.*, which only protected minority groups.¹⁸³ Therefore, such a prohibition may be considered viewpoint discrimination in First Amendment analysis.

By adopting language similar to New York's, Model Rule 8.4, the ABA will circumvent this analysis. Furthermore, it will provide state disciplinary commissions more ammunition in their arsenal for disciplining attorneys whose conduct does not fall within the provinces of the concrete rules in place. Undoubtedly, there is a myriad of activities that should constitute misconduct and that reflect adversely on an attorney's ability to practice law, but do not fit neatly within the rules. If disciplinary commissions were provided with a discretionary rule such as the one proposed, they will be better able to regulate attorneys admitted in their state bar.

If a narrow rule governing attorney speech were constructed only to prevent misogynistic or racist remarks, it would not govern other speech made by attorneys that is inherently harmful. For example, if an attorney decides to develop and operate a revenge porn website for personal profit,

¹⁸² *R.A.V.*, 505 U.S. at 392–94.

¹⁸³ *Id.*

the public will undoubtedly perceive such operation of a website negatively and impute this negativity to the profession. Presently, running a website like this is protected under the First Amendment, and the narrow rule governing lawyers' speech would not apply. Arguably, this type of behavior negatively reflects on the character of the attorney and the attorney should likely be disciplined for this misconduct. However, there is nothing presently in the Model Rules that would enable a state bar to discipline this individual. For this reason, a Model Rule 8.4 that broadly prohibits any conduct that reflects negatively on an attorney's character should be adopted.

VII. CONCLUSION

The Constitution of the United States, the supreme law of our land, ensures equal protection of all citizens regardless of their national origin, creed, or race. Lawyers, as administrators of justice and officers of the court, are instrumental in ensuring that US citizens' rights are protected. The goal of this nation is to ultimately become color-blind. Eventually US citizens should not notice what skin color their neighbors possess. It should simply be of no concern for them—just as the sky is blue or the grass is green. Licensed attorneys who engage in hate speech undermine and conflict with what the profession and the Constitution stand for. Therefore, the ABA should adopt a Model Rule that would enable disciplinary commissions to reprimand attorneys who engage in this conduct. Otherwise, attorney commenters like Dybukk will continue to run amok on the internet on websites such as AutoAdmit, and will make discriminatory and misogynistic comments without any formal reprimand.