Look Who Is Gutting the First Amendment!

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- "The [American Bar Association] wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of. ... state courts and state bars should resist the pressure to adopt it." — Eugene Volokh, UCLA law professor and *Washington Post* columnist.
- The language of Resolution 109 is "so broad it could mean anything... a kind of a speech code that restricts perfectly acceptable speech... anything you say might offend someone and therefore you can be punished for it." — Ilya Shapiro, Cato Institute.
- The ABA declined to answer questions for this article, as did the American Civil Liberties Union (ACLU). The ACLU, which calls itself "our nation's guardian of liberty," and touts itself as fighting for "your right... to speak out – for or against – anything at all," has not issued any statements or press releases about the model rule revision.

The struggle between free speech and speech codes that are intended to prevent harassment and discrimination appears set to leap from college campuses to law offices around the United States.

On August 8, 2016, the American Bar Association (ABA) approved resolution 109, which curtails freedom of speech. The approved resolution amended its model rule of professional conduct 8.4. It prohibits

"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."

The official comment explains:

"discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct."

The model rule is non-binding, but has potentially great influence on professional conduct rules that state courts require lawyers to follow. Should state courts adopt the change, lawyers found to violate it could be sanctioned and possibly disbarred. Because professional rules are legally binding on lawyers, the prospect that states may regulate "verbal conduct" implicates First Amendment concerns.

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Ilya Shapiro, Cato Institute's senior fellow in constitutional studies and editor-in-chief of Cato's *Supreme Court Review*, views the ABA resolution as "a kind of a speech code that restricts perfectly acceptable speech. It's like safe spaces on college campuses, where anything you say might offend someone and therefore you can be punished for it."

Many American colleges, motivated at least partly by a desire to protect members of growing minority populations on campus, have adopted speech codes. The codes have arguably fostered a culture chilling free speech, enabling people who claim offense to shut down dissenting voices. The past two years, for example, have witnessed members of a student government impeached for wearing mini-sombreros to a tequila-themed party, a college master hounded into resigning for publicly disagreeing with a college's cautionary note not to don offensive Halloween costumes, and a professor accused of racism and pressured into taking a sabbatical for supporting the state of Israel's fight against a recognized terrorist organization.

Paul Kazaras, assistant executive director and staff counsel to the professional guidance commission of the Philadelphia Bar Association, agrees that college speech codes are problematic, but says:

"I think this [ABA resolution] is something fundamentally different. We are talking about a profession having ethical rules that already restrict lawyers, and what's more, Pennsylvania's Constitution gives its Supreme Court the authority to regulate the practice of law. There needs to be a way to make sure lawyers act ethically."

Kazaras believes the change is needed to address bias that is still pervasive in some places, which has "no place in a professional world." By adding an affirmative duty to lawyers' ethical obligations, Kazaras says, junior lawyers and other law office employees have a needed tool to cope with special hardships they face in rectifying harassment. According to Kazaras,

"In most workplaces, if a senior manager harasses someone below him/her, the victim can complain through HR [human resources]. HR will then approach the manager and explain, 'You can't do this anymore.' That doesn't fit within law firm culture. It's hard for a woman, person of color, person with disabilities, etc., to say, 'You can't treat me that way.'"

Laws already exist regulating the work environment, Kazaras notes, and adds, "I think compliance with the new ethics rule should in fact lower the instances of litigation by employees against law firms, and that is a good thing."

Ilya Shapiro acknowledges that lawyers are already restricted by special rules -- for instance, rules limiting lawyers' speech by requiring them to be courteous to opposing counsel and parties -- but believes the proposed model rule change "goes far beyond any existing ethical guidelines. I think it's a much bigger step" than existing rules, says Shapiro, "like boiling a frog."

Shapiro believes the revision also "goes far beyond existing employment laws barring harassment." Workplace harassment, Shapiro explains, "is limited to conduct so offensive and pervasive that it creates a hostile work environment." By contrast, the language of Resolution 109 is "so broad it could mean anything." If someone believes he or she is being harassed, Shapiro argues, that person might be able to make a colorable claim under the model rule.

Eugene Volokh, a UCLA law professor who authors a *Washington Post* column on free speech issues, has written that the new model rule is significantly broader than existing workplace harassment laws, both in terms of what statements are covered, and in what settings they may be prohibited. For example, he fears that a lawyer presenting at a continuing legal education (CLE) program, who makes a statement critical of, say, homosexuals or Muslims in the course of the program, may thereby violate professional rules based on the new ABA guideline.

Kazaras, a longtime ethics consultant for the Philadelphia Bar Association, doubts statements made for the purpose of instruction during a CLE program could lead to liability.

Regardless of how that particular issue plays out, Volokh infers from the fact that the ABA moved ahead and adopted the new model rule, despite the many objections raised, "that the ABA wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of." State courts and state bars, Volokh writes, "should resist the pressure to adopt it."