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March 10, 2016

Myles V. Lynk, Chair
ABA Standing Committee on Ethics
and Professional Responsibility
Arizona State Univ. College of Law
Armstrong Hall
PO Box 877906
Tempe, AZ 85287-7906

RE: Standing Committee on Professional Discipline Comments on Draft Proposal to Amend Rule 8.4 of the ABA Model Rules of Professional Conduct

Dear Myles:

On behalf of the ABA Standing Committee on Professional Discipline (Discipline Committee), I am providing our response to the draft proposal to amend Rule 8.4 of the Model Rules of Professional Conduct that the ABA Standing Committee on Ethics and Professional Responsibility (Ethics Committee) posted for comment. The Discipline Committee commends you and the Ethics Committee for its hard and thoughtful work on this very complex and nuanced topic.

The draft proposal would, if proposed by the Ethics Committee and adopted by the House of Delegates, add new Model Rule 8.4(g) to make it professional misconduct for a lawyer to, "in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status." The proposal also seeks to add new Comment language. In addition to the proposal itself, the Discipline Committee studied the accompanying Memorandum (Drafting Choice Memo) explaining the Ethics Committee's drafting choices and the responsive comments posted prior to March 9th. We also reviewed again the Ethics Committee's earlier Discussion Draft and supporting Memorandum, and received the benefit of supplemental legal research from the Deputy Regulation Counsel, in addition to the extensive research that guided the comments in our October 8, 2015 letter expressing considerable enforcement concerns regarding the Ethics Committee's earlier Discussion Draft on this topic. A copy of that October 8, 2015 letter is attached, and our current proposals and suggestions are set forth below.

I. Should There Be Black Letter Language Added to Model Rule 8.4?

After analyzing the Ethics Committee's draft proposal, the Discipline Committee concluded that it would not oppose including a black letter provision in Model Rule 8.4. This is a change from the position the Discipline Committee took in October 2015. The Committee knows, from its own discussions and from reading the comments posted through March 9th, that reasonable minds will and do differ on the philosophical issue of whether it is appropriate to elevate the subject of current Comment [3] of Model Rule 8.4 to the black letter. The Discipline Committee recognizes the Ethics Committee's position

that, because Comments to the Model Rules are explanatory and not enforceable, elevating language on this subject to the black letter could serve to heighten lawyers' awareness that such conduct may subject them to discipline. The development of appropriately tailored language to add to the black letter of Model Rule 8.4 would be consistent with ABA Goal III, to eliminate bias and prejudice in the legal profession, and with the recently adopted Objective J of the ABA Model Regulatory Objectives. Objective J provides that regulators should consider as an objective of regulation: *Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system*.

The Discipline Committee also knows from its research that absent elevating this topic to a black letter provision such as that developed for comment by the Ethics Committee, states will continue to be able to discipline lawyers for the conduct at issue when appropriate. The Discipline Committee is not aware, from its own extensive research or from the Ethics Committee's Memorandum, of any reliable information indicating that there exists a systemic problem in this regard that black letter language is needed to address.

We continue to suggest that the Report supporting any Resolution to the House of Delegates on this matter will benefit greatly from a more convincing demonstration as to why elevating this subject to black letter is appropriate and important, in addition to a discussion that addresses specifically the enforceability concerns raised below. As it did in its October 8th letter, the Discipline Committee urges citation to any available studies, reliable anecdotal information of systemic problems with disciplinary enforcement, and case citations. The Committee strongly recommends, as it did in October, that the Ethics Committee actively seek out such data and information if it has not done so already. We had suggested then that the Ethics Committee develop and disseminate to chief disciplinary counsel, as well as to the National Organization of Bar Counsel and National Council of Lawyer Disciplinary Boards, a survey seeking relevant information about enforcement issues, as well as including questions about the rate at which matters alleging such harassment or discriminatory conduct by lawyers are addressed via alternatives to discipline programs or private discipline. If such a survey was undertaken, it was not evident from the materials posted along with the draft proposal.

The Discipline Committee strongly urges the Ethics Committee to, at a minimum, inquire of the chief disciplinary counsel in the 25 states that have black letter provisions on this subject about their experiences (positive and negative) enforcing those rules; seek data about who files such complaints (and sustainable complaints in particular); and ask those disciplinary counsel what they believe is the most effective approach to combatting such conduct in the legal profession. Specifically, the Ethics Committee may wish to focus on the twelve jurisdictions that have rules and comments similar to current Model Rule 8.4(d) and Comment [3] to determine whether, in practice, these rules have proven adequate to address conduct that requires disciplinary action. In addition, outreach to the Association of Professional Responsibility Lawyers (APRL) is necessary to help determine what, if any, enforceability concerns may exist in the disciplinary defense bar. We understand that APRL held a program on the Ethics Committee's work on this subject at its 2016 Midyear Meeting, but are suggesting more targeted outreach to the APRL membership.

II. The Discipline Committee Has Enforceability and Substantive Concerns Regarding This Iteration of Proposed Model Rule 8.4(g) and Its Comment.

While the Discipline Committee concluded that it would not oppose inclusion of black letter language in Model Rule 8.4 on this subject, I regret to inform you that the members retain significant enforceability and other substantive concerns regarding the language of this iteration of proposed amendments to Model Rule 8.4 and its Comment. The Ethics and Discipline Committees are the two entities in the ABA that are the primary drivers of ABA Goal II, Objective 2 (to promote competence, ethical conduct and professionalism). We all agree that ethical standards and rules mean very little if they cannot be or are not appropriately enforced. The Discipline Committee believes it is in the best interest of the Association, the public, disciplinary counsel, the courts, and the lawyers whose conduct would be governed by the proposed amendments to Model Rule 8.4 adopted by courts, to present to the House of Delegates for adoption a precise, appropriately circumscribed, and enforceable Model Rule.

Legal research shows that conduct constituting discrimination and harassment by a small number of lawyers has, sadly, long existed (as it also has existed in the general population), but also that such conduct has been the subject of disciplinary action when appropriate. As available data shows generally, a very small percentage of the approximately 1.4 million lawyers in this country engage in misconduct necessitating discipline.[1] The disciplinary mechanisms in the states are also able to successfully address acts of minor misconduct by lawyers, in the public interest, through alternatives to discipline programs where lawyers are educated and problems with conduct remediated.

Disciplinary enforcement concerns with this draft of proposed Model Rule 8.4(g) and its Comment, many of which mirror those related to the Ethics Committee's Discussion Draft last year, persist due to the vagueness and over-breadth of the proposal, and also because of what we believe will be the likely unintended consequences for the already resource-strapped lawyer disciplinary agencies in this country.[2] We are aware that past Ethics Committees have similarly attempted, without success, to develop black letter language on this subject for adoption by the House of Delegates. While on its face it may appear easy to develop such a provision in the black letter of Model Rule 8.4, we know that you understand that nothing could be further from the truth.

We offer for the Ethics Committee's consideration the following nonexclusive examples of the Discipline Committee's continued enforceability and other substantive concerns with the current draft proposal to amend Model Rule 8.4.

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[1] See, http://www.americanbar.org/groups/professional_responsibility/resources/surveyonlawyerdisciplinesystems2014.html, and http://www.americanbar.org/groups/professional_responsibility/resources/historicalabasoldsurveys.html. Also, as noted in our October 8th letter, the Ethics Committee has not cited to studies or credible anecdotal information from regulators or others showing an increase in harassment or discriminatory conduct by lawyers. If such an increase exists, the Ethics Committee has not shown that it is tied to substantive and enforcement problems associated with the content of existing state professional conduct rules or current Model Rule 8.4 and its Comment [3].

[2] The Ethics Committee's supporting Drafting Choice Memo does not explain how the current proposal addressed the enforceability concerns raised by the Discipline Committee in its October 8th letter.

A. The Proposal Continues to Suffer from Vagueness That Raises Enforceability and Possible Constitutional Concerns.

The Discipline Committee is concerned that the term "related to the practice of law" is ambiguous and that the explanation in draft Comment [3] that the Rule applies: "*to conduct related to a lawyer's practice of law*, including the operation and management of a law firm or law practice. *It does not apply to conduct unrelated to the practice of law*…" offers insufficient guidance to lawyers and regulators as to when conduct may result in discipline (emphasis added). What is the intended scope of the term "related" to the practice of law? We observe that Comment [1] of Model Rule 1.8 offers one interpretation of this phrase, but that "related to the practice of law" appears to be an otherwise undefined or unexplained term in this and other contexts in the Model Rules. The Discipline Committee recommends that, to eliminate vagueness and concomitant uncertainty, a clearer explanation of the intended scope of this term should be included in any Comment.

The terms "harass" and "discriminate," absent further definition, are similarly vague, and, as urged in our October 8th letter, should be defined for purposes of their use in what is intended to be an enforceable disciplinary rule. The Discipline Committee concluded that the failure to define what is meant by these terms for disciplinary purposes in proposed Model Rule 8.4(g) and its Comment does not serve lawyers, disciplinary counsel, respondents' counsel or the courts well.

These terms cover a wide range of conduct, not all of which is unlawful, and the lack of clarity as to the scope of covered conduct risks misinterpretation and misapplication of the proposed Rule. *See* e.g., *Vance v. Ball State Univ.*, __ U.S. __, 133 S. Ct. 2434, 2455 (2013) ("What qualifies as harassment? Title VII imposes no `general civility code.'" (citation omitted). The Discipline Committee queries whether the Ethics Committee intends the term "harass" to include what may be regarded as bullying or even persistent, annoying conduct by a lawyer? For example, would a lawyer's actions to collect a client's or the lawyer's debt against a socioeconomically[3] disadvantaged person potentially subject the lawyer to discipline under the proposed Rule? Similarly vague is the term "discriminate."

Although the Drafting Choice Memo states that "the terms 'harassment' and 'discrimination' are defined terms under the law," we believe that this explanation offers insufficient guidance to lawyers and regulators. These terms have different meanings under various federal and state laws and require different levels of proof to prove a violation of those laws. For example, harassment is prohibited conduct both under civil and criminal law,[4] but has a

[3] As noted below, the term "socioeconomic status" also requires explication in the Discipline Committee's view.

[4] *See, e.g.*, Mass.Gen.Laws ch.265 §43A (2006), which states that "(a) Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment and shall be punished by imprisonment in a house of correction for not more than 21/2 years or by a fine of not more than $1,000, or by both such fine and imprisonment." While a conviction for violating this statute could subject a lawyer to disciplinary proceedings under Model Rule 8.4(b), because the term "harass" is undefined in the Ethics Committee's proposal, it is not clear whether the Ethics Committee also would intend for such misconduct to be charged under proposed Model Rule 8.4(g).

different application in each context. Our research indicates that under federal law, "harassment" is a form of employment discrimination, which raises the question of whether the term is redundant of "discrimination." *Int'l Union of Operating Engineers v. Port of Seattle*, 295 P. 3d 736, 741 (Wash. 2013); *see generally*, U.S. Equal Employment Opportunity Commission (Harassment, defined as unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information, is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990) (http://www.eeoc.gov/laws/types/harassment.cfm). Absent clarification as to the meaning of the terms "harass" and "discriminate" in the proposed Rule, it is not possible to determine whether inclusion of both terms is necessary to achieve the goals of the proposal; it may be that "discriminate" alone suffices.

Aside from the question of whether "harass" should be considered to be incorporated within the meaning of "discrimination," it is not clear whether "sexual harassment," a specifically defined term under the law, is intended to be included within the scope of "harass" in the Ethics Committee's current draft proposal. We appreciate that defining the scope of what is meant by "harass" for purposes of a disciplinary rule is complex. We are concerned that the description in the Ethics Committee's Drafting Choice Memo, that this term "is understood to include the creation of a hostile work environment and is evaluated in terms of the reasonable perception of the victims of such conduct" could be read to limit the scope of that term for purposes of proposed Model Rule 8.4(g) to the area of employment discrimination. Creation of a hostile work environment is only one form of harassment under law. We are also concerned that the Ethics Committee's explanation in the Drafting Choice Memo is incomplete in that it omits mention that there are other components to evaluating whether a hostile work environment has been established. *See e.g., Oncale v. Sundowner Offshore Services, Inc*. 523 U.S. 75, 81 (1998) (plaintiff must show that the environment was both objectively and subjectively hostile. That inquiry requires careful consideration of social context in which particular behavior occurs and is experienced by its target); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (a hostile work environment requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as victim's subjective perception and proof that the frequency and severity of the harassment reasonably interfered with work performance).

We fear that without resolution of these questions and concerns and more precise definitions, lawyers and regulators will be left to guess what conduct may be covered under the proposed Rule. At a minimum, the distinctions noted above should be described in the Comment in order to establish sufficient guidelines for regulators charged with enforcing the Rule.

Also, the Discipline Committee is uncertain, based on the way in which the proposed Model Rule is drafted, whether the term "harass" is intended to be modified by the protected categories following "discriminate", i.e., only harassment against a person on the basis of one of the protected classes could warrant discipline. Or does the Ethics Committee intend for the Rule to cover harassment that falls outside the scope of those identified categories of individuals? The manner in which the current proposal is drafted could reasonably be read to indicate that the proposed categories only modify the term "discriminate."

The Discipline Committee reiterates its concern from October 2015 that absent appropriate and clear definitions and explanations, the use of these terms may have the unintended consequence of restricting constitutional activities. Although draft Comment [3] states that the Rule does not apply to "conduct protected by the First Amendment," without more we do not believe that this statement sufficiently guides lawyers or disciplinary authorities. This is especially true in light of the law that makes clear that in certain circumstances a state may restrict a lawyer's exercise of personal rights guaranteed by the U.S. Constitution.[5]

B. The Discipline Committee Believes the Proposed Draft Rule Remains Overbroad, Raising Concomitant Enforceability and Possible Constitutional Concerns.

The Discipline Committee remains concerned that proposed Model Rule 8.4(g) is overbroad (due in part to the vagueness concerns set forth above), and therefore questions whether it would withstand a constitutional challenge. The Drafting Choice Memo states that, by using the phrase "related to" the practice of law,[6] the Ethics Committee intends for the scope of the Rule to be as expansive as possible, including "the operation and management of a law firm or law practice… [and] conduct at activities such as law firm dinners and events at which the lawyers were present solely because of their association with the law firm." The Ethics Committee does not explain how or why it chose to maximize the breadth of the scope of the proposed Rule and how that scope would pass constitutional muster, especially since the proposal expands the categories of individuals to those not yet granted constitutional protection (i.e., socioeconomic status).

In this regard, the Discipline Committee continues to maintain its position that employment discrimination should not fall under the purview of proposed Model Rule 8.4(g). The original Comment [3], drafted by the Ethics Committee when Deborah Coleman was the Chair purposely excluded employment discrimination. Ms. Coleman noted this in an August 2015 letter to the Ethics Committee. While this Ethics Committee is certainly entitled to differ on the subject, it has offered no explanation as to why its proposal should reach that far when previous Committees had carefully considered not including employment discrimination within the Rule's purview.

Employment law is a complex and highly specialized area of law. The Discipline Committee is concerned that extending proposed Model Rule 8.4(g) to the employment context without requiring any prior adjudication by a competent tribunal, and instead having the disciplinary proceeding be the adjudication of first instance, risks compromising a claimant's civil remedies or rights, including any defense to such civil claims. The Discipline Committee notes that the Ethics Committee offers no explanation as to why disciplinary agencies should be or are competent to be the tribunal of first instance to investigate, prosecute, and adjudicate such complaints against lawyers. Without sufficient clarity, the proposed amendments create enforcement uncertainties and will require disciplinary agencies to devote their already very limited resources to developing expertise in understanding the complexities

[5] *See e.g., In re Primus, 436 U.S. 412, 422 (1978); Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *In re Sawyer*, 360 U.S. 622 (1959).

[6] The Discipline Committee notes that the Ethics Committee**'s** earlier iteration of draft Model Rule 8.4(g) offered the alternative phrase "in the practice of law."

of employment discrimination law. We believe that this in an area of concern where additional research and discussion with regulators and respondents' counsel, as recommended above, is warranted.

The Discipline Committee notes that two states' ethics rules that explicitly include employment discrimination (and are referenced in the Drafting Choice Memo) seem more limited in scope than the broad Rule proposed by the Ethics Committee. For example, California's Rule 2-400 states "in the management or operation of a law practice, a member shall *not unlawfully* discriminate or knowingly permit *unlawful* discrimination." Also, some states' professional conduct rules that cover employment discrimination require a finding or adjudication by a tribunal with jurisdiction to hear such complaints before disciplinary action is initiated. In this regard, requiring a prior adjudication by experienced tribunals and limiting the scope of the proposed rule to prohibit "unlawful" harassment or discrimination allows both lawyers and disciplinary agencies to rely on established federal and state laws and precedent to guide their conduct and the proceedings.

The Discipline Committee suggests that the Ethics Committee consider how, and the extent to which, including within the purview of proposed Model Rule 8.4(g), conduct relating to the operation and management of a law firm (which clearly encompasses employment law) relates to lawyers' obligations under Model Rule 5.1. Model Rule 5.1 is not referenced in draft Comment [3] to proposed Model Rule 8.4(g). The Discipline Committee believes that some explication of the interrelation between the two Model Rules is warranted. For example, if the Ethics Committee intends for proposed Model Rule 8.4(g) to apply to hiring, firing, and promotion decisions of lawyers and law firms, against whom would a complaint be leveled in a firm where such decisions are made by management or recruiting committees? Absent clarification in this regard, could the proposed Model Rule, as drafted, result in unintended disparate enforcement against solo or small firm practitioners where law firm management decisions are made by a single lawyer? Similarly, does the Ethics Committee intend for disciplinary authorities to invoke the disciplinary process to address discrimination complaints about inequality in wages, bonuses or other compensation of law firm employees who may belong to one of the protected classes identified in the proposed draft Model Rule 8.4? Could managing partners of law firms be held vicariously liable in a disciplinary prosecution for discriminatory or harassing conduct of subordinates in the same way that they may be held responsible under federal employment law? *See e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor, but may raise an affirmative defense if the employee has not suffered a tangible employment consequence). The Discipline Committee believes that any Model Rule and Comment should be drafted so as to be clear on these issues for the benefit of the lawyers, disciplinary agencies and the courts that adopt the Rules.

C. The Discipline Committee Supports Retention of the *Mens Rea* Requirement for Harassment and Discrimination.

The Discipline Committee questions why proposed draft Model Rule 8.4(g) includes the *mens rea* of "knowingly" for "discriminate", but no *mens rea* for "harass." Neither the draft of Comment [3] nor the Drafting Choice Memo explains the reason for having two different *mens rea* standards within the same black letter Rule. As it did in its October 8th letter, the

Discipline Committee urges that the *mens rea* of "knowingly" be retained and would oppose its removal.

As noted above, harassment is prohibited conduct under civil and criminal law. Proof of harassment in a civil versus criminal context may differ. Certain discrimination and harassment claims require proof of intent. *See e.g., Village of Arlington Heights v. Metro. House Dev. Corp.*, 429 U.S. 252, 265 (1977); *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001) ("Disparate treatment claims require proof of discriminatory intent either through direct or circumstantial evidence"); *Seney v. Morhy*, 3 N.E. 3d 577 (Mass. 2014) (intent is an essential element of civil harassment). The Discipline Committee recommends, for consistency and clarity, that the *mens rea* of "knowing" apply to "harass" and "discriminate."

D. The Ethics Committee Should Confirm That Including Categories of Individuals Not Yet Afforded Constitutional Protection Does Not Raise Constitutional Concerns.

As noted in its October 2015 letter, the Discipline Committee believes that including in the black letter categories of individuals in addition to those who are currently afforded constitutional protection necessitates further explanation to avoid enforcement problems. In addition, the Discipline Committee now questions whether the inclusion of such categories may make the Rule vulnerable to successful constitutional challenge. The Discipline Committee does not have the expertise to answer this question, but does believe that it is incumbent on the Ethics Committee, as the proponent of any amendments to Model Rule 8.4 and its Comment, to confirm that its proposal does not raise such constitutional concerns in this or other regards, and to explain in the accompanying Report why that is the case. Further, for those categories of individuals who do not yet have constitutional protection, the proposed new Comment must define or provide additional guidance as to who comprises membership in that category. For example, how is socioeconomic status to be defined and applied for purposes of the rule?[7]

How is gender identity to be defined for purposes of this Rule? The explanation offered in the Drafting Choice Memo that "gender identity" is included because it is "relevant as new societal awareness of the individuality of gender has changed the traditional binary concept of sexuality" does not offer meaningful guidance about who, under this Rule, qualifies as a victim of the alleged misconduct that could result in a lawyer losing his or her license to practice law. That lack of definition or further explanation also inures to the detriment of possible complainants and disciplinary counsel who must determine whether a sufficient basis exists upon which to prosecute for a violation of the Rule.

We understand that the law surrounding discrimination based on "gender identity" is evolving, and necessarily so. In light of that, the Discipline Committee suggests that the Ethics Committee should explain why both "gender identity" and "sex" appear as separate classifications in the Model Rule. It appears that under federal law, discrimination or

[7] The Discipline Committee found the comment submitted by Eugene Volokh, the Gary T. Schwartz Professor of Law at the UCLA School of Law, instructive regarding this particular term. *See*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/volokh_3_1_2016.pdf.

harassment includes "sex based discrimination of any kind that meets the statutory requirements", which under the law prohibits discrimination *because of* one's sex. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79-80 (1998) (emphasis added). *See e.g., Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (a claim for sex discrimination includes discrimination based on an individual's gender non-conformity).

E. Draft Proposed Model Rule 8.4(g) and Comment Do Not Adequately Address Other Issues, Including Lawyers' Decisions to Decline a Representation.

The Discipline Committee is also concerned that the draft Comment does not adequately recognize or articulate how the proposed Model Rule interacts with the longstanding principle that a lawyer has the broad discretion to accept or decline a representation. As noted by Ms. Coleman in her August 2015 letter, the original version of Comment [3] to Model Rule 8.4 was intended to "exclude a lawyer's decision whether to accept or decline a given engagement."

Model Rule 1.16 makes clear that a lawyer shall not represent a client if the representation will result in a violation of other Model Rules (e.g., the lawyer has a conflict of interest or is not competent to handle the matter). However, beyond Model Rule 1.16, lawyers decline to take cases for many other reasons, including business reasons and other concerns about the possible client. The Discipline Committee believes that lawyers should be able to retain breadth in exercising their professional discretion to decline to take on a client without fear of violating this Rule.

Consider a lawyer who is competent to undertake a representation and there exist no conflicts of interest, but he declines to accept the case because, after communicating with the prospective client, the lawyer is not comfortable with what he has seen or heard or otherwise questions the ability of the client to participate meaningfully in the representation. Does the breadth of proposed MRPC 8.4(g) unnecessarily risk opening that decision to challenge or justification of the legitimacy of the declination because that prospective client may claim they are disabled or are a member of another protected class and the lawyer declined to represent them for that reason? The Discipline Committee concluded that the statements in draft Comment [3] do not provide necessary clarity. The Discipline Committee suggests that, in addition to additional explanatory Comment, the Ethics Committee may wish to consider adding to any proposed black letter this statement that is found in Washington State's Rule 8.4(g): "This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16."

The Discipline Committee also does not agree with the Ethics Committee's proposal to replace the "legitimate advocacy" exception in current Comment [3] of Model Rule 8.4 with the statement that "[p]aragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation." The Discipline Committee believes that the proposed Model Rule 8.4(g) should include the "legitimate advocacy" exception language found in current Comment [3] of Model Rule 8.4 and suggests that the exception also be elevated to the black letter, similar to Indiana's Rule 8.4(g). It should be noted that thirteen jurisdictions include similar "legitimate advocacy" exceptions. Contrary to the Ethics Committee's suggestion that "legitimate advocacy" is a less clear standard to apply, the Discipline Committee

believes this term is well recognized in the law and established in precedent that the courts have applied regularly in evaluating a lawyer's representation in civil, criminal and disciplinary cases. The Discipline Committee also queries whether the Ethics Committee intends for the proposed Rule to apply to a lawyer who determines that under the facts and issues of the case it is in the best interest of the client for a male lawyer, rather than an equally experienced female lawyer, to present the closing arguments to a jury? It appears under draft Comment [3] that the lawyer could be subject to a disciplinary complaint for making that strategic decision.

Finally, the Discipline Committee requests that the Ethics Committee reconsider its decision to eliminate from draft Model Rule 8.4(g) an exception currently identified in Model Rule 8.4 Comment [3]: "A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." In its prior comment letter, the Discipline Committee recommended that this exception be retained. Although the Drafting Choice Memo explains that this exception was deleted because a concern was raised that "this sentence could be read as limiting a trial judge's discretion on whether to refer such conduct to discipline," the Discipline Committee notes that there is no evidence cited to show that judges have been hampered by this language or restrained from reporting lawyers to disciplinary authorities in appropriate circumstances. Further, judges' reporting obligations are set forth under Rule 2.15 of the ABA Model Code of Judicial Conduct. The Discipline Committee believes that it is important to include this exception in the Comment to guide lawyers and provide disciplinary counsel discretionary authority, based on the facts and circumstances, to determine whether a lawyer's conduct rises to the level warranting formal charges in a disciplinary proceeding.

III. Conclusion.

We share the Ethics Committee's commitment to ABA Goal II, Objective 2 (to promote competence, ethical conduct and professionalism) as well as to ABA Goal III (to eliminate bias and prejudice in the legal profession). We support the work of ABA President Paulette Brown's Diversity & Inclusion 360 Commission. We agree that it is crucial to highlight for the entire legal profession that discriminatory and harassing conduct is wrong, and that lawyers and judges should not engage in it. Such behavior reflects poorly on the legal profession.

Let me add an additional proposal to the ones we have set out above. In furtherance of these ABA goals and initiatives and the analysis and recommendations we have provided, and in the interest of collaboration, the Discipline Committee members have expressed a strong desire to have a conversation in the near future with you, me, several members of each Standing Committee and our respective counsel about moving forward. We believe that a voice-to-voice interaction in advance of the House of Delegates filing deadline will help facilitate the drafting process on this complex topic by identifying areas of agreement and concurrently narrowing areas where the two Committees may not be able to reach consensus on substance. Importantly, such a call could aid each Committee in better understanding why, if there is an inability to reach consensus on certain issues, such is the case. We are optimistic that there are areas where the two Committees can and will agree about how to address the issues raised above. I will follow up with a telephone call to you so that we may discuss further this proposal by the Discipline Committee.

We hope that you find these comments helpful. If you have any questions, please do not hesitate to contact me.

Sincerely,

Arnold R. Rosenfeld,
Chair, ABA Standing Committee on
Professional Discipline

cc: Arthur H. Garwin, Director
ABA Center for Professional Responsibility
Ellyn S. Rosen, Deputy Director
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APPENDIX

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October 8, 2015

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RE: Standing Committee on Ethics and Professional Responsibility Working Discussion Draft Model Rule 8.4

Dear Myles:

On behalf of the ABA Standing Committee on Professional Discipline (Discipline Committee), I am providing our comments, suggestions and recommendations with regard to the ABA Standing Committee on Ethics and Professional Responsibility (Ethics Committee) Working Discussion Draft of possible revisions to ABA Model Rule of Professional Conduct 8.4 (Discussion Draft) and the accompanying Language Choice Narrative. The Discipline Committee carefully reviewed these documents that seek information as to whether there should be a black letter provision in Model Rule 8.4 addressing lawyer "conduct involving discrimination and harassment" (the language set forth in the Discussion Draft). The Discipline Committee very much appreciates the opportunity to provide input and the transparency with which the Ethics Committee is addressing this subject. We understand that the Ethics Committee has not yet decided whether to propose a black letter addition to Model Rule 8.4 on this subject, but that you will advise me when and if that occurs.

I also appreciate your reaching out to me by telephone to discuss what you had heard about the Discipline Committee's views regarding the Discussion Draft. I hope that our conversation and my subsequent email to you helped correct any misperceptions, or at least helped you understand the Discipline Committee's process with regard to developing these comments. The members and I look forward to having you attend our October 24th meeting to discuss this matter further.

At the outset, it is important to state that, without question, the Discipline Committee has been and is fully committed to the Association's Goal III, to eliminate bias and prejudice in the legal profession, and ABA President Paulette Brown's Diversity & Inclusion initiative. The Discipline Committee knows that acts of discrimination and harassment committed by lawyers and judges exist (or as currently stated in Comment [3] to Model Rule 8.4, conduct or words manifesting bias or prejudice), just as such acts exist within

the general populace. There is no question that lawyers and judges who engage in such conduct should be held accountable, when appropriate, via the justice system and by the disciplinary system. Such behavior reflects poorly on the legal profession and the justice system. The Discipline Committee supports highlighting for the entire legal profession that discriminatory and harassing conduct is wrong, and that lawyers and judges should not engage in it.

That said, at this time, the Discipline Committee does not believe that moving the content of current Comment [3] to the black letter of Model Rule 8.4, as currently written or set forth in the Discussion Draft, is necessary to accomplish these goals, and opposes the creation of such a black letter provision. The Committee voted to take that position during its September 15, 2015 teleconference. That teleconference was not the first time that the Discipline Committee considered the Discussion Draft. We had a lengthy conversation about the Discussion Draft and Language Choice Narrative at our August 2015 meeting. Due to the complexity and nuances associated with this topic, the Committee was unable to finish its discussion and agreed to have a subsequent teleconference. At the Committee's request, I directed our counsel to provide, prior to that call, comprehensive legal research and analysis including, but not limited to, the following: the status of existing ABA policies and their legislative histories, including the Model Code of Judicial Conduct; the details, including legislative histories and associated *mens rea* requirements of state professional conduct rules for lawyers; case law and other information relating to the constitutionality and enforceability of such state ethics rules; disciplinary sanction information; and other information related to the specific questions for which the Ethics Committee sought responses in the Language Choice Narrative. We found that information invaluable in our September 15th teleconference.

I. Reasons for the Discipline Committee's Current Opposition to a Black Letter Rule

1. The Case Has Not Been Made at This Time For a Black Letter Provision in Model Rule 8.4, and Comment [3] and Other Model Rules Have Not Been Shown Insufficient to Address This Subject

The Discipline Committee believes that, absent evidence otherwise, the Model Rules of Professional Conduct and existing Comments adequately address the type of conduct at issue and allow for effective enforcement when such conduct rises to a level warranting disciplinary action. The Discipline Committee does not believe that, based on the information put out by the Ethics Committee to date, a case has been made for amending the black letter of the Model Rules. That specific language addressing conduct or words manifesting bias or prejudice currently resides in a Comment does not, in our view, by itself warrant creating a new black letter provision in Model Rule 8.4. Other black letter Model Rules, as explained below, separately and coupled with Model Rule 8.4 and Comment [3] permit, when appropriate, the prosecution and discipline of lawyers for such acts or words. We observe that at the time the Ethics Committee advocated the adoption of Comment [3], it intended that the Comment "make explicit that expressions of bias and prejudice are among the actions of a lawyer that can prejudice the administration of justice *and subject a lawyer to disciplinary action*." (Resolution 117 A1998, Report) (***emphasis added***).

The Language Choice Narrative does not explain how and why the creation of a black letter provision would have the desired effect of reducing such behavior by lawyers or better educating them about the type of conduct that is of concern. The Discipline Committee members were concerned that the Discussion Draft and accompanying Language Choice Narrative lacked data or reliable anecdotal information showing that nationally there has been a statistically significant increase in conduct or words manifesting bias or prejudice by lawyers (or as set forth in the Discussion Draft, discriminatory or harassing behavior). To the extent that such an increase exists, the Ethics Committee has not demonstrated that the increase is caused by substantive and enforcement issues associated with the content of state rules, so as to show why guidance from the ABA in the form of a new black letter provision in Model Rule 8.4 is needed.

The Discipline Committee urges the Ethics Committee to actively seek out such data and information and to analyze it before deciding whether amending the black letter of Model Rule 8.4 is appropriate. We suggest that the Ethics Committee may want to develop and disseminate to chief disciplinary counsel, as well as to the National Organization of Bar Counsel and National Council of Lawyer Disciplinary Boards, a survey seeking the type of information described above. In addition, we believe that it would be useful for that survey to include questions about the rate at which matters alleging such conduct by lawyers are addressed via diversion or private discipline.

The Discipline Committee also suggests that the Ethics Committee formally inquire of those charged with investigating and prosecuting such cases about their experience doing so under current state rules (there are 25 states with specific rules), seek data about who files such complaints (and sustainable complaints in particular), and ask disciplinary counsel what they believe is the most effective approach to combatting such conduct in the legal profession. Specifically, the Ethics Committee may wish to start with the twelve jurisdictions that have rules and comments similar to Model Rule 8.4(d) and Comment [3] to determine whether, in practice, these rules have proven adequate to address conduct that requires disciplinary action.

The Committee's research indicates that jurisdictions relying on rules similar to Model Rule 8.4(d) and Comment [3] can and do successfully prosecute lawyers who engage in such conduct. *See e.g.*, *In re Goldsborough*, 654 A.2d 1285 (D.C.1995) (lawyer disciplined for sexual misconduct that included inappropriate sexual comments to clients and an employee); *In re Brennan*, 240 P.3rd 887 (Colo. O.P.D.J. 2009) (suspension warranted for lawyer's bullying tactics and inappropriate and disparaging statements to the court, opposing counsel and court staff); *Att'y Grievance Comm'n v. Alison*, 565 A.2d 660 (Md. 1989) (rude, vulgar and insulting language included verbal abuse of court clerks constituted conduct prejudicial to the administration of justice, although the court noted that lawyers are not prohibited from using profane and vulgar language at all times and under all circumstances); *In Matter of Vincenti*, 554 A.2d 470 (N.J. 1989) (lawyer's conduct projected offensive and invidious discriminatory distinctions based on race and gender, is especially offensive, and violates, *inter alia*, RPC 8.4(d), warranting three month suspension); and *Matter of Mann*, 578 S.E.2d 723 (S.C. 2003) (lawyer reprimanded for conduct prejudicial to the administration of justice based on racial slur made during private discussions with members of lawyer's staff as part of his duties as a clerk of county court).

Our research also indicates that disciplinary counsel have effectively used their state versions of other Model Rules to successfully prosecute lawyers for engaging in conduct that manifests bias or prejudice (or discriminatory or harassing conduct). For example, Model Rule 4.4(a) prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Model Rule 3.5(d), which prohibits lawyers from engaging in conduct intended to disrupt a tribunal also has been utilized to address conduct manifesting prejudice or bias by a lawyer. *See e.g., (Florida Bar v. Buckle*, 771 So. 2d 1131 (Fla. 2000); *Idaho State Bar v. Warrick*, 44 P.3d 1141 (Idaho 2002); *In re Williams*, 414 N.W.2d 394 (Minn. 1987); and *In re Coe*, 903 S.W.2d 916 (Mo. 1995).

2. Constitutional Concerns

The Discipline Committee's current opposition to a new black letter provision in Model Rule 8.4 is also based on constitutional questions that have not been addressed by the Ethics Committee's Discussion Draft or Language Choice Narrative. The Discipline Committee is concerned that the language set forth in the Discussion Draft is overbroad and, in some instances, vague, and therefore questions whether such a black letter Rule would withstand constitutional scrutiny. In particular, the Committee members questioned whether the Discussion Draft language could result in infringement upon lawyers' exercise of their First Amendment rights. In reviewing the legislative history of Model Rule 8.4(d) Comment [3], the Discipline Committee considered that the Ethics Committee and the ABA Criminal Justice Section (CJS) acknowledged the difficulties in formulating a black letter rule barring discriminatory conduct while preserving legitimate advocacy and First Amendment freedoms (Resolution 117 A1998). The legislative history also reveals that earlier attempts to develop a clear and constitutionally enforceable black letter rule have proven difficult, controversial and divisive.

For example, we are concerned that the Discussion Draft language "while engaged [in conduct related to] [in] the practice of law" is overbroad and vague, thus risking the unintended consequence of prohibiting constitutionally protected activities. The Discipline Committee knows that this is not the Ethics Committee's intent. However, without further explication of the scope of the Rule or providing examples, the Discipline Committee concluded that the risk for misinterpretation and misapplication is high in this context. The Discipline Committee suggests that the Ethics Committee further define what it means by "*related* to the practice of law." Would that encompass actions taken by lawyers in an employment context?

The Discipline Committee is also concerned that the expansiveness of the Discussion Draft Rule may conflict with lawyers' rights to represent or not represent clients of their choice. *See* Model Rule 6.2(c) and Comment [1]. The Committee will address this issue further in Section II (4) below.

The Discipline Committee is concerned that the broad scope of the Discussion Draft language could chill legitimate advocacy or deter lawyers from representing clients whose views may be unpopular or even discriminatory. The Committee suggests that Discussion Draft Comment language stating that it is not a violation of the black letter for lawyers to "limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services" is too restrictive, and the Discussion Draft does not explain the interrelation between this language

and Model Rules 1.2 and 2.1 and related Comments. A lawyer can choose to not represent a person for other reasons, including those protected by the First Amendment, and should be able to do so without risking discipline. Again, the Discipline Committee believes that further explanation of what is intended is necessary.

As we are sure the Ethics Committee would agree, vague and overbroad language in a Model Rule not only raises constitutional issues, but also may add unnecessary stress to already overburdened disciplinary systems through lack of clarity. Overbroad and vague language creates enforceability problems. Black letter rules of professional conduct should provide lawyers, the public and disciplinary counsel with clear guidance as to what conduct is, and is not, intended to be addressed by the Rule. Such clarity enables disciplinary counsel to explain to a complainant why a matter has been dismissed by the agency, as well as to explain to a lawyer and disciplinary tribunal why the matter is being pursued.

In addition, lawyers who are the subject of disciplinary complaints must report those complaints, even when not sustained, to malpractice carriers and cooperate in any investigation. They are required to cooperate in any disciplinary investigation. Ensuring that ethics rules are not vague and overbroad ensures that lawyers can meet their obligations in this regard.

II. The Discipline Committee's Response to the Ethics Committee's Questions and Narrative

In this Section, the Discipline Committee provides comments in response to the questions posed in the Language Choice Narrative. These responses are distinct from the Committee's opposition to a black letter rule. That opposition remains at this time, so please do not construe any of the responses below as suggesting that the Discipline Committee is supportive of a black letter provision, even if the Ethics Committee agrees with and accepts any of the following suggestions.

However, knowing that the Ethics Committee may ultimately decide to propose black letter amendments to Model Rule 8.4, in the spirit of collegiality we wanted to provide as much input at this early date as possible, and also highlight where we believe more information is needed to make the case that a new black letter provision in Model Rule 8.4 is necessary.

1. Current Comment [3] Strikes the Right Balance by Limiting Its Application to Conduct in the Course of Representing a Client

In the Language Choice Narrative, the Ethics Committee explains that it contemplates reframing and expanding the scope of the Model Rule to all conduct by lawyers "either 'engaged in conduct related to the practice of law' or 'engaged in the practice of law'" instead of retaining the scope of current Comment [3] "because too many jurisdictions have read this provision to mean that the lawyer's biased or prejudiced act must be specifically connected to court proceedings." The Discipline Committee is puzzled by this statement. First, the Ethics Committee offers no support for it. We are not certain what constitutes "too many jurisdictions." We also suggest that any future Discussion Drafts and explanatory memoranda describe what is meant by "related to" versus "in" the practice of law. It is not clear to what extent these alternatives have different meanings and whether these phrases are distinctions without a difference. They may not be, but it is not clear why that is the case.

Second, the Discipline Committee did not understand the Ethics Committee's statement about too many jurisdictions reading the provision of Comment [3] to mean that bad conduct must be tied to a court proceeding, because cases demonstrate that courts have not so restricted the application of Rule 8.4(d). For example, in *Att'y Grievance Comm'n v. Sheinbein*, 812 A.2d 981, 997 (Md. 2002), the Court of Appeals disciplined a lawyer charged with engaging in conduct prejudicial to the administration of justice for thwarting a murder investigation by police by assisting his son to flee the country. The Court found that a violation of Rule 8.4(d) includes conduct that is criminal in nature, conduct that relates to the practice of law, as well as conduct outside the respondent's role as a lawyer. Similarly, in *Florida Bar v. Federick*, 756 So.2d 79 (Fla. 2000), the Florida Supreme Court noted that conduct prejudicial to the administration of justice extends broadly to include conduct beyond the courtroom, encompassing anything "in connection with the practice of law." And, in *In re Ashy*, 721 So.2d 859 (La. 1998), the Louisiana Supreme Court determined that Rule 8.4(d) is broader in scope than "litigation related misconduct. It also reaches uncivil, undignified, or unprofessional conduct regardless of whether it is directly connected to a legal proceeding." *See also, In re Pyle III*, 156 P.3d 1231, 1247 (Kan. 2007).

The Discipline Committee acknowledges that these cases could be read to support the Ethics Committee's suggestion that Comment [3]'s limitation to conduct occurring "in the course of representing a client" is too narrow. However, the Discipline Committee, at this time, still believes that the current language strikes the appropriate balance. In 1998, in support of the adoption of Comment [3], the Ethics Committee stated that "[c]onduct and communications by a lawyer other than in the course of representing a client *are not intended* to be made subject to review under the revised Comment." (Res.117 Report) (emphasis added). If the Ethics Committee has changed its mind, it would be helpful to understand why that is the case, and why amending the Comment language would not be sufficient.

2. The Prohibited Conduct Identified in the Discussion Draft Rule Should Be Clearly Defined and Consistent with Existing ABA Policy

The Discipline Committee is also concerned about possibly replacing the phrase "manifests by words or conduct, bias or prejudice" with "harass" and "discriminate." First, that new language set forth in the Discussion Draft conflicts with other existing ABA policy. It is not clear whether the Ethics Committee would intend for the new language to supersede the language in those other policies too, and if so, whether it would propose such changes. For example, Rule 2.3 (C) of the Model Code of Judicial Conduct mandates that judges:

> *"require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."*

Consistent language is also found in ABA Resolution 116C (A1995):

> *"condemns the manifestation by lawyers, in the course of their professional activities, by words or conduct, of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others,*

based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status…"

Second, the Discipline Committee questions whether the terms "discriminate" and "harass" would need to be defined. It is unclear whether the use of these terms would be intended to expand upon the type of conduct that could subject a lawyer to discipline or to narrow the type of conduct that may do so. If the Ethics Committee intends for all instances of harassment and discrimination against any member of a category noted in the black letter to subject the lawyer to discipline, that should be made clear.

"Discriminate" covers a wide range of conduct, not all of which is unlawful. Since not all acts of discrimination violate federal or state laws, should any and all such conduct be considered a violation of a legal ethics rule? From where would the definition of that term be drawn? What is the intended relationship between this term, as defined in other law, versus the rules of professional conduct? In the Discipline Committee's view, these are questions that should be answered before determining whether to create a new black letter provision in Rule 8.4.

The same is true of the term "harass." The various applications of "harassment" in civil and criminal law raise significant enforcement concerns if the term is to be used in a black letter Rule. The common dictionary definition of harass is *(1)* to annoy persistently *(2)* to create an unpleasant or hostile situation by uninvited and unwelcome verbal or physical conduct. Black's Law Dictionary defines "harassment" as repeated conduct that is not wanted and is known to all parties as offensive. Harassment is prohibited conduct both under civil and criminal law, but has different application in each context. The Discipline Committee recommends that if "harass" is to be used to identify unethical conduct that may subject a lawyer to discipline that the term should be sufficiently defined either in the Comment or in the Terminology. The Discipline Committee suggests that explanatory commentary accompanying the Rules in Maryland, Minnesota, Missouri, New Jersey and North Carolina may be helpful.

The Discipline Committee also notes that sexual harassment has its own legal meaning. Rule 2.3 of the ABA Model Code of Judicial Conduct separates "sexual harassment" from "harassment" in Comment [4]. It defines that conduct to "include but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome." Under federal law, sexual harassment falls within the scope of sex discrimination and requires evidence of a hostile work environment that includes severe or pervasive conduct. However, in one disciplinary case, the court rejected the federal definition requiring ongoing and pervasive conduct *See Iowa Supreme Ct. Atty Disc. Bd. v. Moothart*, 860 N.W.2d 598 (Iowa 2015).

The Discipline Committee is also concerned that the conflict between the various standards of proof required under federal and state laws and administrative hearings in discrimination and harassment cases may create problems from a disciplinary enforcement perspective, since these standards may differ from the standard of proof in disciplinary proceedings. This is especially true given the sentence in the Discussion Draft new Comment language stating that new Model Rule 8.4(g) would incorporate "by reference relevant holdings by applicable courts and administrative agencies."

In civil cases, for example, proof of discrimination differs from what is required as proof in harassment cases. Adding to the confusion is that those standards are not consistent with the standard of proof (clear and convincing) that applies in the majority of disciplinary proceedings and which is set forth in ABA policy.

Finally, the Discipline Committee is concerned that absent appropriate and clear definitions, the use of these terms may have the unintended consequence of restricting constitutional activities.

3. Any Black Letter Rule Should Include a *Mens Rea*

The Discipline Committee believes that any black letter Model Rule should include the *mens rea* of "knowingly." The Committee suggests, however, that the Ethics Committee consider whether and how inclusion of this *mens rea* might be construed as inconsistent with other ethics rules that have been used to discipline lawyers for such conduct. For example, Model Rule 4.4(a) does not have a *mens rea* requirement. Model Rule 3.5(d) does, and disciplinary counsel must prove intentionality when seeking to have a lawyer disciplined for engaging in conduct "intended" to disrupt a tribunal. If the Ethics Committee believes no inconsistencies exist, the Discipline Committee believes that lawyers would benefit from knowing why that is the case.

The Discussion Draft and Language Choice Narrative are also unclear as to how any *mens rea* requirements in statutes and other laws would relate to that in any black letter Model Rule relating to discrimination and harassment. As with the issue of standard of proof, the Discussion Draft's new Comment language that incorporates "by reference relevant holdings by applicable courts and administrative agencies" creates confusion on this front. The same is true of the terms "relevant holdings" and "appropriate courts and administrative agencies." How would these two be defined for purposes of the Rule and Comment?

4. Whether the List of Classes in the Discussion Draft Rule Should Be Expanded to Include Gender Identity, Ethnicity, Marital Status and Socioeconomic Status

The Discipline Committee believes that creating a black letter Model Rule to include classes beyond those that are currently constitutionally protected, such as ethnicity, marital and socioeconomic status requires further explanation and may cause enforcement problems. The Discipline Committee recognizes that consistency with existing ABA policy may require that "socioeconomic status," "marital status" and "ethnicity" be included, as these classifications are included, for example, in Rule 2.3 of the Model Code of Judicial Conduct. Although the Discipline Committee recognizes that a more expansive rule may be warranted for judges who are obligated to remain neutral and impartial in all matters. The Discipline Committee also understands that many state and local anti-discrimination laws include "marital status" as a protected class. Most recently, under the reasoning of *Obergefell v. Hodges*, 135 U.S. 2584 (2015) same-sex marriages fall within that protected status.

How would socioeconomic status be defined for purposes of any new black letter Model Rule provision? The Discipline Committee notes that, although "socioeconomic status" is not a constitutionally protected category, this classification does receive some protection under federal and state laws. For example Congress prohibited the Federal Sentencing Commission from considering the "race, sex, national origin, creed, and socioeconomic status" of offenders in sentencing guidelines.

The Discipline Committee appreciates the Ethics Committee's consideration of including "socioeconomic status" as part of the protected groups in the Discussion Draft. However, we recommend that the Ethics Committee consider deleting the following sentence: "It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services." The Discipline Committee found this statement more confusing than helpful. The language suggests that lawyers should not be disciplined if their client selection decisions involve those who are part of the "underserved" population as defined by the categories in the black letter, but may be disciplined if such an individual is not part of the "underserved population" and the lawyer chooses not to represent that individual (see also the constitutional concerns raised above).

5. The Exceptions for Legitimate Advocacy and a Trial Judge's Findings Concerning Preemptory Challenges Should Remain

The Discipline Committee believes that retention of the legitimate advocacy exception as set forth in current Comment [3] is crucial, and disagrees with the Discussion Draft language restricting the exception's application to only situations where legitimate advocacy about any of the black letter categories is "at issue in the representation." Who defines what is at issue in a representation and how? The Discipline Committee believes that the current construction in Comment [3] is appropriate and that the Discussion Draft language is unnecessarily restrictive absent evidence to the contrary.

Consistency with other ABA policy also suggests that the legitimate advocacy exception remain the same as the current language in Comment [3]. Both Rule 2.3 of the Model Judicial Code and Resolution 116C include the legitimate advocacy exception using that language. Resolution 116C provides: "unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or cause." The Report to Resolution 116C goes on to further explain that this exception is necessary "to protect the needs of the advocate to zealously defend his or her client in those extremely rare instances where discriminatory or harassing conduct might arguably play some legitimate role" or "where an advocate must advance harassing or discriminatory speech in order to zealously protect his or her client's interests." (Resolution 116C Report). The Ethics Committee recognized the importance of this exception when it submitted Resolution 117 and asked the ABA House of Delegates to adopt it. If a change is now made, the Discipline Committee suggests that the Ethics Committee provide reasons demonstrating a need for doing so.

The Discipline Committee also suggests retention of current Comment [3] language concerning a trial judge's finding that preemptory challenges that were exercised on a discriminatory basis do not alone establish a violation. In the Report supporting Resolution 117, the Ethics Committee acknowledged that the caution was necessary because circumstances may exist where the trial judge disbelieves a lawyer's neutral explanation for striking a juror. In making juror selections and developing trial strategy, lawyers may necessarily have to make decisions involving race or gender that may or may not constitute a *Batson* violation. Retaining the exception in the Discussion Draft Rule still gives disciplinary counsel discretionary authority, based on the facts and circumstances, to determine whether a lawyer's conduct rises to the level warranting formal charges in a disciplinary proceeding.

6. Whether the Discussion Draft Rule Should Include the Draft Comment: "Incorporates By Reference Relevant Holdings By Appropriate Courts And Administrative Agencies"

As discussed above, the Discipline Committee found that language that the black letter Model Rule 8.4(g) "incorporates by reference relevant holdings by appropriate courts and administrative agencies" to be confusing and that it risks causing problems for lawyers and disciplinary counsel. It does not add clarity despite the goal of the Ethics Committee "to explain that relevant holdings from courts and agencies enforcing civil rights laws may be used to provide context and standards for disciplinary counsel seeking to enforce the Rule."

Conclusion

We hope that you find these comments helpful. Again, the Discipline Committee wants to be clear that its questioning the need for elevating Comment [3] language to the black letter, as well as raising other enforcement concerns regarding the Discussion Draft, should not be in any way interpreted as a lack of Committee support for working to eliminate discrimination, bias, harassment, and prejudice in the profession.

If you have any questions, please do not hesitate to contact me or Counsel for the Committee.

Sincerely,

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