Dear Committee Members:

The proposed Rule 8.4(g) would bar, among other things, "knowingly discriminat[ing] against persons on the basis of ... socioeconomic status," including especially in "the operation and management of a law firm." "Socioeconomic status" isn't defined in the proposed Rule, but the one definition I've seen -- interpreting a similar ban on socioeconomic status discrimination in the Sentencing Guidelines -- is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *see also United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

Yet surely a law firm should be free to prefer higher educated employees – both as lawyers and as staffers – over less-educated ones. Indeed, it should be free to choose employees who went to high "status" institutions, such as Ivy League schools. It should be free to contract with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.

Likewise, when choosing a prospective partner, a lawyer should be able to prefer someone who is wealthier. Wealth might be a plausible (though imperfect) indicator of past professional success, and a predictor of whether the partner would have the resources to weather economic hard times (and to help the firm do the same). And firms might reasonably spend more effort courting wealthy prospective clients and less effort pursuing middle-class ones.

A law firm should of course also be free to prefer lower socioeconomic status employees, if it wants to, for instance, give someone who is poor or unemployed a hand up, even though that would be discriminating against the middle-classed and employed. Likewise, a firm should be free to give better deals to clients who can't afford the top rates. Yet the proposed rule would apparently forbid that.

Back when the rule was limited to actions that were "prejudicial to the administration of justice," and didn't cover ordinary employment decisions, including socioeconomic status as one of the forbidden bases for discrimination may have made sense. For instance, insulting a witness because of his poverty, where the poverty is not relevant to the case, might reasonably be condemned. But now that the rule is being broadened, the prohibition becomes quite unsound.

I can't imagine, of course, that the drafters were indeed intending to ban law firms from preferring employees with higher-status educations or past employment history, or from preferring wealthier partners, or from giving a break to poorer would-be employees or clients. But that's what the prohibition seems to cover. And if it isn't meant to cover that, I'm not sure what exactly it is meant to cover, at least as applied to "the operation and management of a law firm" -- and in any event, its intended scope should be more clearly stated.

Please let me know if I can elaborate on this. Many thanks,

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