Professor Myles V. Lynk, Chair
ABA Standing Committee on Ethics & Professional Responsibility
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March 10, 2016

VIA E-MAIL

Dear Myles:

We are writing to you on behalf of the Professional Responsibility Committee of the ABA Business Law Section (the “BLS Ethics Committee”) with respect to the current proposal under consideration by the Standing Committee on Ethics and Professional Responsibility (the “Standing Committee”) to amend existing Rule 8.4 of the Model Rules of Professional Conduct (the “Model Rules”). Specifically, the Standing Committee has proposed amending Rule 8.4 of the Model Rules by adding a new subsection (g) that would make it professional misconduct for a lawyer to engage in the following:

(g) 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 Standing Committee proposal also includes adding the following comment to Model Rule 8.4:

[3] Paragraph (g) 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 or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (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. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph
(g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

_Id._

This letter does not represent, or necessarily reflect, the individual views of the signatories, who have served merely as scriveners, but represents instead a consensus of the members of the BLS Ethics Committee. The views expressed herein are, moreover, solely those of the BLS Ethics Committee and do not necessarily reflect the views of the ABA Business Law Section.

Currently, the ABA Model Rules do not have a separate anti-discrimination rule. Anti-discrimination principles have, however, been embodied in the Model Rules in the form of Comment 3 to existing Rule 8.4, which states:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

The proposed rule expands on the current comment in a number of significant ways. First, by moving the language to the blackletter text of the rule, the proposal creates the potential for disciplinary action where none now exists, in jurisdictions where the comments either have not been adopted or, if adopted, are not an official part of the rule, and enhances the potential for disciplinary action in those jurisdictions where the comments are an official part of the rule. Second, the proposal expands the covered conduct from “in the course of representing a client,” to “conduct related to the practice of law.” Third, it changes the applicable standard for misconduct from knowing “bias or prejudice” to “harass or knowingly discriminate.” Fourth, it expands the categories of protected persons.

The BLS Ethics Committee’s membership includes, in addition to very experienced practitioners across the broad spectrum of business law (e.g., corporate law, securities law, banking law, commercial law, bankruptcy law, consumer financial services law), distinguished professors of legal ethics/professional responsibility, and even some former members, and at least one former chair, of the Standing Committee. In preparing this letter, the BLS Ethics Committee has relied on the texts referred to above as well as the Standing Committee’s memorandum accompanying the proposal and discussing the changes and justifications for the proposal. See Memorandum of ABA Standing Committee on Ethics and Professional Responsibility, Draft Proposal to Amend Rule 8.4 (December 22, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8
The BLS Ethics Committee fully understands and appreciates the spirit with which the proposed rule seeking to eliminate discrimination in the practice of law for individuals is offered. No matter how salutary the motivation, however, codifying this position into the Model Rules is fraught with difficulties. Not all conduct that may be inappropriate, or even illegal, with which members of the legal profession might be accused is appropriately addressed by rules of professional conduct and the potential for professional discipline. Also, we note at the outset that the proposed new section (g) to Model Rule 8.4 does not seem to fit well with the categories of misconduct identified in existing sections (a) through (f), all of which bear a much closer and more direct relationship to an attorney’s engaging in conduct prejudicial to the administration of justice or bearing upon fitness to practice law.

The BLS Ethics Committee has a number of concerns about the proposed rule and offers the following comments and recommendations:

1. **The proposed rule is vague and uncertain in its application.** The proposed rule makes it unethical to “harass or knowingly discriminate” against any person on one of the protected grounds “in connection with the practice of law.” That is a rather opaque standard; conduct that qualifies as “in connection with the practice of law” needs to be further clarified.

What constitutes harassment and knowing discrimination is extremely unclear. In fact, the drafters of the rule recognized this when they replaced “bias or prejudice” with “harass or knowingly discriminate.” See Standing Committee Memorandum, *Prohibited Activity*.

Harassing by lawyers in connection with the practice of law is pernicious per se. It has very little to do with categories of persons victimized by such conduct. One finds such conduct in “unsupervised” litigation conduct, most often in deposition practice: The savaging of opposing counsel or opposing witnesses by lawyers in depositions is infamous. Other contexts in which harassment is frequently encountered include debt collection and mortgage foreclosures. While a part of such harassment could involve references to a victim’s race, disability, gender identity, and the like, it is the harassing conduct itself – not the characteristics of the target of the harassment – that should be objectionable.

Apart from the lack of focus in the use of the word “harass,” there is the apparent conflation of “harassment” with “knowing discrimination.” The two are very different concepts, and attempting to establish a standard that combines them in one phrase exacerbates the sense of vagueness in the proposed rule.

The “antidiscrimination” part of the proposed rule, in turn, flatly prohibits “knowingly” drawing distinctions among persons based on particular identified categories, but this approach is
a significant departure from any concept of “invidious” or “irrelevant” distinctions that have animated civil rights law for decades.

Furthermore, the proposed rule creates a laundry list of categories that go well beyond most civil rights legislation and appear to have little relation to concerns that come up in most lawyer’s offices. The closest analogy, Rule 2.3(C) of the Model Code of Judicial Conduct, prohibits a judge, by words or conduct, from harassing or manifesting bias or prejudice toward an almost identical list of groups. This makes sense in the judicial context, where the sense of fairness and impartiality in the court system is axiomatic. Lawyers, however, are not supposed to be neutral arbiters but advocates bound by a fiduciary duty of loyalty to clients, not just in litigation but in all contexts of the lawyer-client relationship. An interesting difference between Model Code of Judicial Conduct Rule 2.3(C) and proposed Model Rule 8.4(g) is that while a judge may not manifest bias or prejudice against a person based on his or her “political affiliation,” a lawyer may so discriminate under the proposed rule; thus, under proposed Model Rule 8.4(g), a lawyer may discriminate against Democrats but does so at the peril of the Democrat who claims that the lawyer really discriminated against him not based on political affiliation but because he is a Baptist, or is Hispanic, or is poor (i.e., based on socioeconomic status). The line drawing offered by the proposed rule seems virtually an open invitation to such unprincipled behavior.

The proposed rule is also problematic in stating a black-letter principle in sweeping terms that the accompanying comment then purports to deny. (Indeed, it seems that the points made in proposed Comment 3 appear to be largely a response to criticism previously leveled against the proposed rule). We recognize there is precedent for this kind of mischief: Model Rule 4.1(a), for example, forbids a lawyer’s making a “false statement of material fact,” but Comment 2 to that rule then denies that the amount for which a lawyer’s client has expressed a willingness to settle is a “statement of material fact.” Perpetuating this kind of nonsensical self-contradiction does little to promote respect for lawyers or legal ethics.

The BLS Ethics Committee questions whether the new standard is any clearer than the previous one. Many fact patterns can be imagined that raise questions about what constitutes discrimination and can have a chilling effect on something that has always been in the best traditions of the bar: representing minority views and unpopular positions or clients. Is an accused criminal less entitled to representation because the crime was allegedly motivated by bias or prejudice? What is to become of a client’s entitlement to zealous advocacy when the lawyer is concerned that such advocacy might require resort to what might be considered discriminatory references, as can easily be imagined in connection with the prosecution of police officers for actions against minorities?

Moreover, some lawyers may limit their practices in ways that could be considered to be discrimination under the rule. Suppose a domestic relation lawyer wants to limit his or her practice to representing only men or only women. Is such a limitation a violation of the rule? Under the proposed rule, can a lawyer feel comfortable representing a baker in a dispute about
his or her refusal to make wedding cakes for a same-sex couple based on the baker’s personal religious beliefs? Suppose a lawyer wants to limit his practice to representation of Muslims or another religious group. Does this restriction violation the rule? Suppose a group of lawyers wants to establish a men-only or a women-only or a transgender-only practice. Is that a violation of the rule? Suppose a client feels uncomfortable with the assignment made by a firm of one of the lawyers to the client’s case on racial, religious, or gender grounds. Do the partners of the firm violate the rule if the firm honors the client’s preference? Does it make any difference if the client’s reason is based on concern about the location of the proceeding rather than the client’s own views regarding the assigned lawyer?

The comment to the proposed rule states that it “does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.” However, there is nothing in Rule 1.16 that authorizes lawyers to limit their practices based on any of the protected grounds set forth in the proposed rule. Moreover, in some jurisdictions, such as New York, the comments are not officially adopted.

The proposed rule and comment make no mention of affirmative action programs by law schools, law firms, and the profession generally. Are such programs considered to be in violation of the rule?

Similarly, the language “in connection with the practice of law” is unclear. The proposed rule seems not to be limited to representation of clients. On the other hand, the proposed rule contemplates a sphere of protected private activity that is not subject to the rule, as the proposed comment specifically refers to First Amendment protections, though certainly other fundamental rights would appear to deserve comparable protection. Where to draw the line dealing with the connection with the practice of law is uncertain, however. For example, would a lawyer’s membership in a discriminatory private club (e.g., women members only, Hispanic members only) violate the proposed rule? Would it be violated by a lawyer’s public support for a governmental policy limiting immigration of Muslims? What about advocacy of behalf of a client or organization that espoused this policy? Under the proposed rule, would a lawyer be able to represent a landlord in the preparation of apartment leases that limit occupancy to seniors or adults without children?

Finally, while we express no a priori support for, or opposition to, any particular language formulation that might be proposed in the future, the BLS Ethics Committee believes that, at a minimum, no anti-discrimination provision should be included in the blackletter of the Model Rules unless it includes, as do provisions in California, Illinois, and New York, a clear requirement of a finding by a competent tribunal (i.e., a court or agency) of unlawful discrimination by a lawyer before a disciplinary proceeding can be initiated against that lawyer. For example, the New York rule requires that a complaint based on unlawful discrimination should in the first instance be timely brought before a tribunal with jurisdiction to hear the complaint; a certified copy of such tribunal’s determination – which has become final and
enforceable and as to which the right to judicial or appellate review has been exhausted – only then can become *prima facie* evidence in a disciplinary proceeding of professional misconduct. Carefully considered and drafted qualifications such as this can assure that a forum more familiar with such issues than bar disciplinary authorities will determine the matter and guard against potentially meritless, frivolous, or harassing claims that the proposed rule would permit.

2. **The vagueness of the proposed rule raises due process concerns.**

As noted above, the proposed rule moves the anti-discriminatory language from existing Comment 3 into the blackletter text of the Rule 8.4. The change from comment to rule is significant, because rules are the basis of disciplinary action while comments are not. The Supreme Court has characterized the disciplinary process as “quasi criminal” and has held that certain (but not all) due process requirements apply, including the requirement of fair notice of the charges. *In re Ruffalo*, 390 U.S. 544 (1968). The vagueness of the rule thus raises serious due process concerns.

3. **A number of limitations on the rule are contained in comments, but in some jurisdictions, notably New York, the comments do not have official status.**

The proposed comment contains a number of important limitations on the proposed rule, but in some jurisdictions, most notably New York, the comments are not official. Even where they are official, the blackletter text of the rule controls.

4. **The proposed rule could be used strategically against lawyers and law firms.**

The proposed rule does not speak to remedies for its violation. Certainly disciplinary action would be the primary remedy, but the rule could be used to support a motion for sanctions or disqualification or as the basis for an action seeking damages for malpractice, breach of fiduciary duty, or breach of contract. Current rules in a number of jurisdictions limit this possibility. For example, in California, Illinois, New York, and Ohio, discrimination is a violation of the rule only if it is unlawful. In addition, as noted above, Illinois, New York, and California require a finding by a tribunal of unlawful discrimination before a disciplinary proceeding can be commenced under the rule.

5. **Absence of evidence of a need for the amendment to Rule 8.4.**

We lack any information about the impetus for the proposed amendment. The proposal identifies no need — much less a compelling need — to change the status quo. Indeed, as presented, the proposal appears to reflect a sentiment, not a fact-based analysis of a deficiency in the existing rule. Before dashing forward to define certain types of behavior as “professional misconduct” and insert it into the disciplinary rules, it would be important to consider, among other things, existing statutory and regulatory prohibitions and penalties already in existence for such conduct, as well as whether existing disciplinary machinery is competent to investigate and
prosecute allegations such misconduct. Whereas the courts and various state and federal agencies have developed a level of sophistication in dealing with the often complex and subtle nuances necessary for proper resolution of allegations of harassment and discrimination, the existing disciplinary machinery has no track record or demonstrated competence (to say nothing of the resources) for the invariably expensive and prolonged investigation and adjudication of these matters.

We understand that some proponents of the amendment believe that having these principles in existing Comment 3 to Rule 8.4 has not created any problems during the years since they were added 17 years ago and therefore is unlikely to create problems if the language is moved to the blackletter text. First, that does not strike us as a reason for change. Second, that rationale ignores the changes in language that we have pointed out above. Third, this particular argument for change actually constitutes an even stronger argument for preserving the status quo: If having this language in the comments has not led to any difficulties over the past 17 years, there is therefore no compelling reason to alter the landscape.

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The BLS Ethics Committee appreciates the hard and diligent work of the Standing Committee leading up to the public hearing at the ABA’s February 2016 Midyear Meeting in San Diego and also appreciates the opportunity to comment in writing on the proposed amendment to Model Rule 8.4 and the comments thereto. Please do not hesitate to contact us if you would like to discuss these issues further.

For the BLS Ethics Committee,

Keith R. Fisher, Chair
Nathan M. Crystal, Member

cc. Dennis A. Rendleman, Esq.
    Mary McDermott, Esq.
    Natalia M. Vera