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March 14, 2016

Myles V. Lynk, Chair

ABA Standing Committee on Ethics and Professional Responsibility

Arizona State Univ. College of Law

Tempe, AZ 85287

RE: Proposed Revisions to Model Rule 8.4

Dear Myles:

On behalf of the ABA Commission on Disability Rights (CDR), I write to express our appreciation to you and the Standing Committee for your efforts to bring about the adoption of an amendment to Model Rule 8.4.

Proposed Rule 8.4(g) would provide that it is professional misconduct for a lawyer, in conduct related to the practice of law, to harass or discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. Although we have a number of suggestions for strengthening the December 2015 draft, we believe the proposed rule will go a long way toward deterring harassment and discrimination within the profession and remedying it when it occurs.

Currently, the only provision in the Model Rules that addresses discriminatory conduct by lawyers is comment [3] to Rule 8.4, which was adopted in 1998. The comment provides: "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."

The report to the House of Delegates indicated that the comment was intended to "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." (Report 117, 1998). Although the comment provided valuable guidance in interpreting the language of paragraph (d), it was not made a part of the black letter rule itself, and

thus remains advisory only. Moreover, the comment is limited to expressions of bias and prejudice made in the course of representation that are prejudicial to the administration of justice, and does not reach expressions of bias or prejudice in other contexts that may result in other harms. The absence of a black letter rule and the narrow scope of the comment leave most manifestations of bias or prejudice by lawyers in the course of their professional capacity effectively unregulated by the Model Rules.

In May 2014, CDR joined with our fellow Goal III entities—the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Sexual Orientation and Gender Identity—in asking the Standing Committee to consider promulgating an amendment that would fill this gap. In July 2014, you requested our participation in a working group to study the issue, and since that time, the Standing Committee has produced a number of discussion drafts of the proposed rule.

We understand that the Standing Committee has received a number of comments opposing the proposed rule on the basis that harassment and discrimination are not a significant problem in the profession. We believe this view is profoundly mistaken. Certainly the vast majority of lawyers would never engage in harassment or discrimination, any more than they would commit other ethical violations. But such behavior is all too common, and it damages the professional lives of many persons with disabilities (as well as the lives of women, members of racial and ethnic minorities, and LGBT individuals).

Persons with disabilities are our nation’s largest minority. Yet they are grossly underrepresented in the profession—particularly within the private bar. According to the National Association for Law Placement (NALP), of the 73,081 lawyers surveyed in 2014, partners and associates with disabilities accounted for only one-third of one percent of respondents. *See* table 4 at http://www.nalp.org/lawfirmdiversity_feb2015. Persons with disabilities confront many barriers in seeking to enter and succeed in the profession, including harassment and discrimination by recruiters, employers and colleagues.

The adoption of a black letter rule would send a strong signal to the profession that harassment and discrimination will not be tolerated. We believe it is long overdue.

Although the Commission supports the proposed rule, we urge the Standing Committee to consider the following changes to the December 2015 draft, which we believe would strengthen and clarify it:

1. Scope of the rule. The draft proposal provides that it is professional misconduct for a lawyer to engage in harassment or discrimination in the course of “conduct related to the practice of law.” As such, the proposal would expand the scope of the rule beyond conduct that occurs “in the course of representing a client.” We support this change. The draft proposed comment indicates that conduct related to the practice of law includes “the operation and management of a law firm or law practice.” In its December 22, 2015 memorandum accompanying the draft proposal, the Standing Committee indicated that this interpretation was intended to clarify that conduct that takes places at firm activities, or events at which the lawyer is present solely because of his or her association with the

firm, are included within the scope of the rule. In its comment of March 10, 2016, the Commission on Women in the Profession raised concerns that this interpretation might not be sufficient to cover “interactions [that] arise in the context of a conference, a dinner, a holiday party, a ride home from the office or a meeting following a trial or deposition. . . [that] can be viewed as social interactions occurring, so to speak, ‘off the clock.’” We urge the Standing Committee to consider whether further clarification in the comment would help ensure that the rule does not create a loophole that would exempt such conduct from coverage.

2. Knowledge requirement. The draft language of proposed Rule 8.4(g) states that it is professional misconduct for a lawyer “knowingly” to discriminate. We join our fellow Goal III commissions in urging the Standing Committee to eliminate the knowledge requirement. Like other civil rights laws, Title III of the Americans with Disabilities Act (ADA) does not include a *mens rea* requirement for a finding of discrimination. It provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). We are concerned that imposing such a high intent standard would result in a rule that is effectively unenforceable.
3. Refusal to grant accommodations. As we noted in prior comments and at the hearings, the refusal to grant accommodations or modifications is among the most pervasive forms of discrimination experienced by persons with disabilities. Without such accommodations or modifications, many persons with disabilities are denied full and equal access to the opportunities that others take for granted. Indeed, for persons with disabilities, this is the very essence of discrimination. We therefore urge the Standing Committee to make clear in the comment to Model Rule 8.4 (g) that refusal to provide requested accommodations or modifications to persons with disabilities is covered by the rule.
4. Covered categories. At the February hearing, the Commission on Sexual Orientation and Gender Identity and the Commission on Racial and Ethnic Diversity in the Profession urged the Standing Committee to add “gender expression” and “color” to the categories currently covered by the proposed rule. CDR supports these requests. The rule should afford protection from harassment or discrimination whether based on an individual’s gender identity or on the manner in which that identity is expressed. Similarly, the rule should cover “color,” which may or may not be expressive of an individual’s racial identity.

Finally, we have reviewed the comments of some opponents of the proposed new rule. Some have suggested that adoption of the amendment would unleash an avalanche of complaints. Others have voiced fears that it would force lawyers to accept clients they do not want to represent. But those making these arguments have presented no evidence to support their assertions, and we cannot know whether they are based on fact or conjecture. We would only note that such arguments have long been raised by opponents of anti-discrimination measures, including the ADA and other civil rights statutes at both the state and federal levels. Time and again, the predicted flood of complaints has failed to materialize. As for the 24 jurisdictions that have adopted a black letter rule of professional conduct to address bias, discrimination or harassment, to our knowledge none have experienced a large volume of complaints.

Some opponents of the rule apparently believe that lawyers should be held responsible for professional misconduct only if remedies are not available at law. But, as the Standing Committee has observed, the same argument could be made to exclude from the ethical rules other kinds of misconduct that are violations of the law, such as fraud, deceit or misrepresentation. Paradoxically, some opponents have argued that the rule should make discrimination professional misconduct *only* if it is unlawful. This would result in a patchwork in which, say, sexual orientation discrimination is professional misconduct in New York but not in Mississippi. More fundamentally, our ethical rules should hold us to a higher standard than merely following the law.

The Commission on Disability Rights is grateful to the Standing Committee for its willingness to undertake this challenging task. We look forward to continuing to work with you to enact the proposed rule in the coming months.

Sincerely,



Mark D. Agrast
Chair, ABA Commission on Disability Rights

cc: Dennis Rendleman, Ethics Counsel,
ABA Standing Committee on Ethics and Professional Responsibility

Amy Allbright, Director,
ABA Commission on Disability Rights