



March 11, 2016

To: Myles V. Lynk, Chair, ABA Standing Committee on Ethics and Professional Responsibility

From: Will A. Gunn, Chair, ABA Commission on Racial and Ethnic Diversity in the Profession

Re: Proposed Amendment of Rule 8.4 of the Model Rules of Professional Conduct

The Commission on Racial and Ethnic Diversity in the Profession (“CREDP”) strongly supports the draft proposal to amend Model Rule of Professional Conduct 8.4 and Comment [3] to prohibit lawyers from engaging in harassment or discriminatory conduct in conduct related to the practice of law. Amending the black letter of the Rule 8.4 is an important step towards the elimination of bias in the legal profession. CREDP agrees with assertion of the Standing Committee on Ethics and Professional Responsibility (SCEPR) that it is critical that this issue be covered in the black letter rules, not a comment. Additionally, CREDP believes this prohibition against harassment and discrimination should stand on its own and not be tied to existing Model Rule 8.4(d).

After considering the many comments made at the public hearing on the proposed amendment to Rule 8.4 held on February 7, 2016 at the ABA Midyear meeting, CREDP objects to the inclusion of the term “knowingly” in the proposed Model Rule 8.4(g). As President Paulette Brown noted at the public hearing, a “knowing” standard would exceed standards that already exist for federal and state laws against discrimination and would effectively establish such a high standard of proof as to make the rule effectively unenforceable.

CREDP also commends the SCEPR’s decision to retain all of the protected categories included in existing Comment [3] of Model Rule 8.4(d) and to add “ethnicity” and “gender identity.” However, CREDP would like to see “color” and “gender expression” added to the list of protected categories.

In addition, at the public hearing, there were numerous comments expressing concern that references in the draft comment to the “operation or management of a law firm or law practice” might be construed as a limitation on the phrase “conduct related to the practice of law” in the text of Model Rule 8.4(g), itself.

CREDP hopes that the draft comment to Model Rule 8.4(g) will be revised to make clear that Model Rule 8.4(g) encompasses not just the “operation or management of a law firm or law practice” but also conduct by lawyers in their professional capacities.

The Commission extends its appreciation to SCEPR for its work on the proposed amendments of Rule 8.4 and looks forward to working with SCEPR to move this effort forward.

Very truly yours,

A handwritten signature in black ink that reads "Will A. Gunn" followed by a long, horizontal flourish.

Will A. Gunn

Chair

ABA Commission on Racial and Ethnic Diversity in the Profession