MEMORANDUM

TO: Standing Committee on Ethics and Professional Responsibility

FROM: ABA Standing Committee on Legal Aid and Indigent Defense
ABASection on Civil Rights and Social Justice
Equal Rights Advocates

RE: Draft New Model Rule of Professional Conduct 8.4(g) and Draft Amended Comment [3]

DATE: March 11, 2016

These comments are filed on behalf of the ABA Standing Committee on Legal Aid and Indigent Defense (SCLAID), the ABA Section on Civil Rights and Social Justice (CRSJ, formerly IRR) and Equal Rights Advocates (ERA).

SCLAID, CRSJ and ERA join with the ABA Goal III Commissions and many others in our profession in applauding the efforts of the Standing Committee on Ethics and Professional Responsibility (SCEPR) to study and recommend draft proposed amendments to ABA Model Rule of Professional Conduct 8.4 and Comment [3] to that Rule, for the purpose of effectively addressing the ethical ramifications of discrimination and harassment by attorneys in conduct related to the practice of law.

While, as set forth more fully below, we recommend a number of changes to the currently proposed language and proscriptions, we commend SCEPR’s stated conclusion, as contained in

---

1 The submitting ABA entities and Equal Rights Advocates are indebted to Drucilla Stender Ramey, who distilled their views and prepared this Memorandum. Dru is former Executive Director and General Counsel of the Bar Association of San Francisco, past Executive Director of the National Association of Women Judges, Dean Emerita of Golden Gate University School of Law, and former Chair of the San Francisco Commission on the Status of Women. Ms. Ramey was a co-founder of the California Minority Counsel Program and numerous other diversity-related initiatives, is an ABA Foundation Life Fellow and recipient of the ABA Margaret Brent Women Lawyers of Achievement Award, the American Jewish Committee’s Learned Hand Award and the NBA’s Wiley Branton Award. She currently serves as Chair of the Board of Directors of Equal Rights Advocates.

2 Established in 1920, the ABA Standing Committee on Legal Aid and Indigent Defense (SCLAID) serves as the ABA's principal entity tasked with examining issues and initiating projects and programs relating to the delivery of civil legal services and criminal defense services to indigent persons.

3 Created in 1966 at the height of the civil rights movement, the ABA Section of Civil Rights and Social Justice (CRSJ), formerly the Section of Individual Rights and Responsibilities (IRR), is the only membership entity within the ABA dedicated solely to civil rights, civil liberties and human rights issues. Through education and advocacy, the Section expresses the profession's commitment to achieving through the legal system the American ideals of justice, freedom and equality for all.

4 Equal Rights Advocates (ERA) is one of the nation’s leading public interest advocacy organizations committed to protecting and expanding the rights of women and girls to economic and educational equality.
its Memorandum dated December 22, 2015, that proscription of harassment and discriminatory conduct must be the subject of a distinct rule within the black letter of the Model Rules of Professional Conduct, both as a practical matter of enforceability and in recognition of the fact that the Model Rules serve as “...a statement of the minimum expected by all lawyers. It is time that harassment and discriminatory conduct by a lawyer based on race, religion, sex, disability, LGBTQ status or other factors, be considered professional misconduct when such conduct is related to the practice of law...Any such conduct brings disrepute to the profession. Rather, the public has a right to know that as a largely self-governing profession we hold ourselves to normative standards of conduct in all our professional activities, in furtherance of the public’s interest in respect for the rule of law and for those who interpret and apply the law, the legal profession.” SCEPR Memorandum, p. 7

SCLAID, CRSJ and ERA urge you to recommend to the ABA House of Delegates their adoption of a new Model Rule 8.4(g) that states, once and for all, that discrimination, harassment and manifestations of bias and prejudice in our professional lives as lawyers are unethical and may be subject to discipline. We urge the ABA to join the numerous states that have already adopted such rules for their own jurisdictions without the benefit of an ABA Model Rule.

We largely concur in the positions and rationales therefor contained in the excellent January, 2016 Memorandum and earlier filings by the ABA Commission on Sexual Orientation and Gender Identity (SOGI). Because SOGI’s Memorandum contains a full and complete analysis of the critically important impact the new Rule will have on non-lawyer participants in the justice system, as well as on the broader public’s perception of a fair and impartial system of justice, this Memorandum will focus on the proposed Rule’s potentially enormous potential to effect positive change in the legal profession itself. We will also elaborate on certain of SOGI’s other enumerated areas of concern, but will begin by briefly stating our summary positions on selected areas within the proposed Model Rule’s ambit.

I. SUMMARY POSITIONS

SCEPR’s current draft amendment establishing M.R. 8.4(g) reads:

It is professional misconduct for a lawyer to:

(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.

SCLAID, CRSJ and ERA recommend that SCEPR propose the following Model Rule 8.4(g):

It is professional misconduct for a lawyer to:

(g) engage in words or other conduct, while acting in a professional capacity, that harasses, manifests bias or prejudice, or otherwise discriminates on the basis of race, national origin, gender identity/expression, marital status, or socioeconomic status.
1. We strongly support a new Model Rule 8.4(g) that makes it professional misconduct for a lawyer to harass, discriminate, [or engage in words or other conduct manifesting bias or prejudice] (see paragraphs 3 and 4 below), on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, and we join in SOGI’s suggestion that “gender expression” be added as a protected category of persons.

2. We believe that draft Model Rule 8.4(g) correctly includes a prohibition on harassment and discrimination against the protected groups, but suggest that Comment [3] be amended to contain definitional clarity as to the meanings of “harassment” and “sexual harassment,” respectively, along the lines of language contained in Comments [3] and [4] to Rule 2.3(C) of the Model Code of Judicial Conduct.

3. In addition to the current draft Rule’s prohibition on conduct which harasses or discriminates against the protected groups, we recommend that the language specifying the conduct proscribed by this Rule be amended to include the terminology employed by Rule 2.3(C) of the Model Code of Judicial Conduct (which perforce addresses litigation-related proceedings only), characterizing impermissible attorney conduct as follows: “A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon (enumerated bases).5

Model Rule 8.4’s current Comment [3], as well as the ethical codes adopted by many of the 23 states that have enacted their own separate rules in this area, employ similar language, including those of Missouri, Indiana, Massachusetts, Colorado and Washington. The enforcement agencies of these states do not report having experienced any upsurge in spurious claims under these provisions, and have proven to be fully capable of determining the substantiality and validity, or lack thereof, of claims brought under their entity’s rules in this area and in determining appropriate levels of discipline, including private reproval, just as they do with respect to all other cases.

We believe that the “manifesting bias or prejudice” language has a familiar and well accepted meaning in the profession and the judiciary, and is congruent with Rule 2.3(C) of the Model Code of Judicial Conduct. Hence, we join SOGI in recommending the addition of language forbidding engagement in conduct “…that manifests bias, prejudice,…” (emphasis added).

4. Proposed M.R. 8.4(g) should be amended specifically to prohibit words and other conduct (emphasis added), in order to prevent any possible misunderstanding as to the
new Rule’s coverage of verbal (oral or written) expression which constitutes harassment, [manifests bias or prejudice] or [other] discrimination. As members of SCEPR, of course know, long-established precedents under Title VII and other anti-discrimination statutes, ethical rules and court rules establish that words may be actionable if they are of the proscribed discriminatory nature.

In two recent federal decisions, for example, the judges awarded sanctions against male lawyers for unethical conduct including sexist statements (“You’re not getting menopause, I hope” and “[D]on’t raise your voice at me. It’s not becoming of a woman…”) directed toward female opposing counsel. Quoting from a recent ABA landmark federal court study which established that women are dramatically underrepresented among the ranks of lead counsel, especially in civil cases, and even more so in class actions, Puerto Rico District Court Judge Francisco Beso and Northern California Magistrate Judge Paul S. Grewal both cited to the Report’s findings that, “inappropriate or stereotypical comments” directed at female attorneys by opposing counsel were “one of the causes of the marked underrepresentation of women in lead trial attorney roles…When an attorney engages in discriminatory behavior, it reflects not only on the attorney’s lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice…” (Judge Beso), and such conduct is “…among the more overt signifiers of the discrimination, both stated and implicit, that contributes to [women’s] underrepresentation in the legal field.” (Magistrate Judge Grewal)

5. As more fully discussed below, SCLAID, CRSJ and ERA’s strongly oppose SCEPR’s inclusion in the new draft Model Rule 8.4(g) of the requirement that the discrimination be “knowing,” a requirement which threatens to substantially gut the intent and successful application of the new Model Rule.

6. We agree with the Commission on Disability Rights and others that Comment [3] should be amended to expressly state that the failure to provide reasonable accommodations to a person with a disability is a manifestation of disability discrimination prohibited under Rule 8.4 (g).

7. We agree with SOGI that the definition of the draft Rule’s prohibited conduct on the basis of socioeconomic status should be defined in Comment [3] to clarify what is and is not covered. We specifically urge amendment of Comment [3] to clarify the most

---

6 Stephanie A. Scharf & Roberta Liebenberg, First Chairs at Trial: More Women Need Seats at the Table, 14-15 (2015), http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdamm.pdf, (based on case filings in the U.S. District Court for the Northern District of Illinois and finding, e.g., that 76% of lead counsel in civil cases, and 86% in class actions, were men.

frequent manifestations of discrimination by lawyers with respect to low-income individuals and communities who turn to the courts for justice.  

8. We concur in SOGI’s recommendation, as well as the suggestion made at the February 7, 2016 hearing by the representative of the ABA Women’s Commission, that Rule 8.4(g)’s ambit of proscription be changed from the current draft language, “related to the practice of law,” to instead read “while acting in a lawyer’s professional capacity,” with definitional clarification added to Comment [3] to indicate that the Rule’s intended coverage includes, e.g., participation in professional activities such as bar association work (cf., the New Jersey Supreme Court’s Comment in this regard), and coverage of the kinds of extra-office misconduct occurring on the way to and from, as well as during, outside-the-office proceedings and social gatherings, as described by the Women’s Commission representative and CRSJ’s Robert Weiner.

9. We support draft Comment [3]’s statement that proposed M.R. 8.4 (g) applies to “…the operation and management of a law firm or law practice.”

10. We join SOGI in urging the re-inclusion in draft Comment [3] of the words, “A lawyer may not engage in such conduct through the acts of another,” a not uncommon scenario in the context of discriminatory conduct, and one addressed in other contexts by Model Rules 5.1(b) and (c), “Responsibilities of Partners, Managers, and Supervisory Lawyers” and Model Rule 5.3, “Responsibilities Regarding Nonlawyer Assistance.”

II. PASSAGE OF NEW MODEL RULE 8.4(g) IS OF PARAMOUNT IMPORTANCE IN EFFECTING EQUALITY WITHIN THE LEGAL PROFESSION

Contrary to the undocumented assertion in “52 ABA Member Attorneys” comment that there exists “no demonstrated need” for draft Model Rule 8.4(g), the legal profession’s longstanding and, for many groups, worsening patterns of exclusion, harassment, bias, prejudice and other discrimination are a harsh reality that the proposed Model Rule has the potential to go a significant distance in reversing.

As headlined in the Washington Post in May 2015, “Law is the least diverse profession in the nation. And lawyers aren’t doing enough to change that.” For, despite the indefatigable efforts of a great many determined individuals and organizations, there has long existed an enormous body of studies, law review articles, scholarly symposia and professional conferences across the

---

8 Model Code of Judicial Conduct Rule 2.3’s Comment [2], as earlier discussed, contains possible such language, including “negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity or nationality [or socio-economic status] and crime; and irrelevant references to personal characteristics…”

9 The Court clarified the that the application of that state’s prohibition expanded to cover activities related to professionally-related activities outside the courthouse, whether or not limited to litigation, such as “…treatment of other attorneys and their staff; bar association and similar activities…”
nation \(^{10}\) irrefutably establishing that the law continues to be a profoundly and, in many respects, increasingly segregated profession.

A few of the bald numbers tell the tale: Eighty-eight percent of lawyers in the United States are white and 65% are male, while only 2.34% of lawyers in 2015 NALP-reporting firms are openly LGBTQ (with wide differences based on, e.g., geographic location and firm size) and partners reporting a disability stand at barely one-third of one percent (.0033). Only 40% of NALP-reporting offices reported at least one LGBT lawyer, while just 10% of all responding firms reported having one or more lawyers with a disability.\(^{11}\)

As further demonstrated in substantially all these studies, among the primary factors driving the continuing disproportionate entry into, and advancement in, the profession by women, people of color, the LGBTQ community, and lawyers with disabilities, and the unequal access to justice for these and other societally marginalized groups, is conduct driven by harassment, bias and prejudice and other forms of discrimination, largely based on harmful stereotypes, with few, if any, adverse consequences for attorneys engaging in such behavior.

\(^{10}\) Among the distinguished entities performing such studies have been the District of Columbia Bar, the New York City Bar, the Bar Association of San Francisco, the State Bar of California, the Florida Bar, the Washington State Bar Association, the Lawyers Club of San Diego, the Hispanic National Bar Association, the National Association of Women Lawyers (NAWL), the Minority Corporate Counsel Association, the National Association for Law Placement (NALP), ALM, Catalyst, and, of course, the ABA and the ABA Foundation. Many of these groups, including the Bar Association of San Francisco, NALP, NAWL and the ABA, have produced multiple studies over the course of almost 30 years revealing a dismaying lack of progress in changing the identified attitudes, conduct and outcomes. A small sampling of very recent studies includes, e.g., “Invisible Then Gone, Minority Women Are Disappearing From BigLaw And Here’s Why,” ABA Journal, March, 2016, pp. 37-43, noting that 85% of of minority female attorneys quit large firms within 7 years, and the discrimination implicated in this shameful phenomenon; and a Florida YLD survey of young women lawyers, finding that nearly half of the respondents reported already having experienced gender bias during their brief careers. The Florida Bar News, March 1, 2016.

\(^{11}\) Women: Increasingly well represented in the profession as a whole since the late 1970’s, women have nevertheless made glacial progress in attaining leadership positions, languishing at approximately 17% of Big Law equity partners, at 7% of ALM-100 firm chairs, earning 32% less in compensation than their large firm male counterparts, and remaining totally absent from over 50% of the ALM 100 management committees. While continuing to occupy well over 40% of associate positions in large firms, women’s representation among associates has fallen in all but one of the past six years, while they are substantially overrepresented in “staff attorney” and “contract attorney” positions. As to minority women, according to a recent NALP press release, women of color stand at 2.55% of partners in reporting firms, “a pattern that holds across all firm sizes and most jurisdictions.”

Minorities: Although minorities have eked out some marginal gains in the last year, minority equity partners in large firms stand at about 5.4%, approximately the same level as Bar Association of San Francisco Goal for 1995 (set in 1989), while African-Americans lawyers today constitute only 3% of all Big Law attorneys, a percentage which is falling. (The number of African-American associates in NALP-reporting firms has fallen in all but one of the past 6 years.) Hispanic attorneys comprise only 3.2% of all Big Law attorneys, while the Asian-American percentage stands at 6.3%. Native American numbers are rarely reported at all because they are so small, but they are thought to represent less than one-half of one percent of all lawyers nationwide.

The pipeline: The chances of remedies via “the pipeline” are not reassuring. Despite their huge influx into the profession starting in the early 1970’s, women have never reached 50% of law school matriculants, and their percentage has dropped for all but a few of the years since the 2002-03 entering class. Due in some substantial part to the attack on and subsequent steep decline of affirmative action programs, the numbers and percentages of African-American, Mexican-American and Native American law students has fallen precipitously since the 1995-96 enrolling class, and have never recovered. ABA statistics show that while the percentage of minority law school students more than tripled between 1971 and 1996, from 6 to 20%, the percentage of all minorities rose only 9% over the ensuing twenty years, with virtually all that growth attributable to non-Mexican-American Hispanics and some Asian-American groups.
Though penned 25 years ago, Harvard Professor David Wilkins’ words are as relevant today as they were when he wrote them. “Few would dispute that the campaign to end legal segregation culminating in Brown v. Board of Education is the legal profession’s finest accomplishment—just as the profession’s complicity in the regime that this campaign demolished was its darkest hour. The fact that the country’s most prestigious law firms are nearly as segregated today as the entire legal system was forty years ago stands as a constant rebuke to the profession’s attempt to claim the noble side of this heritage…As the legal profession confronts the uncertainties of the next millennium, it is the energy [of recent initiatives] that holds the best hope for charting a new path that connects the profession’s future to the best of its past.”

Rule 8.4(g) is one such initiative, and a potentially powerful one.

Numerous studies have demonstrated that biased, prejudiced, discriminatory and/or harassing misconduct can be prevented or ameliorated by so-called “bias-interrupters.” Subject to the recommendations contained herein, and those of SOGI and other groups, new Rule 8.4 (g) can be a particularly effective such “interrupter,” because it holds attorneys accountable for their harassing, biased, prejudiced, or otherwise discriminatory conduct, by specifying and proscribing such conduct and imposing consequences (discipline) for engaging in such conduct.

If lawyers know they will be called upon by the Bar to explain their discriminatory conduct, they will have a strong incentive to attempt to be fair and nondiscriminatory -- by educating themselves about the existence and injurious impact of bias in their own behavior, and by changing their behavior accordingly. Attorney education is made all the easier in MCLE states with required ethics and diversity units. Many attorneys may thereby be led to doubt or at least become more skeptical about their own objectivity, whether it means rethinking and refraining from making biased statements, or affirmatively employing strategies to both lessen the role of bias in their own decision-making and that of their institutions, or, at a minimum, to consciously avoid engaging in stereotyped or biased behavior in their professional lives.12

III. THE REQUIREMENT OF KNOWING DISCRIMINATION RISKS GUTTING THE EFFECTIVE APPLICATION OF THE NEW RULE

As discussed above and at length in the SOGI Memorandum, proposed Rule 8.4(g)’s requirement for knowing discrimination appears to set a prohibitively high standard that would effectively defeat the Model Rule’s intent to prevent and, where appropriate, penalize discriminatory conduct by lawyers. The “knowing” standard is the functional equivalent of that required for proof of a criminal violation, and one which exceeds well-established standards governing proof of civil violation of federal, state and local civil rights and nondiscrimination laws and ordinances, which generally contain no such requirement. (We adopt by reference SOGI’s discussion of this issue). The “knowing” requirement also runs counter to applicable

12 Experts such as UCLA Professor Jerry Kang and Amy Oppenheimer, for example, recommend strategies including: engaging in education on this subject; spending time with and extending assistance to people from groups other than one’s own; allowing more time to consider and then to justify decisions, and committing those decisions to writing; creating and consistently utilizing previously agreed-upon, clear merit criteria and processes; and questioning assumptions in making individual decisions and thinking through alternative hypotheses.
Judicial Code provisions, setting up the kind of double standard discussed in the SOGI memorandum regarding application of different standards for litigators and non-litigators, and is contained in neither the ABA Criminal Justice Standards nor the rules of 19 of the 23 jurisdictions that have adopted anti-bias, prejudice, harassment and/or discrimination provisions.

Should SCEPR ultimately believe it advisable to include some form of scienter or negligence standard, we suggest that it adopt Washington State’s formulation barring a lawyer from engaging in conduct “that a reasonable person would interpret as manifesting prejudice or bias,” or the New Jersey Code’s language, prohibiting conduct involving discrimination “…where the conduct is intended or likely to cause harm.” Finally, a third, but more restrictive alternative that we do not recommend but would call to the Committee attention, is Missouri’s “know or should have known” standard.

IV. CONCLUSION

SCLAID, CRSJ and ERA again commend SCEPR for the time and effort it has devoted to drafting a Model Rule to effectively address attorney conduct which constitutes harassment or is otherwise discriminatory in nature. Subject to the above commentary, we believe House passage of the black letter Model Rule 8.4(g) and amended Comment [3] have the potential to materially reverse the seemingly intractable patterns of harassment, bias, prejudice and other discrimination which continue to plague our profession and to erode public confidence in our system of justice.