To: ABA Committee on Ethics and Professional Responsibility
From: Jessie Allen, Assistant Professor, University of Pittsburgh School of Law
Date: March 11, 2016
Re: Proposed Amendment to ABA Model Rule of Professional Responsibility 8.4

Introduction and Summary of Recommendations

I am an assistant professor of law at the University of Pittsburgh, where I teach professional responsibility, property, and a seminar on rights theory and practice. Before coming to legal academia full time six years ago, I practiced law for about 10 years, litigating for national public interest organizations in the areas of voting rights and reproductive rights. My comments relate to one aspect of the proposed changes to ABA MR 8.4: whether the amendments limit, or should limit, lawyers’ freedom to select or reject clients on the basis of prohibited categories of discrimination.

My interest in this issue began with a student’s question in my Professional Responsibility course. We were discussing a scenario in which a woman criminal defense attorney hesitated to represent a man accused of killing his girlfriend. The attorney explained to her prospective client that she was concerned about how her own identity, as a woman, would be used at a trial in this high-profile case. A student raised her hand and asked, “What if she just didn’t want to represent a man? Would that be okay?” Out of the mouths of babes.

After a long pause, I told the class that I was not sure of the answer to that question. One thing I could tell them was that there was no explicit prohibition on gender or race discrimination anywhere in the ABA Model Rules, which are the primary text my class uses as a source of legal ethical norms. My students were incredulous. I suggested that there might be an argument that such discrimination would violate Rule 8.4’s prohibition on “conduct that is prejudicial to the administration of justice,” but that it would be a stretch. As for other sources of law that prohibit discrimination, in particular public accommodations laws at the federal, state and local levels, I was not sure whether lawyers would be covered, and if they were, whether that would trigger a conflict with associational rights. “Wait a minute,” said another student, “are you telling me that after I graduate I could hang out a shingle that says, ‘Lawyers for White People’”? I swallowed hard. “Maybe,” I said. “Well,” another student chimed in, “I’m interning right now at a firm downtown that advertises as “Divorce Attorneys for Men.”

Since that class I have been researching and thinking about the intersection between antidiscrimination norms and lawyers’ prerogative to select clients. Developing an anti-discrimination policy for client selection is, on one level, a question of balancing lawyers’ professional autonomy against society’s interest in preventing discrimination. But in my view the greatest challenge to applying antidiscrimination law to lawyers’ client selection does not stem from professional privilege, protection of zealous representation, or lawyers individual rights of free speech and association. The toughest issue is a realistic worry that applying antidiscrimination norms could wind up punishing lawyers whose practice focuses on disadvantaged social groups and so increasing rather than decreasing social inequality. That
problem stems from the conflict between the neutral principles approach of current anti-discrimination doctrine in the U.S. legal system and the anti-subordination goal that motivates ethical concerns about discrimination in client selection. Another difficult question is how to deal with implicit or unconscious bias that affects lawyers’ client selection. These problems do not admit of immediate easy answers. But a policy aimed at reducing discrimination in legal practice must at least acknowledge them. Although the proposed amendment to Rule 8.4 does not address these issues explicitly, the language of the proposed rule and comment suggests these concerns were on the drafters’ minds. I have some suggestions about how to better address these concerns in the proposed amendment.

The pragmatic bottom line, in my view, is that ABA policy on discrimination in client selection should do four things:

1. Confirm that lawyers are ethically and legally bound to abide by basic antidiscrimination norms in client selection – that professional prerogative does not protect categorically refusing clients based on essentialized identity traits;

2. Protect conscious client or case selection that overlaps otherwise forbidden categorical choices but is motivated by a desire to help subordinated groups, redress status hierarchies, or provide legal representation to groups who lack access to legal process;

3. Recognize that implicit, unconscious bias likely affects lawyers’ client selection and work to reduce its impact; and

4. Seek greater knowledge about the extent to which lawyers’ conscious and unconscious choices in client selection actually affect access to justice for different groups.

In terms of the proposed rule change, I suggest the following:

1. For the text of proposed Rule 8.4(g), eliminate the “knowing” modifier on prohibited discrimination.

2. For proposed Comment 3: Eliminate the language regarding client selection and Rule 1.16 and substitute a more overt anti-subordination protection along the lines of the previous version of the comment in the August draft. Perhaps the comment could say something like: “Paragraph (g) forbids invidious discrimination in client selection on the basis of the enumerated characteristics. A lawyer’s conscientious choice to limit client representation in order to focus on disadvantaged groups, destabilize status hierarchies, and/or serve groups who lack access to legal process does not violate paragraph (g).

The remainder of this memo provides a brief discussion of these issues and the reasons for my recommendations.
I. *The Proposed Amendments Leave Open the Question Whether a Lawyer May Discriminate in Client Selection.*

The amendments to Rule 8.4 are ambiguous regarding whether lawyers’ client selection is, or should be, subject to antidiscrimination limits. Although the text of the amendment does not address the client selection issue directly, two iterations of proposed changes to the associated Comment 3 (as well as several of the comments posted on the ABA website) suggest that this issue is a significant concern for the rule drafters and ABA members.

Under the proposed new rule, “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.” Client selection seems centrally “related to the practice of law.” Yet the rule’s new proposed Comment 3 asserts that “[p]aragraph (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.” Assuming that the comment counts as an authoritative interpretation of the rule (itself a contestable position), this clarifies that the amended rule’s categories do not add new restrictions on lawyers’ freedom to reject clients. But because Rule 1.16 neither states that lawyers have total discretion nor lists any permitted or prohibited reasons for declining representation, it leaves open the question whether there are already existing anti-discrimination limits on client selection.

Arguably one could find such limits in the existing Rule 8.4(d) prohibition on engaging “in conduct that is prejudicial to the administration of justice.” While conduct that prejudices the administration of justice may make us think first of actions that limit access to legal process, or corrupt that process, we need not stop there. The dignitary harm of being refused representation by a lawyer because of one’s membership in a stigmatized group might itself, in at least some circumstances, constitute prejudice to the administration of justice. That said, there are surely readings of the rule that would exclude client selection on any grounds from the conduct it prohibits. Among other things, existing Comment 3’s reference to bias and prejudice “in the course of representing a client” might be read to exclude reasons for deciding whether or not to take on a client representation.

Of course questions about the extent to which existing Rule 8.4 bars discriminatory conduct are what has motivated the proposed amendments. So it is curious that combined new Rule and new Comment 3 work to maintain ambiguity about the Model Rules’ approach to discrimination in client selection. Moreover, the current proposed Comment 3 couched in terms of Rule 1.16 backtracks from a previous iteration of the Comment circulated in the working discussion draft of the rule revision which squarely affirmed that some client choices based on the rule’s enumerated factors are exempt. That version read, “It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services.”
The upshot is that both the proposed amended rule and the new proposed comment avoid any clear policy on whether and when anti-discrimination norms apply to lawyers’ choice of clients. The rest of this memo explains why I believe that lawyers’ client choices are subject to anti-discrimination norms and how those norms can be applied consistent with the anti-subordination policies that apparently animate the proposed amendments.

II. Lawyers Are Ethically Bound to Abide by Basic Anti-Discrimination Norms in Client Selection.

In deciding whether and how the Model Rules should address lawyers’ discrimination in client selection, it seems important to consider the broader normative context. In particular, it is likely that courts in many states would interpret public accommodations laws to forbid lawyers from rejecting clients on the basis of protected characteristics.

The best known federal public accommodations law, Title II of the Civil Rights Act of 1964, prohibits the refusal of service on the basis of race, color, religion or national origin. Title II has generally been limited to the types of establishments enumerated in the act, i.e., inns, restaurants, gas stations and place of entertainment. See e.g., Priddy v. Shopko Corp., 918 F. Supp. 358 (D. Utah 1995); Clegg v. Cult Awareness Network, 18 F.3d 752 (9th Cir. 1994). In contrast, the Americans with Disabilities Act of 1990 expressly lists lawyers’ offices as places of public accommodation. 42 U.S.C. 12181(7)(F). There is also some possibility that Section 1981, which guarantees the right to make contracts without regard to race might prohibit lawyer’s rejections of clients based on race. See Runyon v. McCrary, 427 U.S. 160 (1976) (holding that a private school’s rejection of African American students violated Section 1981).

Many states have public accommodations laws with broad definitions of what constitutes a place of public accommodation. Joseph Singer, Property 75 (3d ed. 2010). Some state courts have held that professional offices are covered. In the only case I have found that deals with an attorney’s discriminatory rejection of a client, the Massachusetts Commission Against Discrimination found that a woman attorney who refused to represent a man in a divorce proceeding violated Massachusetts public accommodations law. Stropnicky v. Nathanson, 19 Mass. Discrim. L. Rep. 39 (1997). The decision was affirmed by the Massachusetts Superior Court. Nathanson v. MCAD, 16 Mass. L. Rptr. 761 (Mass. Sup. Ct. 2003). The Nathanson case raises problematic questions of how to protect the anti-subordination values underlying anti-discrimination norms while explicitly prohibiting lawyers’ client selection on the lines of categorical group identity. I will discuss those issues in Section III below. On the question whether lawyers’ practices are covered by generally worded state public accommodations statutes, however, it seems to reflect a tendency to read these statutes broadly.

New York’s public accommodations statute does not explicitly cover medical facilities, but its courts have held that dentists’ offices are places of public accommodation. Cahill v. Rosa, 674 N.E.2d 274, 275 (N.Y. 1996). The Michigan Court of Appeals found that a doctor’s refusal to provide fertility services to a single woman violated that state’s public accommodations law, rejecting the lower court’s “conclusion that a professional, such as a doctor, may reject a patient or client for any reason, including discriminatory animus toward a protected characteristic.”
Moon v. Michigan Reprod. & IVF Ctr., 294 Mich. App. 582, 589 (2011). After the Illinois Supreme Court held that dentists were not covered by that state’s public accommodations law, the state legislature broadened the scope of the statute to include health care providers as well as “an office of an accountant or lawyer.” 775 Ill. Comp. Stat. 5/5-101(A)(6)(2010).

Doubtless their familiarity with the public accommodations regime was part of why my students were shocked when I told them that the Model Rules might not prohibit openly racist or sexist client selection. But I don’t think that was the only reason. I think they were shocked because in their minds legal practice is a gateway to justice. It was shocking to consider that in this day and age it could be viewed as ethically acceptable to bar that gate because of someone’s membership in a suspect class.

My students would differ on the question of the application of anti-discrimination principles to different kinds of cases. For instance, I am sure that some would question the inclusion of “socioeconomic status” and “gender identity” among Rule 8.4’s newly enumerated categories, while others would applaud those additions. Opinions might differ on whether implicit bias is or should be a prohibited form of discrimination. And some students would likely raise the kinds of questions I address in Section III about when, if ever, lawyers should be free to choose cases based on suspect categories. But before our discussion, I doubt that any of my students would have guessed that the Model Rules of Professional Responsibility might allow a lawyer to refuse a client just because that person belonged to a suspect class. Again, I think this is partly because they see legal practice within the broad realm of services subject to public accommodation laws. But I also think they understand lawyers’ professional ethics as fundamentally shaped by the same anti-discrimination norms and principles of equality that they view as fundamental to a just legal system. From that perspective, it was unthinkable that lawyers would or could exempt ourselves from the anti-discrimination regime we helped to create for others.

I think my students were right – descriptively and normatively. Equal protection of the law is a basic ground rule of just legal process. Lawyers’ client selection is not something that begins as an unregulated prerogative and then might be restricted after the fact by rules against discrimination. Principles of equal protection, nondiscrimination, and anti-subordination are integral to legal ethics because they are necessary for a just legal system. Another way to think of this is to say that lawyers’ professional prerogatives exist to serve the values of a just and effective legal system. In a democratic society committed to equal protection of the law, anti-discrimination norms don’t regulate lawyers’ prerogatives after the fact; they are part of the institutional and normative infrastructure that constructs those prerogatives.

There is another view, which asserts that traditionally lawyers enjoy an unregulated prerogative to decline to represent a prospective client for any reason or no reason, and that continuing to recognize such a prerogative would “respect an attorney’s personal ethics and moral conscience.” Comment of 52 ABA Member Attorneys at 9, quoting Charles Wolfram’s statement that “a lawyer may refuse to represent a client for any reason at all,” including “because the client is not of the lawyer’s race or socioeconomic status.” Charles W. Wolfram, Modern Legal Ethics 573 (1986). The appeal to tradition and personal conscience looks practically identical to the arguments raised by business owners after the passage of the Civil
Rights Act of 1964. And if the owners of Ollie’s Bar B Q can be required to serve customers of different races even though that practice is an affront to their personal moral code and traditional way of life, it seems to make not ethical sense at all to allow attorneys to refuse to represent clients of different races who are trying to vindicate their legal rights. See Katzenbach v. McClung.

Two further arguments that might be raised against applying anti-discrimination rules to lawyers’ client selection are that (1) as long as other attorneys are available, a lawyer’s discriminatory refusal to represent a client does no real harm to justice, and (2) forcing lawyers to represent clients against whom they harbor discriminatory bias will ensure those clients get lousy legal representation and so will harm justice. See Gabriel J. Chin, Do You Really Want a Lawyer Who Doesn’t Want You? 20 W. New Eng. L. Rev. 9 (1998).

The response to the first point is that the harm of discrimination is not just the inability to obtain a needed service. There is also the dignitary harm of being turned away because of some stigmatized characteristic. That harm would be greatly amplified by the knowledge that professional legal norms treat one’s rejection as legitimate. In effect, being rejected with impunity by a lawyer because of one’s identification with a stigmatized group means being cast out by a representative of the institution ostensibly dedicated to removing and redressing such stigma. The argument about effective service is one that is raised repeatedly and unsuccessfully in various discrimination law contexts. For instance, presumably one does not want a hairdresser who harbors discriminatory bias and claims to be unable to provide competent services. Nevertheless the Fourth Circuit held that a salon that refused an African American customer because its hairdressers did not “do black people’s hair” violated Section 1981. Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006).

III. Conscious Client Selection in the Interest of Helping Subordinated Groups, Destabilizing Hierarchies, or Providing Representation to Groups that Lack Access to Legal Process Does not Violate Anti-Discrimination Principles Even if Selection Criteria Track Otherwise Forbidden Categories.

I see one potential serious problem with applying categorical antidiscrimination norms to lawyer’s client selection. The history of the proposed amendments suggests that the drafters see it, too. A previous draft of proposed new Comment 3 asserted that “it is not a violation of paragraph g for lawyers to limit their practices to clients from underserved populations as defined by these factors,” i.e., factors the rule lists as forbidden bases for discrimination. It seems likely that the drafters were concerned that applying anti-discrimination norms to lawyers could wind up hurting lawyers who want to represent clients based on their membership in a subordinated group, e.g., women. This is a legitimate worry. Indeed the Nathanson case mentioned above, the only reported instance of a lawyer being found to have illegally discriminated by rejecting a client, is arguably such a case.

The attorney sanctioned, Judith Nathanson, was a lawyer in private practice. She had no problem representing men in various contexts. But, as a feminist, Nathanson had made a conscious choice to represent only women in divorce cases. Stropnicky v. Nathanson, 19
M.D.L.R. 39 (1997). Her goal in exercising that choice was to “devote her expertise to eliminating gender bias in the court system.” Nathanson at 40. As one article criticizing the decision points out, “The irony is that it is precisely Nathanson’s devotion to the eradication of gender bias” that caused her to be sanctioned for violating anti-discrimination law. Bruce K. Miller, Lawyers’ Identities, Client Selection and the Anti-Discrimination Principle: Thoughts on the Sanctioning of Judith Nathanson, 20 W. N. Eng. L. Rev. 93, 94 (1998).

The Nathanson case has been criticized as a failure to recognize the difference between “gender-based animus” and a lawyer’s legitimate professional choice to limit client selection “in order to engage in a particular form of specialization.” Joan Mahoney, 20 W. N. Eng. L. Rev. 79, 91 (1998). But if Massachusetts public accommodations law tracks the neutral principles approach of most current anti-discrimination doctrine, it is not hard to see why a court concluded that Nathanson had violated the law. Under most anti-discrimination doctrine today, the main question is whether all protected identity groups are treated the same. Under that approach, Nathanson’s differential treatment of women and men, whatever the reason, looks like illegal discrimination.

Even if the categorical neutral principles approach is widespread in anti-discrimination doctrine in general, there is no reason why an ABA Model Rule must adopt that approach. In framing, interpreting and applying a rule barring discrimination in client selection, the ABA is free to focus on the anti-subordination goals that no doubt underly the impulse to create such a rule in the first place. Nor is an anti-subordination approach at odds with the basic values of most anti-discrimination law. In fact, as one writer has pointed out “some of the criteria used to define suspect classifications – past historical discrimination and political powerlessness – reflect [anti-subordination] values.” Lauren Sudeall Lucas, Identity as Proxy, 115 Colum. L. Rev. 1605, 1610 (2015). Under an anti-subordination approach to antidiscrimination law, “the goal is not to eliminate all differential treatment, but to destabilize status hierarchies and effectively counter forces giving rise to subordination.” Id. at 1609.

IV. Little Is Known about How Lawyers’ Conscious and Unconscious Client Selection Criteria Reflect Discriminatory Bias and Affect Access to Justice.

There is one additional issue that seems worth raising regarding efforts to frame policy about discrimination in client selection – the lack of information we have regarding the prevalence of such discrimination and effects. We know for sure that some lawyers actively target for services groups identified along the categorical lines of the amended rule. Despite the result in Nathanson, one can find ads on the internet today, for “divorce attorneys for men” and also for “divorce attorneys for women.” The attorneys in these ads are located in a number of different states. In fact, one firm actually advertises “Dads’ Law” satellite offices of divorce attorneys for men in Massachusetts! But I am aware of no studies of the effects of these – or any other client selection practices – on access to justice. And these are just examples of the most overt current client selection practices. What of more subtle, less public choices?

There appears to be a dearth of empirical research on the relationship between various social characteristics and access to legal representation. A 2008 article concluded that “[n]o
A major qualitative study has focused expressly on race and disputing, justiciable problems, or contact with civil courts or staff.” Rebecca L. Sandefur, Access to Civil Justice and Race, Class, and Gender Inequality, 34 Annu. Rev. Sociol. 339, 350 (2008). One more recent study, however, reports an interesting result in the area of employment discrimination law. Amy Myrick, Robert L. Nelson, & Laura Beth Nielsen, Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs, 15 Legis. and Pub. Policy 705 (2012). Using a sample of over 2,000 cases from federal courts, these authors found that African Americans are more than twice as likely as whites to lack lawyers for the employment discrimination claims they take to court. Id. at 709, 715. The authors of this study do not suggest that this difference is the result of conscious racial choices on the part of lawyers. Rather they conclude that “race operates in complex ways, both for minority plaintiffs seeking lawyers and for lawyers who decide whether to accept them as clients. In sum, minority plaintiffs face many of the same barriers to obtaining legal resources as minority groups do in other social domains.” Id. at 708.

In conjunction with their quantitative analysis of racial differences in representation, Myrick et al. interviewed plaintiffs’ attorneys about their client selection methods and concluded that “lawyer screening practices may be vulnerable to racial bias.” According to the authors, “lawyers claimed to have an ability to assess the merits of a case almost instantly.” Id. at 743. This is suggestive of the potential for unconsciously biased selection. There is a large and growing body of scholarship indicating that many, perhaps most, people with no conscious racial animus carry unconscious racial biases. And there is another large and growing body of work contending that this type of bias is particularly likely to operate in situations where the person is engaging in fast judgments.

The findings from the lawyer interviews suggest circumstances that might be vulnerable to implicit bias. “After the initial phone call, most plaintiffs’ attorneys said a large part of their decision whether to accept a client was based on her mannerisms or demeanor at the initial meeting.” Id. at 744. Or something even more ineffable: One attorney explained candidly that part of what he was looking for was “chemistry,” between him and the client, “Is this somebody that you feel like you can work with? Are you able to communicate effectively with that person”? Another attorney said “if I don’t have a sense of the, if I personally don’t get a sense of the honesty of the person or if I don’t feel like what I’m hearing is what’s really there, I don’t get involved. And one lawyer declared that she uses “the smell test” – to decide whether the potential client has a “morally right” conviction that she has suffered discrimination or is just “trying to work the system.” Ultimately the authors point out the potential for unconscious bias to drive racial selection of clients “if lawyers tend to unfavorably assess the demeanor of minority plaintiffs, viewing them either as ‘difficult’ to work with, not credible, or unlikely to present well to a judge or jury.” Id. at 745. They conclude that “lawyer screening practices may be vulnerable to racial bias.”
V. Recommendations

My view is that, although anti-subordination concerns are real, we need to do more than just insist (or imply) that anti-discrimination law is simply inapplicable to lawyers. Without an explicit recognition that anti-discrimination rules apply to lawyers’ client selection, and do so in an anti-subordination framework, we are left with what amounts to a NIMBY (Not In My Back Yard) argument against applying civil rights norms to legal practice. If lawyers are not bound to respect laws that prohibit invidious discrimination, why should others be?

I would therefore suggest two changes in the proposed amendments to the rule and comment.

1. For the text of proposed Rule 8.4(g), eliminate the “knowing” modifier on prohibited discrimination. The type of categorical choice in client selection that we would want to defend on anti-subordination principles would certainly be knowing. At the same time, the knowledge requirement adds a further hurdle in proving the existence of discriminatory animus.

2. For proposed Comment 3: Eliminate the language regarding client selection and Rule 1.16 and substitute a more overt anti-subordination protection along the lines of the previous version of the comment in the August draft. Perhaps the comment could say something like: “Paragraph (g) forbids invidious discrimination in client selection on the basis of the enumerated characteristics. A lawyer’s conscientious choice to limit client representation in order to focus on disadvantaged groups, destabilize status hierarchies, and/or serve groups who lack access to legal process does not violate paragraph (g).

Finally, apart from the rule making, I would urge the ABA to support research into the realities of lawyers client selection practices and the interaction of those practices with access to justice.