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March 11, 2016

American Bar Association
Standing Committee on Ethics and
Professional Responsibility

Re: Proposed Changes to ABA Model Rule 8.4

Dear Committee Members and Delegates:

I write as a criminal defense attorney and a member of the Minnesota bar. Although I write this letter in my own private capacity, I have the honor of serving as Chair of the Minnesota State Bar Association Solo and Small Firm Section, and I serve on the council of the Criminal Law Section of the Bar Association.

The proposed changes to ABA Model Rule 8.4, although well-intentioned, cannot be stamped on every area of legal practice without inhibiting and undermining fundamental rights of our clients. The proposed changes have a strong likelihood of being misused and abused, especially with very vague and general terms such as “harass” applied to any conduct related to the practice of law. As a defense attorney, I can attest firmly that vague and general prohibitions result in widely inconsistent and unpredictable enforcement. Defense attorneys often have to take up unpopular causes and publicly-maligned clients, and from time to time we must comment in court on individuals and advocacy groups that affect our clients, or oppose their intervention. The proposed language would create an entirely unclear category of discipline and complaints against lawyers if anything they say were termed harassment of someone who fit into the many categories listed. I know from long experience litigating these issues in criminal cases and restraining order proceedings that harassment is a term whose meaning varies drastically from person to person, often depending entirely on how much a person doesn’t like something rather than on any objective criteria.

The fundamental rights of our clients at trial are also disrupted by the change removing any exception for peremptory challenges at trial. This would hinder and inhibit attorneys in two concrete ways: first, by expanding the categories of characteristics that an attorney may not consider in making peremptory challenges; and second, by putting the attorney in fear that a

perception by a judge that a challenge was made for a discriminatory reason would result not just in a mistrial or sanction, but in ethical discipline impacting the lawyer's career.

The proposed inclusion of peremptory challenges as an open field for ethical discipline troubles me deeply. We often represent people who are already the victims of prejudice and misunderstanding in our society. A great many of our clients are minorities, and many come from low-income backgrounds. The purpose and value of peremptory challenges is that a defense attorney can scrutinize the jury to see who may have a background and attitude that would cause him or her to be unfavorable or biased toward a defendant. The peremptory challenge protects the lawyer's freedom to guarantee his client a fair and impartial trial by taking no chances about possible juror bias. Detecting bias among jurors is notoriously difficult because people rarely admit to prejudice. Thus lawyers must focus instead on inferences and connecting the dots among body language, statements, and personal background. Because peremptory challenges need no demonstration of cause and require no explanation, a lawyer is free to use his own judgment without having to prove his concerns. I have yet to meet the trial lawyer who does not insist on this as crucial to directing a client's defense.

No one can question that the jury is the most important factor in a criminal trial. Trial by jury is so fundamental it was included in the Declaration of Independence. The Sixth Amendment to the Constitution insists “the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury[.]” Ensuring a jury panel that is as open-minded and fair to the defendant as possible is one of the most crucial duties of the defense attorney. It is the defendant accused of a crime who runs the greatest risk of discrimination and bias. In greatly expanding the different characteristics that could trigger a Batson challenge and prevent a defense attorney from using a peremptory challenge, this proposal would tie the hands of defense attorneys and inhibit their ability to protect clients from bias. The language of the proposal would not only chill and constrain peremptory challenges, but even the questioning of jurors in voir dire. Questions that touch on anything that could fall under the various categories in the proposed language could be perceived to be harassment under the rule. An attorney wary of this would feel that even the questioning of jurors to identify bias is constrained by the threat of ethical discipline.

This also impacts the interests of the state in appropriately prosecuting crimes. Many prosecutors, in ensuring that victims of crime are given fair consideration and heard without prejudice, will see the need to strike certain jurors who may show bias affecting the victim. The proposed changes greatly multiply the grounds on which a defense attorney can retaliate with a Batson challenge, making prosecutors who value their professional licenses reluctant to strike even apparently biased jurors.

This is to say nothing of the questioning of witnesses. The proposed language would make any conduct incidental to the practice of law, even in the courtroom, a disciplinary offense if perceived as harassment related to the listed categories. This clearly does not exempt the questioning of witnesses at trial. But one of the most fundamental areas that a witness must be probed on is bias. The rules of evidence expressly allow for wide latitude in testing a witness for bias. But it is a sad fact that our biases often relate to our social and cultural circles and our

personal characteristics. Demonstrating a witness's bias against a defendant will often necessarily require exposing the witness's own background, associations, and beliefs. Under the proposed language, this could now be considered harassment and unethical. This destroys the value of a trial as a search for truth and a process of testing the credibility of the evidence. It introduces a counterweight that discourages that pursuit.

It has been repeatedly demonstrated that bias of witnesses and jurors is a major factor in wrongful convictions. This is one of the greatest crises in our criminal justice system. This is the time for attorneys to be zealously and aggressively examining witnesses and jurors to eliminate bias, not holding back out of fear they will be disciplined for touching on the wrong subject. The freedom and even the life of many defendants depends on being able to vigorously search through motivations and credibility. We cannot inhibit that process by putting various personal details of a witness off limits to questioning. In fact, we do not need to. There are already rules protecting witnesses from being badgered or harassed on the stand. They allow a judge to discern when questioning has ceased being a search for truth and has become bullying or demeaning. The rules already adequately protect witnesses. There is no need for a new rule, especially one that would unpredictably inhibit questioning of even relevant areas of bias.

Further, this expansion of the categories for Batson challenges complicates the determination of when discrimination is the motive for a peremptory challenge. Race, ethnicity, and gender are fairly obvious categories that in most cases will not be in doubt. But sexual orientation and gender identity, as well as marital status, are not immediately apparent from a person's appearance. This could result in suspicious opposing counsel making "guesses" at whether a juror might fall into one category or the other, and raising Batson challenges that could require a judge to pass judgment on a juror's sexual orientation or gender identity to determine if the category applied. I have personally seen a Batson challenge made based on "perceived" race, where the objecting attorney was convinced the juror struck was African-American. The judge determined the juror identified as white on the jury questionnaire. I am aware of several other examples of Batson challenges based on perception happening just in Minnesota alone.

Consider the complications and guesswork involved in adding Batson challenges based on whether a person was perceived to be gay or perceived to be transgender. Either the court must guess at whether the category applies, or the court must question the juror. Few jurors would welcome being questioned by a judge in the presence of two or more attorneys on these personal matters. Worse, some states may consider that in order to avoid this uncertainty, they must now inquire on jury questionnaires about these categories. Again, many persons will feel uncomfortable being asked these questions and having to answer them.

This expansion could have the unintended effect of making jurors in the proposed categories feel more harassed and scrutinized, rather than protected. It may even be that some attorneys would want to question the jurors during voir dire to elicit these characteristics in order to prepare a Batson challenge as 'insurance' in case the other attorney strikes any jurors desired by the first attorney. Putting these categories at issue in jury selection has just as much potential to isolate and embarrass jurors as it does to ensure they are allowed to serve. This effect requires

much more careful reflection and examination of the potential impact of these changes. It would be a grave mistake to adopt these changes in the zeal of supporting diversity, only to see more people singled out and scrutinized based on their beliefs and lifestyle when they are called to jury service. People do not respond to a jury summons wanting their sexuality to be the subject of discussion in the courtroom.

Adding the threat of professional discipline for lawyers making a peremptory challenge also complicates the judgment and duty of attorneys who may raise a Batson challenge. I would be very conflicted about making a Batson challenge against a colleague on the opposite side of the case if I knew that a judge's agreement with me would mean my colleague could be investigated and disciplined. That is a very severe and drastic thing to bring upon another lawyer. I foresee many attorneys refraining from possibly legitimate Batson challenges because they fear the consequences to the other attorney. Many prosecutors and defense attorneys have friendships outside the courtroom and maintain the kind of collegiality that gives our profession dignity and allows civility in resolving disputes. This is an asset to the profession. It also allows lawyers to endure disagreements in litigation without taking them personally.

But when the weight of an ethics investigation is added to a Batson challenge, it becomes a very personal attack on a lawyer. It's no longer just a legal issue related to the trial. This will cause lawyers to be reluctant to make them, and it would mean other lawyers on the receiving end would be angered and feel attacked by such challenges. All of this creates distraction and interference in a trial process that is already delicate and complicated enough. Removing the language on peremptory challenges from the comments to Rule 8.4 puts too much at stake for a lawyer in *voir dire*, and would mean that lawyers who have an obligation to be thinking about ensuring a fair and impartial trial for their clients will end up thinking of protecting themselves and holding back out of caution and self-preservation instead. Others will fail to exercise the Batson challenges because the ethics dimension makes them the "nuclear option" in a relationship with a colleague.

The greatest and most honored defense attorneys in the history of our profession have always pushed the envelope and dared to take risks in the courtroom. This willingness to mount an aggressive defense and pull no punches in advocating for a client is what holds the power of the state accountable in criminal cases. We admire Clarence Darrow for being fearless in the courtroom and being no respecter of persons. Shall we train a new generation to be cautious and timid about saying the wrong thing, or touching on the wrong subject? The defendant is the one who has the most to lose and the most interest in fairness in the process. The defense attorney's sole objective ought to be to ensure that fair and impartial trial, including selecting the jury he or she judges to be most appropriate for this defendant.

Invading this process with the threat of ethical discipline for any questionable challenge in *voir dire* puts the attorney's interests at odds with his or her client, and inhibits the purpose of a criminal trial: to ensure the defendant is tried objectively and receives a just verdict free from bias. No defendant should have this put in jeopardy because a defense attorney, anxious about his professional license, fails to thoroughly question a juror or to make a challenge that is in the

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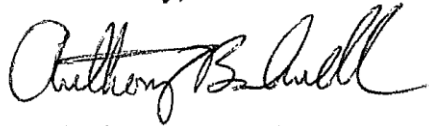
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defendant's best interests. And no defense attorney should be forced to make such a challenge in the anxiety that a judge inferring a wrong motive would mean the lawyer's license is at stake. The right of trial by jury is too important. We cannot afford to compromise it by making Rule 8.4 so broad and expansive that it sweeps other rights away before it in any and every setting. The proposed language is not carefully tailored to account for the different types of legal practice where a general rule such as this is at odds with the process of trial and the rights of clients.

For these reasons, I respectfully disagree with the proposed changes and I especially urge the committee and the delegates to reject the removal of the peremptory challenge exception, and to reject the very unclear and vague category "harass" as it pertains to "conduct related to the practice of law" in proposed paragraph (g). I do, however, commend the language in proposed comment [3] and earnestly urge the comment's adoption if other provisions of the proposed changes are adopted. Thank you for your time and consideration of these concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Bushnell". The signature is fluid and cursive, with a long horizontal stroke at the end.

Anthony Bushnell