MEMORANDUM

To: ABA Standing Committee on Ethics and Professional Responsibility
    modelruleamend@americanbar.org

From: Professor W. Burlette Carter
       The George Washington University Law School

Date: March 11, 2016

Re: Proposed Amendments to Rule 8.4

Dear Committee Members:

I write to provide comments on whether the ABA should adopt Proposed Rule 8.4, offered by the ABA Standing Committee on Ethics and Professional Responsibility (“Standing Committee”). In considering this matter, I have read both the Standing Committee’s memoranda of July 16, 2015 (the “7/16/ memo”) and of December 22, 2015 (the “12/22 memo”). I respectfully dissent from the Committee’s views that the proposal, as written, should be adopted and offer some alternative approaches to dealing with the important issues that the Committee attempts to address.

I am a Professor of Law at the George Washington University Law School. I am also African-American, a descendant of slaves freed by the Thirteenth Amendment to the U.S. Constitution and given citizenship and protections by the Fourteenth. Prior to entering law teaching, I practiced litigation with a large firm. I am a member of the District of Columbia Bar and a retired member of the Bar of the State of New York. I am a member of the bar of the U.S. Supreme Court. As a young lawyer, I also served on the Young Lawyers Committee of the Association of the Bar of the City of New York. I am a member of the ABA and, have in the past, served on Committees within the leadership of the Section of Litigation. Consequently, I am well aware of the work that goes into drafting such proposals. I do not intend to disparage those efforts. I also agree with the Committee that discrimination and harassment directed toward perceived members of a class uniquely hinder both access to justice and the administration of justice. They hinder it both as to individuals and as to the class with which the individual is perceived to be associated.

Recognizing these comments will be public according to the ABA’s practice, for other readers’ reference, I include the current language of 8.4 at footnote 1. The original rule also is addressed in a Comment, designated as [3], which states as follows:

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1Rule 8.4 currently reads:

   It is professional misconduct for a lawyer to:
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. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

It is my understanding that the effort to amend Proposed Rule 8.4 came about out of two concerns. The first was that Rule 8.4 did not address issues of discrimination expressly in the context of the rule. Comment #3 was deemed insufficient as only commentary, which is not adopted by the ABA. The second concern was that Rule 8.4(d) to which the Comment [3] applied was being narrowly construed to apply primarily to court appearances. Thus, ethics complaints and disciplinary proceedings disproportionately focused on conduct in litigation before courts, while ignoring context that might arise in other practice contexts. (See 7/16 memo at 1.) Responding to these concerns, the Committee, in consultation with numerous other groups, came up with the proposed amendment to Rule 8.4 and a revised version of Comment [3]. The proposed rule would add a section (g) to the existing Rule. (See n. 1 for existing rule.) The revision would providing, essentially, that 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.

It seems to me that, in a single rule, then, the Committee tried to do four things. First, it tried to give recognition expressly in the rule of the harm done by class or stereotype-based prejudice and bias through the practice of law. Second, it tried to clarify that the obligation was not

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
restricted solely to a lawyer’s role when acting before the Courts, but included representational activity when conducted outside of the courthouse or in representative engagements that did not include judges. Third, it tried to extend the contexts in which lawyers faced obligations from “in the course of representing a client” to “conduct related to the practice of law.” In other words, they wanted the obligation to extend to the operational and administrative business practices of lawyers, not merely to lawyers in their specific roles as advocates. And fourth, the Committee attempted to expand the groups of people who are “protected” to new classes.

I suggest that an alternative approach tied to obligations under existing federal, state and local laws (including the respective federal and state constitutions and the state rules of ethics), might be better. Before I critique the existing proposal, I offer such ideas below.

**ALTERNATIVE APPROACH**

One alternative approach might be to rewrite proposed 8.4(g) to tie it to violating existing laws and to give local jurisdictions the option of imposing additional penalties if they find that the laws arose out of stereotyping or affected a larger class. The rule might say that it is professional misconduct for a lawyer:

(g) in conduct related to the practice of law to knowingly and intentionally deny or to attempt to deny rights already protected by existing state, federal or local laws, (including state ethical rules to which the lawyer is required to adhere) to any person, persons or class of persons.

In determining the type of sanction that should be imposed, once a violation of this rule has been found, bar authorities may consider whether the lawyer’s violation was intended to deny or operated to deny rights to a person or persons because the lawyer perceived said person or persons as belonging to a class of individuals (for example, members of a particular race, sex, religion, national origin group, ethnic group, or a group perceived as having a particular sexual orientation, gender identity, disability, or age).

Others may be able to improve upon my language. But the gist of the approach is to focus on the dangers of “class” and stereotypes generally, rather including some classes but excluding others. While there are particular classes that have historically suffered discrimination disproportionately, the ABA would have to agree that in the case in which discrimination operates against others, it is, nevertheless, objectionable.

I have not drafted proposed comments but here are a few observations. Note that like the proposed rule, this formulation of 8(g) extends to “conduct related to the practice of law,” but it ties a lawyer’s responsibility to respecting existing laws. The failure to mention particular minority groups in the first section is not fatal for generally speaking, minority groups have historically been disproportionately targeted in denial of rights. Consequently, the rule would presumably operate accordingly to protect them from such violations and repeat violations but it would not exclude others suffering denials.
The use of the words “knowingly and intentionally” is not intended to comment on the level of intent required under the relevant law but rather to define the level of confidence bar authorities must have in an ethics investigation. Given that some proceedings might operate before a court has heard the matter, the language recognizes that, as I note below, ethics proceedings lack the same protections of judicial proceedings. A lawyer still might also be held responsible for unintentional or negligent violations under other rules (e.g., failing to keep a client confidence through negligent behavior). The “knowingly and intentionally” language also makes it clear that this rule should not sanction unintentional violations that could be corrected upon notice. Obviously, lawyers have a responsibility to know the laws that govern their operations. In some cases, intent will be obvious. In others, it seems to me that once an individual is put on alert, then the intentionality requirement could be satisfied with continuation of the behavior.

Notice the terms harassment and discrimination have been removed. They are both included under the notion of conduct that is prohibited by law. This approach does away with the need to restate the standards of the law of harassment and discrimination, which, I believe, is not as clearly stated as it might be in the various memos supporting the proposal.

Under this approach, legitimate advocacy and the First Amendment would continue to be exceptions to the rule. But if the misconduct is already prohibited by law, then it seems less likely that such challenges would be successful. If the action involves only violating an ethics rule, then the appropriate ethics panel is exactly the place where the discussion should be had.

Note that the second paragraph of the rule would make it appropriate for a bar authorities to consider whether the misconduct affects a class. This approach allows for consideration of the larger impact in appropriate cases but allows local authorities to make the decision. The approach is supported by the fact that when people are not treated as individuals, they suffer additional harm and the class to which they belong suffers harm.

I think is also important for the Committee to recognize expressly that the current Rule 8.4 should be read to already cover discriminatory behavior in all of its respects. The original comment referred to only 8.4(d), which addresses “conduct that is prejudicial to the administration of justice.” The thought seemed to be that discrimination alone is “conduct prejudicial to the administration of justice.” But one could accomplish discrimination by way of “conduct involving dishonesty, fraud, deceit or misrepresentation” as well. So discrimination is relevant to more categories than merely 8.4(d). Currently, there is no existing way for bar authorities to take the issues of class bias and targeting by stereotype into account in deciding penalties, even though the harm is greater because of the effect on a class.

I agree with the Committee that there is an additional harm caused when a person is targeted because of membership in a class of persons as compared to when one is targeted because of one’s individual conflicts with the offender. Misconduct that treats one as a class of persons, as opposed to an individual, creates horizontal and vertical restrictions on the legitimate exercise of rights. Current laws such as hate crime statutes, civil rights statutes and gender discrimination laws already recognize that particular classes have been historically targeted more than others and in need of protection.
It could be argued that this approach changes ethics adjudicators into mini-tribunals. That claim could be raised with respect to existing rules that look to laws to define their content. Moreover, if the matter is too complex to resolve, then obviously it cannot be resolved at the ethics level and will have to be tried before a tribunal.

Some might complain that this rule would allow individuals to fudge when the law is unclear. It is my view that when judges are ambiguous they usually are intentionally so. They mean to leave the matter to the public, lower courts or to another day. As for statutes, when true ambiguity exists, that means that the courts or the public have not decided the question—and I think the issue is theirs to decide, not the ABA’s or an ethics panel. And finally, some may object that the rule does not cover instances when law has not been passed to protect individuals sufficiently. My answer is not that these people do not desire protection but rather, as in other cases, the matter is one for the public through legislatures and courts to decide. As I discuss below, if one of the interests is protecting minorities, there are also dangers in giving too much power to ethics panels to decide such issues.

**Categories for Discrimination**

*Categories Generally.* I think that the use of categories needlessly thrusts ethics panels into the midst of ongoing social controversies, thereby suggesting that the ABA believes there is a “right” side in these debates. If it believes so, then a resolution is the way to proceed.

Indeed, I am unclear about the justifications for some of the rule’s categories. Thus, at pp. 4-5 the 12/22 memo states that the “additional categories reflect current concerns regarding discriminatory practices.” Whose current concerns? Should so called “current concerns” of the group that drafted the rules and those agreeing with them really be the test for charging a lawyer with professional misconduct? When imposing such serious penalties, is it not better to rely on offenses that are already violations under law? What about categories left out such as children (as clients), veterans, immigrants etc. What about discrimination based on cultural norms?

Relatively, the memo says that “a new societal awareness of the individuality of gender has changed the traditional binary concept of sexuality.” But in fact, even though the binary concept of “male” and “female” is not precise in terms of identity, the truth remains that courts have not rejected the distinction as it relates to biology in every case and the overwhelming majority of persons self-identify as “male” and “female.” Moreover, the inappropriateness of using the binary concept in policymaking instead of the majority perspective is far from settled. Every day all sorts of minority groups are subject to rules that consider primarily the majority’s experience. The issue here is not how it should be settled but rather the ABA should try to resolve these

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2This notion that the ABA should make moral judgments harkens back to a movement in the legal academy to have judges interpret the federal Equal Protection clause through the lens of “dignity” rather than original intent. Not everyone agrees that such an approach is a good idea. Even the Supreme Court could not agree, as evidenced by its 5-4 decision in Obergefell v. Hodges, 576 U.S. __ (2015). Some, like myself, fear that the standard diminishes the sufferings of some minority groups and creates the opportunity for moving the goal line constantly against less politically powerful minorities. Original intent is at least a reference point. Some have also complained that it requires the Courts to choose whose dignity to respect. Having said that, I have no objection to the concept as one of several factors to be considered in decision making.
debates by threatening to punish under legal ethics rules those who do not settle these matters according to the Committee’s desires.

In that regard, I have no objection to the inclusion of gender identity, so long as the protection is tied to existing law and not to some trend desired by politically powerful advocates. As to those who might oppose this inclusion, my reasoning is not due to some alleged “new awareness” but rather it is based on the fact that my own research reveals a long record of historical discrimination against persons based on gender identity or expression. I am personally aware of such instances going back to the 1700s. Moreover, I believe that Obergefell v. Hodges, 576 U.S. ___ (2015) grants such persons the right to marry even if the marriage is to the same biological “sex.” I also believe that other laws give them the same protection as others have. There remain issues of contest including access to what they would consider gender appropriate bathrooms. These issues are bubbling through legislatures and courts and no ABA ethics rule commanding a point of view for lawyers is appropriate.

Pregnancy vs “Disability.” The proposed rule mentions pregnancy but not disability. But consider that there is a federal Pregnancy Discrimination Act which is separate from the Americans with Disabilities Act. Consider also that not everyone agrees that pregnancy and disability are one and the same and should be treated as such under law. The Family and Medical Leave Act has been criticized as being unfair to pregnant women because, by treating pregnancy as a disability, it denies women who become pregnant other disability time or forces them to return from maternity leave earlier than might be feasible so that they can keep some time in reserve. This debate is part of a larger debate over gender and its meaning in law. Surely lawyers must comply with the laws. But if the laws allow it, should not a law firm should be able to choose to grant benefits for pregnancy that it does not grant to those with other disabilities without running afoul of the new rule 8.4? Some states certainly have pregnancy specific laws. Pregnancy affects the majority of women in the U.S. at some point in their lives. It is a health issue that is not “gender neutral.” Given this fact, I think that it should be separately mentioned in the proposed rule.

Marital Status. The “marital status” category, also poses a difficulty. The 12/22 memo justifies the inclusion of the term by pointing to the Obergefell decision and the rise of single-parent households. On the first point, there is no question that same-sex couples have a constitutional right to marry. But that right is already covered by other language in the proposed rule listing categories of sexual orientation discrimination or gender identity discrimination. (Some, have argued that compromising the marriage right also constitutes gender discrimination, but others, including some courts, have rejected this view. The Court in Obergefell decided not to address it, though it was clearly presented.) Of course, it also is obvious that some types of discrimination against the unmarried would be disallowed under existing law. It would certainly be wrong, for example, to require unmarried people to work longer or more difficult hours than married ones work on a stereotype that the unmarried have fewer responsibilities. Nor would it be appropriate to ban single parents from a firm nursery on the ground that they should be married before having children. But the general reference to “marital status,” would theoretically prohibit distinctions between married and unmarried in employee benefits (which some groups claim is discrimination). Such distinctions have long been and are today allowed under law.
The employee benefits issue is of particular import to the Obergefell case. Before Obergefell, some employers gave same-sex couples in domestic partnerships (or other similar “nonmarital” committed arrangements), many of the employee benefits married opposite-sex couples received. They did this on the view that same-sex couples could not marry but many were as committed to each other as married couples and many had children. On the other hand, unmarried opposite sex couples were denied those same benefits because they could marry. Now, same-sex couples can marry. So today, employers face a choice. They can no longer offer different benefits to opposite sex and same-sex unmarried couples. They must even the playing field for unmarried either by adding unmarried opposite-sex couples in domestic partnerships to those receiving benefits (thus increasing their costs) or reducing the benefits afforded to unmarried same sex couples (who now can marry.) Rather than settling it as a professional ethics issue (which it certainly is not), the ABA should leave it to the business judgment of lawyers and, if necessary, to the courts. The reference to “marital status” is confusing and overreaches and should be struck. If protecting rights under Obergefell is the concern, then mention the case with respect to same-sex marriage rights. On the other hand, the approach I suggested in the alternative, tying the obligations to existing law rather than specific categories, make sense.

Nor is it a sufficient answer that the Judicial Code, by comparison, includes “marital status.” (See 7/16 memo at 4.) The prohibition in that context is quite different and is certainly appropriate. Judges are not running private businesses. Decisions about employee benefits (e.g., here decisions benefits to be afforded to the married versus the unmarried) are often made by the state or federal governments in which they serve or at least in counsel with them. If the government distinguishes based on marriage, the Judges will have to as well. In private businesses such decisions, if not compelled by law, are made according to a host of factors. It cannot be that bar authorities intended to prevent the design of benefits plans based on factors that are legal to consider otherwise.

Religion. There is some debate about what “religion” means. Is it the same as a person’s personal “religious doctrine?” In other words, does one look to institutionalized religion to determine what one should believe or to personal faith?

Ethnicity. The 12/22 memo’s discussion of “ethnicity” is contrary to how I would usually think of the word. (See 12/22 memo at 4-5.) The stated intended reference is to “individuals who are of mixed national origins or races.” In fact, anyone who knows U.S. history knows that virtually all Americans who are descendants of slaves are individuals who are of mixed national origins or races, yet most are classified by “race.” The word “ethnicity” as I understand it is usually used with reference to social and cultural groups, (such as the American Indian). Moreover, oppression against persons because they are “mixed” (or privilege because they are) has itself a “mixed” history. I think what the Committee wants to do is to prevent discrimination. That makes sense. But I think selecting among categories as it does is not the correct approach.

Socioeconomic Status. Socioeconomic status similarly poses difficulties. To demonstrate the mischief in the proposed rule consider whether a firm would be violating the rule if it provided free transportation for legal assistants or secretaries to attend a law firm gathering but not to lawyers on the theory that the lawyers are paid a much higher salary. Would that be discrimination? Would it be discriminating if it asked an apparently homeless man to leave its
lobby? I think these are issues that the laws already address. Moreover, there are some specialized laws that prohibit such discrimination. ERISA, for example, has economic antidiscrimination provisions. All the more reason that the Committee should tie the professional obligation under the proposed rule to existing law.

**Differing or Even Conflicting Interests Among Categories.** It would be a mistake for the Committee to assume that the interests of the different categories of groups named in its categories are the same. As I read it, the proposed rule also seems to proceed from the perspective of minority groups that have a significant degree of representation within the avenues of power and significant individual power along those avenues. It proceeds from the perspective of those not easily identified. Consequently, it fails to take into account how the proposed rule might be turned on its head and used to target minority groups disproportionately. One may win a minor battle but lose the War. It does not consider that, as noted in the discussion on Due Process, tribunals will lack needed diversity for appreciating the issues before it. Differences in perspectives and experiences can create the appearance of conflict rooted in discrimination when in fact the conduct has a very different genesis. And finally, it seems not to be worried that a committee lacking diversity might very well establish precedents not rooted in existing laws the proponents of the rule don’t like or think fair.

**DEFINING HARRASSMENT AND DISCRIMINATION**

While again, I prefer a different approach, I turn your attention to the definitions of harassment and discrimination. Of harassment, the 12/2 memorandum states “The terms ‘harassment’ and ‘discrimination’ are defined terms under law and goes on to say that harassment “is understood to include the creation of a hostile work environment and is evaluated in terms of the reasonable perception of the victims of such conduct . . . . “ and the term “knowing discrimination” “which is understood to include conduct that a person engaging in such conduct knows will result in a person or persons being treated in a different and harmful way because of their membership or perceived membership in one or more of the categories listed in the rule.” (12/2 memo at 4.) This language referencing victim’s perception seems to be an attempt to describe obligations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 but I think it falls short on a complicated issue. Referencing the law in the rule as the standard would be better. Moreover, there is certainly “harassment” that does not fall under Title VII but would still be illegal under the common law tort of “assault” under stalking laws, or other laws. That is another reason to look to the laws themselves.

**DUE PROCESS**

The proposal as written also raises Due Process concerns. As I understand it, upon the filing of a complaint of a violation, the local bar agency will commence an investigation regarding whether someone has discriminated against or harassed a person belonging to a certain group. As previously noted, the ABA offers no assurance that the Committee reviewing the claim will itself will have a diversity of perspective on the issues raised.

It also appears that, absent privileges, accused lawyers would be bound to cooperate in these proceedings. Presumably, the complaint remains on a person’s law record, even if the Committee
finds that there was no basis to it. As more and more lawyers seek to use ethics investigations as evidence in trials, lawyers will have a greater need to protect their interests in them and the due process concerns grow.

The investigation could reach into law firm operations generally, and neither lawyers nor their firms would be protected by any of the rules of evidence or other rights that would exist in a judicial or quasi-judicial proceeding. And yet the result of a successful claim—denial of a law license or at least serious damage to one’s reputation—is as serious as that which might pressed in such a proceeding. Media attention alone would ensure the needed damage to a lawyer’s business, even in the case of a finding of no violation. And it would be up to the lawyer, not the ethics panel, to repair the lawyer’s reputation.

Some lawyers will, no doubt, see ethics panels as good precursors to litigation to accomplish long range goals, that is, to put into law views on controversial issues. If that is true, one can expect that the initial targets of such an approach will be small firms, including those headed by visible minorities. The larger firms would have too many political contacts and would have the resources to offer too serious a defense.

Indeed, if the rule remains as written, I would not be surprised at all if those challenged under it would seek injunctions from the Courts. (Would the seeking of an injunction, be a failure to cooperate in an investigation?)

I agree with the Committee that the presence of other remedies is not alone an objection to a rule. But other legal violations noted in the rules are uniquely treated in other areas of the law because they are directly tied to the search for truth which lies at the heart of our justice system. Rule 8.4 (c) bars fraud, deceit or misrepresentation. R. 8.4(b) (criminal misconduct) refers to an act that “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. We see this concern for truth elsewhere. Thus, the Federal Rules of Evidence (“FRE”) allow some evidence in for impeachment purposes that it would not allow in for substantive purposes. We have special pleading rules for F.R.C.P. 9(b) fraud claims. FRE 609(a)(2) allows broader use of criminal convictions to impeach when the underlying misconduct of the conviction involved a dishonest act or false statement. The other justification for focusing particularly upon offenses relating to truthfulness in ethics, is that more often than not, that the actions affect the rights of one’s own clients.

The ABA should be careful to avoid the suggestion that the reason for rule 8.4 is not to enforce lawyer misconduct and elevate the bar, but rather to lighten the litigation load on parties seeking to press discrimination cases or to provide an authority for pressing new claims of discrimination. It is noteworthy that while the memorandum makes the case for those claiming discrimination, it does not address what due process and fairness protections should be afforded to those against whom the claims are made. No one knows better than the African-American community from which I come that, without that process protections, tribunals reach erroneous judgments and power determines outcomes.
THE FIRST AMENDMENT

I was glad to see that the Committee recognized First Amendment concerns. I am not confident those concerns are resolved as the proposal is written. If it is the case that the vagueness of the rule allows persons with disfavored views to be hauled before a state-run ethics Committee every time they express them, the rule creates a state burden on disfavored speech, even if the individuals are eventually cleared of wrongdoing. This reality is created by the failure to tie the sanctions expressly to existing laws.

I also call to the Committee’s attention that for some minorities, and especially racial minorities, First Amendment has been a bedrock principle and central to the freedoms we now enjoy. It has always been key to the achievement of Civil Rights for such groups. Those minority groups who are well represented at various levels of the media and have the means to speak by exercising that authority may find the First Amendment less significant to their lives. Their emphasis may be on stopping offensive speech. But the First Amendment still remains extremely important to the rights of many minority groups.3

THE PHRASE “CONDUCT RELATED TO A LAWYER’S PRACTICE OF LAW”

Meaning: Comment [3] to the proposed rule says that conduct “related to a lawyer’s practice of law” includes operation of a law firm or practice. What else might it include? The comments should tell us more about what is intended. The alternative is to make every bar authority a creator of the common law of “conduct related to a lawyer’s practice of law.” If the comment means to say that it includes representing a client or operations of a law firm or practice, saying that would be helpful.

Wisdom of Extension: The Committee has noted that it has considered but rejected the approach of jurisdictions that have eliminated employment practices from antidiscrimination rules. As it has noted, some jurisdictions exclude employment discrimination unless it has resulted in an agency or judicial determination. However, the Committee offers an incomplete reason for why these eliminations have occurred. The 12/22 memo at 3 states “one simply cannot demand one level of professional behavior for lawyers that is external to their own law practice while allowing a lesser standard of behavior inside one’s own office. But that explanation is insufficient.

First, on its face the existing rule makes no such distinction. The present 8.4 surely was intended to reach misconduct even when either inside a building other than a courthouse. The distinction between the old and new rule was likely intended to be the lawyer operating as an instrument of justice and officer of the Court (inside or outside) and the lawyer acting as a businessperson.

3I do not mean to say that the First Amendment has no limits. I do believe that the defense weakens when it collides with other laws such as a harassment/hostile work environment claim. I believe that private organizations have a strong business (or, in the appropriate case educational) interest in ensuring that everyone feels welcome in their organizations and that in some cases the obligation is legally compelled.
Second, there is a reason a closer look in the lawyer-client context. In that context, a lawyer has a confidential relationship with a client, has a fiduciary duty to that client, and is acting directly as part of the machinery of justice in that role. Within the bounds of professional responsibility obligations and law, the lawyer is supposed to have an interest that is one with the client’s own interest. Those same interdependent relationships simply don’t exist in the contexts of other law firm operations. The Committee needs to recognize that the distinction of inside/and outside cannot justify the new rule. The justification must lie in the effect upon justice of the behavior. That is another reason why tying the rule to current law and current rules makes sense.

Supervisory Roles: It sometimes occurs that the lawyer does not himself or herself engage in misconduct, but rather employees do. On occasion, these employees are so valuable to a firm that a firm might hesitate to act to curb the behavior. What are the responsibilities of a lawyer in a supervisory capacity? Moreover, many lawyers at a firm may work on a project. If there is a responsibility, who is a supervisor with responsibility within the meaning of the proposed rule? Here again, we have another reason for tying the misconduct to existing law or professional conduct standards.

**OBLIGATION TO REPORT?**

Has the Committee considered whether the ABA should tweak Rule 8.3 either in the rule or in its comments? That rule relates to a lawyer’s obligation to report conduct “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Does the proposed 8.4 constitute “fitness as a lawyer in other respects?” If so, the Committee should say so.

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4 Rule 8.3 reads:

**Rule 8.3 Reporting Professional Misconduct**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.
In some jurisdictions, lawyers already have the obligation to report misconduct but in others not. I confess that I am not one who favors a professional obligation to report as to any of the rules. I would prefer that the Model Rules not state a position, rather than try to predict why people act or don’t act. However, I do believe that the ABA can clarify a lawyer’s standing to initiate complaint in cases that involve this kind of misconduct, perhaps, again, in the comments to 8.3 and 8.4(g) or its substitute rule. Considering whether Rule 8.3 should be revised is entirely consistent with the views expressed by the Committee in its various memoranda that this kind of conduct is extremely harmful to the administration of and access to justice and such a recognition of reporting rights might ease the burden of misconduct on the lawyer who is its target.

**COMMENT VERSUS RULE LANGUAGE**

The drafters acknowledge that the ABA does not adopts neither the commentary nor the memos that shape this proposal. And so, if the commentary is not adopted, then any language in it protecting First Amendment or addressing Due Process etc. is not the ABA’s view. See 12/22 Memo at 5, ¶4. We also know that the memos and the commentary are used as legislative history by some judges.

**THE DIFFICULTIES IN USING OF PROFESSIONAL ORGANIZATIONS AS SUBSTITUTE ADJUDICATORS AND VIEWPOINT ENFORCERS**

I don’t question the good intentions of the Committee. I share its concerns over discrimination. I do wonder whether the design of this proposed rule reflects a pattern apparent in other contexts over the past decade. Academicians and lawyers seeking to change the law have encouraged professional organizations to adopt rules embracing their viewpoints on matters that are the subject of broad public discussion and controversy. Later, they seek to offer these rules as templates for states and courts to follow using the organization’s name and esteemed position as evidence of the reasonableness of the approach. But often, these rules are drafted by groups that lack a fair representation of the diverse viewpoints that are needed to build a consensus. Sometimes an individual’s advocacy and even the experience of discrimination can lead one to think that all other views are simply unreasonable. Often the language is subject to broad interpretation. The rules often lack the due process protections inherent in the judicial proceedings that they seek to replace.

We have seen a similar dance with the Commissioners on Uniform Laws and the American Law Institute when it proposed the de facto parent doctrine. The de facto parent rule essentially provides that anyone who has been in a child’s life two years or more and has performed in the role of a parent is legally a “parent,” even if there is an objecting and fit biological parent. But the advocates went further so as to suggest that the longstanding rights of a fit biological parent to determine his or her child’s future could be cut off, without even so much as a hearing or a finding of unfitness. The states have widely rejected the proposals or altered them substantially to recognize the longstanding rights of biological parents, especially when the two parties did not mutually agree to utilize reproductive technologies together in producing the child. Biological parents with few resources were put in the position of having to bring cases to ensure rights that have historically always been assumed to be theirs for generations even though there was not an
An inkling of a suggestion that they were unfit parents. The defacto parent doctrine, when applied to battles between fit biological parents and third parties who have acted as parents, essentially curtailed parental rights without the due process and put the burden and cost of defending rights on the biological parent. Yet the doctrine in a narrower form deals with a real problem of defining parenthood in the LGBT community, since both partners cannot be a biological parent.

My point here is not to debate whether de facto parenthood is good or bad. I simply think that the battle over it, starting with a professional organization, is one example of the dangers in the trend of using the weight of professional organizations to accomplish legal change. The result is often that due process protections are erased and the burden shifted to others to restore them. That is the risk the ABA faces now.

**CONCLUSION**

I set out these debates and complications in detail because I guessed that most practicing lawyers and most in the ABA leadership were not aware of them. At the same time I wished to offer an alternative, in respect of the good intentions of the Committee. I thank the Committee and all persons who participated in the drafting for their time.