March 11, 2016

BY E-MAIL

ABA Ethics Committee
c/o Dennis A. Rendleman, Ethics Counsel
Center for Professional Responsibility
American Bar Association
17th Floor
321 North Clark Street
Chicago, Illinois 60654

Re: Draft Rule 8.4(g) and Associated Comment

Dear Sir/Madam:

I write largely in support of the comments filed by the Christian Legal Society ("CLS"). This letter amplifies on them to some degree.

CLS begins its comments by expressing doubt about the wisdom of the ABA imposing a "culture shift" on all attorneys. There is well founded concern that this proposed Rule 8.4(g) would align the ABA behind those who are most actively pushing an expansive definition of "sexual orientation," "gender identity," and "marital status," to the degree that any such "discrimination," broadly defined, will override religious and other freedoms. CLS well describes those freedoms and why they must be protected in any new rule.

In addition, I urge the Committee not to include the categories of "sexual orientation," "gender identity," and "marital status" in any new rule. In support of that, I outline several relevant considerations, in part to explain more fully the key difference between homosexual and transgender inclinations and conduct and in part to reinforce that the public policy debate on such conduct is not a closed issue but is supported by substantial health and social science evidence. The bottom line is that this is neither a closed debate in our society nor one on which the ABA as a body should take sides.

Religiously Informed Views on Sexual Orientation and Gender Identity

Christians are called to love and serve all persons, including those with a homosexual orientation or those who feel a closer association to the gender other than their biological sex. However, most Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse and rejection of one's birth gender as both unnatural and immoral. Thus, while Christian lawyers would not (and
overwhelmingly do not) refuse to take work from persons who identify themselves as gay or transgender when the work does not involve supporting that lifestyle (e.g., representation as a victim of a car accident), many would have ethical qualms in working for such a person or organization if the representation directly or indirectly advanced the cause of such lifestyles or helped entrench their participants in it. It is not discrimination on the basis of sexual orientation or gender identity to refuse to approve or support same-sex intercourse or gender “transformations.” It is the difference between personhood and activity. Persons are just as much persons if they never engage in sexual intercourse, of whatever kind.

The Christian view that separates the person from the offensive activity is not generally accepted by either the LGBT community or, increasingly, administrative and judicial officials. *E.g.*, *Christian Legal Soc’y Chapter v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (recording state university’s labeling of CLS chapter’s requirement that leaders not engage in sexual intercourse outside marriage between a man and a woman as “sexual orientation” and “religious” discrimination, although the case was decided on other grounds). CLS in its comments and many other cultural observers have noted an increasing lack of toleration – ironically often under the banner of “toleration” itself – to those who will not affirm the LGBT lifestyle. Christian attorneys are often representing citizens whose refusals to support the LGBT lifestyle or participate in LGBT events, taken for religious reasons, are attacked as “sexual orientation” or “marital status” discrimination. *E.g.*, *In re Klein*, Case Nos. 44-14 et al., Final Order, Ore. Bureau of Labor and Indus. (July 2, 2015). The draft Rule 8.4(g), if not revised, could be used in similar ways against attorneys acting in accord with their basic constitutional freedoms.

These understandings may not be those currently held by a majority of the ABA’s leadership. But these understandings of many ABA members are religiously, scientifically, and logically informed. And such understandings to some degree have also informed legislators at all levels of our governments – from federal to local – in rejecting the addition of “sexual orientation,” “gender identify,” and “marital status” to their non-discrimination laws and policies.

Obviously, those who are sponsoring this revision are not satisfied with the pace of change across the country. The Ethics Committee in its December 22, 2015, memorandum (“Memorandum”) quoted (at 2) from the “eloquence” of the Oregon New Lawyers Division that “[t]here is a need for a cultural shift in understanding.” In uncritically accepting that there is such a “need” for a “cultural shift” and in seeking to advance it, the Ethics Committee has taken an unwise step. But, at a minimum, its attempt to push this agenda should be more nuanced to recognize and exempt speech and conduct motivated by sincerely held religion beliefs and to clarify exactly what is being proscribed.

**Suggested Revisions to the Draft Rule**

I have no quarrel with the formulation of a black-letter ethics rule addressing inappropriate, invidious discrimination. Such a provision would properly address discrimination based on uncontroversial and constitutionally protected categories, such as race and religion. However, the addition of “sexual orientation,” “gender identity,” and “marital status” as nondiscrimination categories would be ill considered. At the very least, those terms must be
more carefully defined and limitations more clearly specified to prevent improper and unconstitutional use of any such rule and its associated comment.

1. Proposed addition of “sexual orientation.” The category of “sexual orientation” should not be added. It is not a category uniformly recognized throughout the country, and it is subject to misinterpretation and abuse. See Todd A. Salzman & Michael G. Lawler, The Sexual Person 150 (2008) (“The meaning of the phrase ‘sexual orientation’ is complex and not universally agreed upon.”).

If retained, however, the comment should include an explanation that “sexual orientation” discrimination does not encompass the refusal to approve or support same-sex conduct, be that conduct intercourse, marriage, advocacy, or some other activity. Suitable language to include in the comment would be along these lines: “Paragraph (g) does not include a lawyer’s refusal to approve or support same-sex conduct or to represent an individual in a matter related to such conduct.”

That such an elaboration and clarification is needed is demonstrated by Ward v. Wilbanks, No. 09-cv-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), rev’d sub nom., Ward v. Polite, 667 F.3d 727 (6th Cir. 2012). Ward was dismissed from her graduate counseling program by a state university because, although she did not have objection to counseling homosexual individuals generally, she did not want to counsel them about same-sex marriage, which she believed to be unethical, and sought to refer such counseling to others, instead. The school was not satisfied with this resolution and found her beliefs inconsistent with the American Counseling Association Code of Ethics, which prohibit discrimination on the basis of sexual orientation. The school (and the district court) rejected the distinction between personhood (which homosexuals share with all other persons) and conduct (such as same-sex marriage and relations). (The Sixth Circuit did not reach the issue, but reversed because the student was not given the opportunity to show that the refusal to allow her to refer was applied to her in a discriminatory manner due to her speech and faith.)

Similarly here, without the clarification that “sexual orientation” discrimination does not encompass a lawyer’s refusal to approve or support same-sex conduct or to represent an individual in a matter related to such conduct, lawyers could be driven out of the practice because of their sincerely held ethical beliefs and refusals to participate in or encourage conduct they consider harmful to both the individuals involved and to our society. To use the weight of the Model Rules adopted as proposed to bludgeon attorneys to represent clients with regard to advancing conduct with which they disagree, or to muzzle their opposition to it, violates several constitutional protections, including compelled speech, as set out more fully in CLS’s comments.

Finally, if “sexual orientation” is added as a category in the black-letter text of Model Rule 8.4, the comment should clarify that the term does not encompass “gender identity” as well, and also that the category of “sex” does not include either “sexual orientation” or “gender identity.” These positions have recently been put forward in proposed federal regulations by the EEOC, but they are not generally accepted or approved expansions of the category of “sex.” The proposed addition of “gender identity” to the categories of “sexual orientation” and “sex” indicates that the Committee recognizes that the terms do not include each other, but that should
be made express to address, at least partially, the vagueness of the term sexual orientation (and gender identity).

2. Proposed addition of “gender identity.” “Gender identity” should not be added as a nondiscrimination category in the rule, for several reasons. First, there is no nationwide consensus on whether it should be a protected category, and it is not a protected category in the majority of this country’s jurisdictions. For this reason alone, it should not be adopted.

Second, the timing of this and similar efforts to legitimize “gender identity” is more than ironic. The movement for official acknowledgment that taking transgender actions is “normal,” and that such inclinations should even be encouraged, is gaining steam at the very time social science studies have had a long enough period to document the dramatic, long-term, deleterious effects on those who have elected to have “transgender” medical procedures performed on them. In a recent article by Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, he noted that gender identity confusion is a mental disorder that deserves understanding, treatment, and prevention and that the suicide rate among those who had “reassignment” surgery is 20 times higher than that among non-transgender people. P. McHugh, “Transgender Surgery Isn’t the Solution,” 6/12/14 Wall St. J., available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120; see also Cal. Health Interview Study, reported in Center for American Progress, “How to Close the LGBT Health Disparities Gap,” www.americanprogress.org/issues/lgbt/report/2009/12/21/7048 (“[t]ransgender adults are more likely to have suicide ideation” (2% heterosexual; 5% gay; 50% transgender)). Draft Rule 8.4(g) would improperly align the ABA with those who would blink physical reality and social science results and who unfairly and improperly accuse those who do not support transvestitism and gender “transfers” of “harassment” and “discrimination.”

Third, the term gender identity is also unconstitutionally vague. This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally inconsistent manner:

The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. “Gender identity” refers to one’s inner sense of being female, male, or some other gender . . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . . , individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.

5) demonstrates the ambiguity of the term, as it states that the term gender identity recognizes that “a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality.” Any “identity” subject to changeable, subjective “individuality” untethered to objective biology is, by definition, vague and subject to abuse. As Dr. McHugh notes in his Wall Street Journal article, studies show that 70% to 80% of children who express transgender feelings spontaneously lose such feelings over time.

While, to repeat, Christians (and others) do not believe those with transgender inclinations are any less persons for having such inclinations, that is not the same as approving and being able to support or advocate for actions taken in furtherance of that inclination or to advance its spread. Christians recognize that all persons, including themselves, take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform. See John 8:2-11 (New Int’l Version) (story of Jesus not condemning the woman caught in adultery but telling her to “leave your life of sin”). Thus, at a minimum, if this category of “gender identity” is retained in the draft rule, the language suggested above for “sexual orientation” should be expanded to include “gender identity,” to wit: “Paragraph (g) does not include a lawyer’s refusal to approve or support same-sex or gender transfer conduct or to represent an individual in a matter related to such conduct.”

3. Proposed addition of “marital status.” The term marital status is hopelessly ambiguous. It is obviously not an inherent condition like race, ethnicity, or sex, but what exactly it covers is unclear. It is a nondiscrimination category in only a few jurisdictions, and its meaning is not well settled or accepted.

The Committee in its Memorandum (at 5) attempts to explain why it included “marital status” in the text of the draft rule: “the Supreme Court’s decision upholding that marriage is a fundamental right regardless of sexual orientation, and the rise in single parenthood in our society, makes the addition of ‘marital status’ apt.” This explanation provides more questions than answers. What is intended by the reference to Obergefell v. Hodges, 135 S. Ct. 2071 (2015)? If it is to suggest that a lawyer could not discriminate against those in a same-sex marriage, “marital status” adds nothing to “sexual orientation.” Moreover, Obergefell did not overturn the public policy of many States that still disfavors same-sex marriage, even though those States may no longer prohibit a civil ceremony. In this respect, the right of a same-sex couple to a civil marriage parallels the right of a woman to a pre-viability abortion. While such abortions may not be prohibited by governments, see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), the Supreme Court has repeatedly upheld the right of federal, state, and municipal governments to disfavor abortion and not to fund the practice. E.g., Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); Williams v. Zbarz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977). Thus, to the extent “marital status” is intended to cover the same-sex marriage status, it runs directly contrary to the statements of public policy still common and effective throughout this country that disfavor same-sex marriage.
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The Committee apparently has some reach in mind for “marital status” broader than just
covering those in a same-sex marriage, as it also refers to the “rise in single parenthood in our
society” (Memo at 5). The inference of invidious discrimination against single parents is made
without any support. The reason why representation (or employment at a law firm) would be
refused because a person is single but has a child goes unarticulated and its occurrence unproven.
Nondiscrimination categories should not be proliferated without cause.

A broad reading of this amorphous phrase marital status could also intrude in law firm
hiring decisions. Relational skills are of major importance in both client contacts and in the
close working quarters of a law firm. If someone has been divorced repeatedly, it is a possible
indicator of relational difficulties, failures to honor commitments, and other immaturities in that
person. Would asking about the facts and circumstances of such a personal history, and/or
basing a non-hiring decision in part on it, be “harassment” or “knowing discrimination” on the
basis of “marital status”? Would that be true if the person’s marital history was well known to
the recruiter and in the community she based her refusal to hire in part on that knowledge?

On its face, it is also conceivable that “marital status” discrimination would include, for
example, when a Christian attorney, for religious reasons, refused to craft a prenuptial agreement
for previously divorced individuals because the lawyer held the belief that the Bible disallows
remarriage after divorce if the divorced spouse is still alive. Similarly, would a family law
attorney who refuses for religious reasons to assist a single person or a same-sex couple adopt a
child have engaged in improper “marital status” discrimination?

The “marital status” category is simply too vague, pliable, and potentially subject to
abuse to be retained. It fails due process analysis and could intrude on many decisions and
actions that are constitutionally protected.

4. Proposed deletion of peremptory challenge exclusion. The draft comment deletes,
without substitute, the following sentence in the current comment: “A trial judge’s finding that
peremptory challenges were exercised on a discriminatory basis does not alone establish a
violation of this rule.” This language should be retained.

Obviously, deleting the sentence suggests the argument that the categories of “sexual
orientation,” “gender identity,” and “marital status” are now off limits for peremptory
challenges. It further suggests that any attorney found “guilty” of such discrimination when
making peremptory challenges should be sanctioned. This would not only expand the grounds
on which a hostile opposing counsel could attack a lawyer’s use of peremptory challenges, but
further subject a lawyer to ethical discipline for any perceived Batson violation. This is a severe
increase in the professional risk a lawyer runs by making a peremptory challenge, which cannot
avoid having a chilling effect on a lawyer’s choice of jurors to challenge. The entire point of
peremptory challenges is to give the person on trial the freedom to remove jurors he or she is
anxious about or whose motives or objectivity are suspect without having to obtain a judge’s
approval of the reasoning. It is a guarantee of the plaintiff or defendant’s right to obtain a fair
trial. This twofold complication of the limitations on voir dire would necessarily make many
lawyers much more cautious in using peremptory challenges, which would mean the person on
trial is restricted and inhibited in obtaining a fair trial before an impartial jury. In some cases, it
is precisely the potential bias and prejudice that comes from jurors having very different beliefs or lifestyles from a defendant that causes a defendant to fear the juror will not reach an impartial verdict.

This incursion into the criminal process and the civil trial process should be resisted, as it opens up the possibility of further collateral proceedings, delay, and intimidation. Batson challenges have heretofore been limited to fundamental rights, which the Supreme Court has pointedly refused to adopt for sexual orientation, and it certainly has not done so for transvestitism. Moreover, the inclusion of all peremptory challenges, expanded with these additional characteristics, is a massive encroachment on a defense attorney or prosecutor’s judgment and advocacy. The intention of these changes could easily backfire, causing a defendant who is from a vulnerable and underrepresented group to be deprived of careful advocacy during jury selection because his or her attorney is too afraid of being accused of discrimination and undergoing an ethics investigation and potential discipline. This is too high a price for our criminal justice system to pay to advance a “culture shift.”

Suggested Revisions

For the reasons stated above, I recommend the following with regard to the draft Rule 8.4(g) and its associated draft comments, in addition to those recommendations suggested by CLS in its comments:

- Remove “sexual orientation” and “gender identity” as a nondiscrimination category; at a minimum, (a) add in the comment language to the following effect: “Paragraph (g) does not include a lawyer’s refusal to approve or support same-sex or gender transfer conduct or to represent an individual in a matter related to such conduct.” and (b) add in the comment language that clarifies that the terms sex and sexual orientation do not overlap and do not overlap with the term gender identity;

- remove “marital status” as a nondiscrimination category;

- retain the following sentence in the current version of the comment: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.”

Conclusion

I appreciate the working committee’s recognition in its earlier draft comment of “the fundamental principle that all people are created equal.” (Emphasis added.) Christians do, indeed, believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for those he has created, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a married man and woman, and that violating God’s moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.
The text of draft Rule 8.4(g) and the draft comment, if unaltered, is susceptible of being used to attack those who hold religiously based views on and objections to what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBT movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct are immoral and deleterious to our civil society, as well as to the individuals involved. The ABA should not provide a platform for such actions by adopting the revisions to its Model Rules as proposed.

Thank you for your kind attention to these remarks and suggested modifications to proposed Rule 8.4(g) and its associated draft comment.

Respectfully submitted,

[Signature]

Frederick W. Claybrook, Jr.