AMERICAN BAR ASSOCIATION

COMMISSION ON WOMEN
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Date: March 10, 2016

To: Myles V. Lynk, Chair, Standing Committee on Ethics and Professional Responsibility

From: Michele Coleman Mayes, Chair, Commission on Women in the Profession

Re: Proposed Amendment of Rule 8.4 of the Model Rules of Professional Conduct

Following discussion at its business meeting at the 2016 ABA Midyear Meeting as well as participation in the public hearing, the Commission on Women in the Profession (Commission) respectfully requests further modifications to the proposed amendment of Rule 8.4 of the Model Rules of Professional Conduct.

The Commission believes strongly that this change is vitally needed. As stated poignantly at the public hearing by law student member Matt Mecoli, "We, the future members of this profession, were frankly surprised to discover that an anti-discrimination provision was not already in the black letter of our rules. There is no doubt in our mind that any discrimination on any basis is inherently unethical and should be treated as such. … If anything, we as a profession should hold ourselves to the highest levels of ethical conduct and our rules should demonstrate that commitment."

Contrary to its proud history, the ABA finds itself in the unusual role of following the lead of many other states. Nevertheless, it is not too late to get it right, and to be counted among those that have labeled this conduct correctly. It is our understanding that twenty-four states have amended their misconduct rules and codes to include some form of anti-discrimination and harassment language. As many states look to the ABA Model Rules to set the tone and path to follow, and for the guiding principle of equality in the profession, it is incumbent upon ABA leadership to proscribe conduct that is reprehensible on an ethical and moral basis as well as outright illegal.

The Commission recommends that the word "knowingly" be removed from proposed Model Rule 8.4(g). The "knowingly" standard establishes a legal standard exceeding that which already exists within federal and state laws against discrimination including Title VII, Equal Pay Act, Americans with Disabilities Act, The Fair Housing Act, Title IX, Title II, Title VI, Rehabilitation Act, the Age Discrimination in Employment Act and Immigration Reform and Control Act, and most states' discrimination laws.[1] If the ABA adopts a "knowing" standard for Model Rule 8.4(g), even lawyers who are held liable for discrimination under federal and state civil rights law might not be subject to ethical discipline for professional misconduct because of the substantially higher threshold required by the draft rule. A model rule that includes a standard of proof so high will likely never be enforceable nor change the discriminatory behavior we have worked hard as a profession to prevent. If you can escape accountability for reprehensible conduct simply by claiming that you did not know you were discriminating or harassing someone, then the rule has scant credibility and will have little to no effect on professional conduct. By allowing a modifier such as "knowingly", or "known", or even "should have known" to be a barrier to culpability, we essentially excuse the behavior. And, if our learned profession has failed at educating lawyers on knowing what is discriminatory and harassing behavior, then we have sadly failed our greater mission to uphold the rule of law.

Further, as it currently stands, the proposed comment includes "the operation and management of a law firm or law practice." The Commission encourages the expansion of this language to make clearer that the rule reaches *the terms and conditions* of a lawyer's employment or partnership that may be affected by discrimination or harassment, e.g., the failure to promote, the inequity of compensation, the inequitable distribution of client and litigation matters. Such an addition will also cover harassment that occurs outside the periphery of the practice. This latter point is discussed in more detail next.

The third issue upon which the Commission wishes to comment is the narrow scope set forth in the comment by limiting the conduct of harassment and discrimination to conduct that "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment."

The Commission is deeply concerned that much of the conduct reported by women, and in particular women of color, in regard to harassment and/ or discrimination includes conduct that often occurs in social interactions. For example, these interactions may arise in the context of a conference, a dinner, a holiday party, a ride home from the office or a meeting following a trial or deposition. The case law supports this finding as well.[2] While in some respect these actions may be related to the practice of law or the management of a law firm—often times they can be viewed as social interactions occurring, so to speak, "off the clock." Hence, as stated in the

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[1] *See* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d;Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; Equal Pact Act, 29 U.S.C. § 209; Rehabilitation Act of 1973, 29 U.S.C. § 701; Fair Housing Act, 42 U.S.C. § 3601; Americans with Disabilities Act; 42 U.S.C. § 12101; Age Discrimination in Employment Act, 29 U.S.C. § 621; Immigration Reform and Control Act, 8 U.S.C. § 1101.

[2] *See* Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make it Stop,* N.Y. L.J. (Mar. 4, 2016), http://www.newyorklawjournal.com/id=1202751285096/Sexual-Harassment-in-the-Legal-Profession-Its-Time-to-Make-It-Stop (citing Compl, *Youngblood v. Irell & Manella*, No. BC46597, (L.A. Cnty. Super. Ct. July 22, 2011); Compl., *Marchuk v. Faruqi & Faruqi*, 13 Civ. 1669 (S.D.N.Y. Feb. 5, 2015); Compl., *Chechelnitsky v. McElroy, Deutsch, Mulvaney & Carpenter*, 15-cv-01777 (S.D.N.Y. March 1, 2015)).

proposed rule, the violative conduct at issue would remain beyond the reach of the proposed ethics rule, freeing bad actors to harass their victims so long as it was far enough away from the office or the courtroom.

Thank you to the Standing Committee on Ethics and Professional Responsibility (Standing Committee) and the Working Group on Model Rule 8.4 (Working Group) for the time and effort expended to develop these proposed important and necessary changes to the Model Rules of Professional Conduct. We appreciate the opportunity to provide additional comment. We are pleased to submit a revised draft incorporating our comments if it would be helpful to the Standing Committee and the Working Group.