ABA Standing Committee on Ethics and Professional Responsibility
321 N. Clark Street
Chicago, Illinois 60654-4714
E abamodelruleamend@americanbar.org

Re: December 2015 Draft Proposal to Amend ABA Model Rule of Professional Conduct 8.4 and Comment [3] (the “Proposal”)

ABA Standing Committee on Ethics and Professional Responsibility:

I am writing to provide some remarks regarding the Proposal. I commend the ABA Standing Committee on Ethics and Professional Responsibility for their work on this Proposal and others.

As introduction, I am a patent attorney and I have practiced for just over a decade now in private practice firms of all sizes. I am currently a legal commentator. Besides my independently published works, I have been published by the American Bar Association, American Intellectual Property Law Association, Journal of the Patent and Trademark Office Society, Michigan Telecommunications and Technology Law Review, the State Bar of Michigan and the Intellectual Property Law Bulletin. Moreover, I have been an adjunct professor of law.

ABA Proposed Rule 8.4(g):

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.

Generally. I am in favor of the Proposal as presented. As it has been remarked over the course of history: great power demands great responsibility. I find very compelling the list of eleven other professional organizations that have adopted similar provisions as indicated in the Appendix of the
Standing Committee’s Memorandum of December 22, 2015. In professions as vastly differing as accounting to psychology, discrimination on the basis of protected categories is explicitly admonished by the governing bodies of those professions. I see no viable reason why law should be an exception or why lawyers should be entitled to a professional autonomy that might facilitate discrimination on a basis that our laws already admonish. Consider, for example, that under Title II of the Civil Rights Act a store clerk should not discriminate against persons on the basis of race, color, religion or national origin. I would expect most lawyers to believe that their responsibilities are greater than that of the average store clerk; why then can we not ask all attorneys to manage similar courtesies? The public typically does not contact a lawyer for reasons as vain as fashion trends or as routine as coupon discounts for grocery runs; potential clients typically believe they need serious assistance when they contact us. Client matters typically impact the client much more than they do the attorneys who represent them. Accordingly, the inconvenience caused by non-representation or begrudged representation is likely substantially greater than some of our alleged inconveniences. As attorneys we do not want to add to the public’s legal woes, we want to reduce them. Potential clients should not be denied adequate or convenient legal services on the basis of any of the articulated categories.

**Harassment.** I would add that the language of the Proposal be amended to rebuke harassment in conduct related to the practice of law regardless of its basis. That is to say, I do not believe it is necessary to establish that harassment unbecoming an attorney must be motivated by “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status” to be unbecoming an attorney. Any harassment related to the practice of law is arguably unacceptable. This can also significantly reduce the evidentiary proofs necessary to invoke discipline where an attorney has, in the course of practicing, harassed others.

Consider the following addition:

It is professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass anyone 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.

Harassment does cause disrepute to the profession as it does not require competence in the law or merits of a matter to be employed. Harassment is also often a precursor for other unethical or unprofessional behaviors such as stalking, unwanted physical contact and mental abuse. It would be preferable that attorneys not engage in harassment at all with respect to their conduct related to the practice of law.

**Employment.** While the Proposal makes clear that harassment and discrimination are unwanted in a potential client relationship, I believe the Proposal’s criticism in an employment context can be enumerated at least in the comment section. Equal employment commission decisions can be
relevant to attorney disciplinary proceedings, for example, as articulated by DC Rule of Professional Conduct 9.1.

If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. See §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

**Evidence.** As some brother and sister counsel have articulated in their commentary on the Proposal, it may be desirable to provide evidence that discrimination in the legal profession does occur in order to justify a need for the Proposal. While I have no personal experiences to provide, I am aware of resources that our devoted colleagues may utilize.

- **Ending the Gauntlet: Removing Barriers to Women’s Success in the Law** by Lauren Stiller Rikleen
- **Early Exits: Women of Color at Large Law Firms Tell ABA Researchers They Are Being Overlooked and Undervalued – Maybe That’s Why They Are Leaving in Drovers** by Jill Schachner Chanen
- **Barred from the Bar: A History of Women and the Legal Profession** by Hedda Garza
- **Women in the World’s Legal Professions** by Shultz et al.

Further evidence can be obtained through a public search engine query of “discrimination legal profession” or researching the same at your local law library.

Sincerely,

/s/ Kristy J. Downing /

Kristy J. Downing, Esq.