

Dear Committee Members:

The Commission proposes to amend Model Rule 8.4 by adding an entirely new subsection (g), specifically:

*It is professional misconduct for a lawyer to: . . . (g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law.*

I respectfully object to the Committee's proposed amendments to Rule 8.4 of the ABA Model Rules of Professional Conduct. Specifically, the proposed amendments are unconstitutionally vague because of a lack of provided definition for the terms "harass" and "discriminate".

"Harass":

The use of "harass" as recited is unconstitutionally vague. The proposed amendment prohibits attorneys from harassing anyone on the basis of one of the protected classes. Yet, absent from the proposed amendment is a clear definition of what constitutes "harassment". This leads to subjective and varied interpretations, void of an objective standard by which conduct is assessed or measured. Clarification as to whether the subjective feelings of one party constitute harassment is needed. Similarly, the standard by which someone is harassed has not been put forth, and thus facially appears to rely on the subjective feelings and interpretations of one party. Unlike the current Model Comment [3], the proposed amendment does not expressly require "words or conduct" in order for there to be "harassment." The proposed amendments, as recited, necessarily rely on subjective feelings without presenting any standard by which objective facts can be, or would be, measured.

Moreover, legal precedent has previously shown that the term "harass" can be unconstitutionally vague. See, e.g., *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996)(holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague); see also, *Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994)(the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass."). Accordingly, use of the term "harass" (as recited in the proposed amendments) would likely not pass constitutional scrutiny because (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it shifts the burden by forcing the accused attorney to prove their innocence without an objective standard, thereby requiring those who oversee and enforce the Rules of Professional Conduct to rely on subjective feelings of what constitutes an offense rather than objective facts or standards; and (3) its vagueness will not only chill the speech of attorneys, but stifle the freedom to contract, because of the boundaries of what constitutes "harassment" is inadequately defined.

“Discriminate”:

The use of “discriminate” as recited is unconstitutionally vague. The word “discriminate” has been defined as “to unfairly treat a person or group of people differently from other people or groups.” See Merriam-Webster On-line Dictionary, <http://www.merriamwebster.com/dictionary/discriminate>. But this is circular and subjective, because the definition inherently relies on the subjective feelings and fails to account for what constitutes “unfair treatment”. Without a definition, the use of “discriminate” is subjective and fails to rely on any objective facts or standards. United States statutes and codes prohibit discrimination; however, their constitutionality requires the specific and objective nature that constitutes “discrimination”.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that:

*“It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual’s race, color, religion, sex or national origin.”* 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. Rather, the objective standard by which “discrimination” is measured states:

*“[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.”* 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as “dwelling,” “person,” “to rent,” and “familial status.” 42 U.S.C. § 3602.

Here, the proposed amendments fail to provide an objective standard, and instead merely rely on the subjective feelings and bias of those enforcing the rules. By reciting only *“[i]t is professional misconduct for a lawyer to: . . . (g) 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, while engaged [in conduct related to [in] the practice of law*” – the standard of what constitutes “discrimination” relies entirely on the subjective nature of what each person believes. Yet facts don’t care about a individuals feelings. The fact is, if an attorney will be reprimanded for the subjective feelings of another person, then the rules for professional conduct are in fact not rules at all – because rules require objective standards and facts for their foundation.

Attorneys facing professional discipline for engaging in certain proscribed behavior, must first know exactly what behavior is being proscribed. As written, I respectfully submit that the proposed amendments would likely lead to a deprivation of due process and would be subject to constitutional challenge. For these reasons, the proposed amendments cannot be adopted and must be rejected.

The views expressed herein are my own and do not reflect the views of any other person, client, corporation, or employer.

Best,

T. Alan Dunbar

Attorney