ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY'S WORKING DRAFT AMENDMENT TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4

IN RE: PROPOSED CHANGES TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4

Joint Comment Regarding Proposed Changes To ABA Model Rule of Professional Conduct 8.4

The 52 undersigned ABA member attorneys – from 22 states and the District of Columbia – hereby respectfully submit this Joint Comment regarding proposed changes to Rule 8.4 of the ABA Model Rules of Professional Conduct as set forth in the *American Bar Association Standing Committee on Ethics and Professional Responsibility Working Discussion Draft* dated July 16, 2015.

I. The Current Rule and Proposed Amendments

A. The Current Rule

The current Model Rule 8.4(d) of the Model Rules of Professional Conduct ("Rules") provides that "*It is professional misconduct for a lawyer to: … engage in conduct that is prejudicial to the administration of justice. . .*"

The current Comment [3] to Model Rule 8.4(d) provides:

> *[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on 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.*

B. The Proposed Amendments

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

> *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*.

The Commission also proposes to amend Model Comment [3] to Model Rule 8.4 to read as follows:

> *[3] Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) –* [sic] *incorporates by reference relevant holdings by applicable courts and administrative agencies.*

There are several reasons why the signers of this Comment object to the Committee's proposed amendments to Rule 8.4 of the ABA Model Rules of Professional Conduct. These

reasons are discussed below.

II. The Objections

A. The Proposed Amendments Would, For The First Time, Sever The Rules From Any Legitimate Interests Of The Legal Profession.

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either adversely affect an attorney's fitness to practice law or that would prejudice the administration of justice. The current Model Rule 8.4 (*Maintaining The Integrity of the Profession: Misconduct*) recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either adversely impact an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

(1) Violating the Rules of Professional Conduct;

(2) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) Engaging in conduct that is prejudicial to the administration of justice;

(5) Stating or implying 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; and

(6) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's

violation of them did not constitute professional misconduct.

The second and third proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted – namely, to serve their clients and the legal system with honesty and trustworthiness. But– revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*." As current Comment [2] to Rule 8.4 explains: "*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category*" (our emphasis).

The fourth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of this proscription have been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. See, for example, *In re Complaint as to the Conduct of David R.*

Kluge, 66 P.3d 492 (Or. 2003), which held that to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding. And in *In re Complaint as to the Conduct of Eric Haws*, 801 P.2d 818, 822-823 (Or. 1990), the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions; interfering with the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. See also, *Iowa Supreme Court Attorney Disciplinary Board v. Wright*, 758 N.W.2d 227, 230 (Iowa 2008)(Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar*, 731 So.2d 1158,1170 (Miss. 1999)(For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C.Ct.App. 1996)(In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimus* way, that is, at least potentially impact upon the process to a serious and adverse degree); and *In re Karavidas*, 999 N.E.2d 296, 315 (Ill. 2013)(In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

And the last two proscriptions in the current Model Rule 8.4 also target what is clearly

attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely (a) improperly influencing a government agency or official or (b) knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

The current Model Comment [3] is also in line with and limited to the current Model Rule 8.4's legitimate concern with actions that are prejudicial to the administration of justice. The current Model Comment [3] is a non-discrimination provision – to be sure – but the current Comment [3] does not proscribe *all* bias and prejudice. It only proscribes bias and prejudice that is actually "prejudicial to the administration of justice." That is clear, both from the fact that the current Model Comment [3] is a Comment specifically addressing and expressly linked to current Model Rule 8.4(d), which itself only proscribes conduct "prejudicial to the administration of justice," as well as from the fact that the current Model Comment [3] explicitly requires that – to constitute a violation – the bias or prejudice must be proven "prejudicial to the administration of justice."

In short, Model Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

The amendments now under consideration, however, would take Rule 8.4 in a completely new and different direction because, for the first time, the new Rule would subject attorneys to discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the proposed new Rule would not require *any* showing that the proscribed conduct prejudice the administration of justice or that such conduct adversely affects the

offending attorney's fitness to practice law, the Rule will constitute a free-floating non-discrimination provision – the only restriction on which will be that the conduct be "related to" or performed "in" the practice of law (depending upon the final language adopted).

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we need only look to states that have already amended their Rules 8.4 in this way. In one of those states, in particular, the amendments contemplated here have resulted in nothing less than the creation of a pure speech code. After Indiana elevated Comment [3] into its Rule 8.4, two Indiana attorneys were professionally disciplined under the new Indiana Rule – one for "gratuitously" asking if someone was "gay" (*In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana 2010) and another for applying a racially derogatory term to himself in a private telephonic communication between the offending attorney and another's secretary (*In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010)). In neither case did the offending conduct occur within the context of a legal proceeding, and in neither case was the offending conduct shown to have had any prejudicial affect on the administration of justice. It was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the proposed new Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (see, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo.R.P.C. 8.4(b))., but could be disciplined for gratuitously asking someone if they were "gay" or for uttering a racially derogatory term in a private conversation. That alone should give one pause.

Such a dramatic departure from the historic regulation of attorney conduct should not be taken lightly. It would represent an entirely new and precedent-setting intrusion on attorneys'

professional autonomy, freedom of speech, and freedom of association.

Because the proposed amendments to Model Rule 8.4 constitute an extreme and dangerous departure from the principles and purposes historically underlying Model Rule 8.4 and the legitimate interests of professional regulation, they should be rejected.

B. The Proposed Amendments Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation.

The most important decision for any attorney – perhaps the greatest expression of a lawyer's professional and moral autonomy – is the decision whether to take a case, whether to decline a case, or whether to withdraw from representation once undertaken.

If the proposed amendments are adopted, however, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the proposed Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.

This is another grave departure from the professional principles historically enshrined in the Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Model Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Model Rule 1.7 which precludes attorneys from representing clients

or cases in which the attorney has a conflict of interest, and Model Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*"). See also Model Comment [1] to Model Rule 6.2 ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant").

There are, of course, good reasons why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent. The reasons underlying this historically longstanding respect for attorneys' professional autonomy are twofold.

First, the Rules respect an attorney's personal ethics and moral conscience. See, for example, Model Rules Preamble [7] ("*Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience*"), and [9] ("*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person*"), and [16]("*The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules*."). If a lawyer is required to

accept a client or a case to which the attorney has a moral objection, the Rules would have the effect of forcing the attorney to violate his or her personal conscience. The Rules have never – until perhaps now – done so.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously. Comment [1] to Model Rule 1.3, for example, provides that a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case. In the same vein Model Rule 1.16(b)(4) recognizes that a lawyer may withdraw from representing a client (which, of course, would also mean a lawyer may decline in the first instance to accept a client) if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. And Model Rule 6.2, although prohibiting attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, explicitly recognizes that good cause to refuse such appointments includes the situation where the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client (see Model Rule 6.2(c)) – an acknowledgement in the Rules themselves that a lawyer's personal view of a client or a case can be expected to adversely affect the attorney's ability to provide zealous and effective representation.

To force an attorney to accept a client or case the attorney does not want, and then require the attorney to provide zealous representation to that client, is both unfair to the attorney – because doing so places conflicting obligations upon the lawyer – and to the client, because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and

devotedly represent the client's best interests (see, for example, Model Rule 1.7(a)(2), which prohibits an attorney from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer).

It must be admitted that human nature is such that an attorney who – for whatever reason – has an aversion to a client or a case will not be able to represent that client or case as well as could an attorney who has no such aversion. For that reason, recognizing an attorney's unfettered freedom to choose which clients and cases to accept and which to decline serves the best interests of the client.

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. "Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective." An Honest Calling: The Law Practice of Abraham Lincoln, Mark A. Steiner, Northern Illinois University Press (2006).

Indeed, as noted above, the Model Rules themselves recognize this principle in that Model Rule 6.2(c) itself recognizes that a client or cause that is repugnant to the attorney may impair the lawyer's ability to represent the client.

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish lawyer be forced to represent a neo-Nazi? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the proposed amendments would do.

For these reasons, too, the Commission should reject the proposed amendments.

C. The Proposed Amendments Would Be Contrary To National Trends And Exacerbate Constitutional Infirmities Already Associated With Various State Actions Amending Rule 8.4 And Comment [3].

In its efforts to amend Model Rule 8.4 the Committee appears to be motivated –at least in part – by the fact that some states have amended their Rules 8.4 in ways similar to what the ABA is considering now (see the third paragraph on page 1 of the Committee's Working Discussion Draft). But, in fact, only a small number of states have done so, and rather than such state action constituting a reason for amending Model Rule 8.4, such state actions have actually highlighted constitutional problems with amending Rule 8.4 in the manner contemplated here.

1. **Only A Minority Of States Have Amended Their Rules 8.4 In Ways Similar To What The Commission Is Contemplating, And The Recent Trend Is To Reject Such Amendments.** First, it should be noted that most states have not, in fact, amended their Rules 8.4 in the way the Commission is considering here. Indeed, not only have many states not amended their Rules 8.4, but 18 states have not even adopted Model Comment [3] in *any* form, let alone elevated it into Rule 8.4. And only 17 states have elevated Comment [3] or some version of it into Rule 8.4 itself. This refutes the argument that the ABA needs to amend the Model Rule so as to "keep up" with the states.

Indeed, not only have the majority of states not elevated Comment [3] into their Rules 8.4, but the trend is actually to reject such actions. For example, in just the past few years the Arizona Supreme Court rejected an attempt by the state bar to elevate Comment [3] into Arizona's Rule 8.4 and rejected two attempts to add "gender

expression" to Comment [3]'s list of protected classes; the Tennessee Supreme Court rejected the Tennessee Board of Professional Responsibility's attempt to add a non-discrimination provision as part of its Rule 8.4; the North Carolina Supreme Court rejected the North Carolina Bar's attempt to add a non-discrimination provision to the Preamble of its Code of Professional Conduct; and the Oregon Supreme Court rejected that state bar's attempt to elevate Comment [3] into its Rule 8.4.

These attempts have all failed because the dangers these provisions present to attorneys have become apparent. For example, New Hampshire declined to adopt Model Rule 8.4(d) and Comment [3] citing free speech and free assembly concerns.

The clear current trend, then, is for states to reject Model Comment [3] and non-discrimination provisions like it. That being the case, for the ABA to amend Model Rule 8.4 in the way being contemplated here would, in fact, be contrary to – rather than in line with – what states are currently doing.

2. **State Actions To Amend Rule 8.4 In The Way Contemplated Here Have Highlighted The Constitutional Infirmities Associated With Similar Non-Discrimination Provisions.** As noted above, the proposed amendments divorce the new Rule from any requirement that the proscribed conduct prejudice the administration of justice. In addition to radically departing from the historic principles of Rule 8.4, these changes to Rule 8.4 raise serious First Amendment issues because the new Rule would infringe upon attorneys' free speech rights.

This problem has drawn academic attention. For example, a recent article in the *Georgetown Journal of Legal Ethics* discusses the free speech issues raised when Comment [3] of Model Rule 8.4 is elevated into Rule 8.4 itself. The author – after

pointing out the fact that lawyers retain free speech rights even when engaging in professional activities – concludes that there is no reason or justification to censure a lawyer's speech unless such speech, if not limited, will have a concrete prejudicial effect on the administration of justice, and that infringing on lawyers' free speech rights when the prohibited speech does not have such a prejudicial affect on the administration of justice raises serious First Amendment issues. *Lawyers Lack Liberty: State Codifications Of Comment 3 Of Rule 8.4 Impinge On Lawyers' First Amendment Rights,* 28 Geo. J. Legal Ethics 629 (Summer 2015).

Due to the fact that the proposed Model Rule amendment severs the new Rule from any requirement that the speech and conduct being proscribed prejudice the administration of justice, it is subject to constitutional challenge. For this reason, as well, the proposed amendments to Model Rule 8.4 should be rejected.

D. The Proposed Amendment Is Unconstitutionally Vague And Overbroad.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy

matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of the proposed Rule violates these principles.

1. **The Term "Harass" Is Unconstitutionally Vague.** The proposed amendment prohibits attorneys from *harassing* anyone on the basis of one of the protected classes. But the term "harass" is not defined in the proposed Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

   Does expressing disagreement with someone's religious beliefs constitute harassment based on the basis of religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment? Indeed, the proposed Rule – unlike the current Model Comment [3] – does not even expressly require "words or conduct" in order for there to be "harassment."

   Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *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.").

In short, because the term "harass" is so vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

2. **The Term "Discriminate" 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.*" Merriam-Webster On-line Dictionary, http://www.meriam-webster.com/dictionary/discriminate.

But – given that definition – a legitimate question can be raised as to what sorts of behavior are, in fact, encompassed by the proposed Rule's proscription against *discriminating* on the basis of one of the protected classes. What constitutes "unfairly" treating a person differently from others? One might assume the proscription applies to "unfairly" declining certain clients – whatever that means. But is it broader than that and, if so, how much broader? To what sorts of behavior does the proposed Rule apply? Would it apply to an attorney making an offensive comment that could be perceived as relating to a protected class member? Would it

apply to an attorney writing an article for a legal publication, or giving a speech? Would it apply to an attorney's internal law firm practices – such as hiring and employee disciplinary decisions?

It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior 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. It provides a description of what, specifically, is being prohibited: "[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.

Unlike other non-discrimination enactments, however, the amendments proposed here simply state that "*It 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*" – leaving to the attorney's imagination what sorts of behavior might be encompassed in that proscription.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know precisely what behavior is being proscribed, and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the terms used, the proposed amendments are subject to constitutional challenge. For that reason, as well, the proposed amendments should be

rejected.

E. The Proposed Amendments Perpetuate The Problematical Policy Of Creating A Never Ending List Of Specially Protected Classes To Discrimination Provisions.

In addition to elevating current Model Comment [3] into Model Rule 8.4, the Commission's proposed amendments would add three additional classes to the ever growing list of specially protected groups. The current Model Comment [3] protects "*race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.*" The proposed amendments would add "ethnicity," "gender identity," and "marital status" to that list. The phenomenon of ever-growing, never-ending lists of specially protected classes in non-discrimination laws raises a variety of problematic issues.

1. **The List of Specially Protected Classes Includes Classes That Are Not Even Objectively Definable.** The proposed amendments continue the apparently never-ending process of adding specially protected classes to anti-discrimination laws, rules, and regulations, including judicial and professional codes of conduct. Indeed, this process has now reached the absurd result that the proliferating classes cannot even be rationally identified or objectively determined.

   For example, the Commission itself admits that "*Research failed to reveal either a definition for the term* [socioeconomic status] *or its application in any disciplinary context*." And yet this class has been protected in Comment [3] to Model Rule 8.4 for years – which suggests that non-discrimination provisions and the classes they protect are more likely the result of unrestrained political agendas than of thoughtful responses to demonstrated needs.

Likewise, the terms "sexual orientation" and "gender identity" are indefinable. Even scholars who regularly study sexual orientation cannot agree on a definition for or an understanding of that term. 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.*").

Further, neither sexual orientation nor gender identity is objectively determinable. Sexual orientation is certainly not objectively observable. Indeed, if one were to assume another's sexual orientation by reference to their public presentation and behavior, such in and of itself might be considered discriminatory. And "gender identity" is, by definition, completely subjective, depending entirely upon a person's self-perception, which may have nothing to do with how they objectively appear to others. The concept is malleable and subject to change. There is absolutely no requirement that someone have a temporally consistent "gender identity." In fact, proponents of gender identity protection admit that "gender identity" is not only indefinable and changeable over time but also that different "gender identities" may exist simultaneously and in different contexts. See, for example, *Self-Determination In A Gender Fundamental State: Toward Legal Liberation Of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 104 (2006) ("[I]*ndividuals may identify as <u>any combination</u> of gender identity referents <u>simultaneously</u> or identify <u>differently in different contexts</u> or communities. Furthermore, two individuals may deploy the same signifier to identify themselves or their communities, <u>but mean very different things</u> by the descriptor they choose. And <u>various individuals may view one person's gender differently</u> and thus deploy*

different gender signifiers to refer to that individual.")(our emphasis). The article is written by a proponent of a "right to gender self-determination" who posits "*the addition of <u>infinite</u> new classifications of individuals' genders within and outside of the gender categories society currently comprehends.*" (our emphasis).

Consequently, under the Commission's proposed amendments, attorneys are being directed to refrain from harassing or discriminating against classes that no one can even define, let alone objectively perceive or rely upon as having any objectively consistent existence. Such a Rule is unreasonable.

2. **The Lists Of Specially Protected Classes In The Various Legal Conduct Codes Are Inconsistent.** Attempting to create and maintain a list of specially protected classes results in inconsistency and brings disrepute upon the legal profession because different classes are protected in different professional codes.

For example, Rule 2.3 of the ABA Model Code of Judicial Conduct currently protects race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, and political affiliation. But Comment [3] of Rule 8.4 of the Model Rules of Professional Conduct, although listing race, sex, religion, national origin, disability, age, sexual orientation and socioeconomic status in common with the Judicial Code, does not list ethnicity, gender, or political affiliation, which the Judicial Code does. And adopting the proposed amendments to the Rules of Professional Conduct will *still* not bring the two codes into conformance with one another, since the Model Judicial Code will still include gender and political affiliation, which the Model Rules will not, and will not include gender identity, which the Model Rules will include. This inconsistency

is further evidence that protected class theory may be driven more by the changing winds of political expediency than by any sort of demonstrated need.

In addition, including a list of specially protected classes factionalizes society and creates a distinction between those who are protected and those who are not. This practice of identifying groups of people – giving some of those groups and not others legal protection – pits groups of people against each other and conveys the impression that the ABA values certain sorts of people, but not others. Why does the proposed Model Rule protect physical characteristics such as race, disability, and age, but not height or weight? See http://en.wikipedia.org/wiki/Height_discrimination and http://www.obesityaction.org/weight-bias-and-stigma. Or why does the proposed Model Rule protect marital status but not discrimination against other familial statuses, such as Family Responsibility/Caregiver (FRC) status? http://worklifelaw.org/frd/faqs/. The answer, of course, is that there is no *principled* reason why such is the case. Which groups are protected and which are not appears to be the result of simple political pressure, and nothing more. If the members of a certain interest group bring sufficient political pressure upon the ABA, the group gets protection. If not, they don't. Such a construct is bound to bring the ABA into disrepute and raises the question whether the ABA is really interested in justice, or is simply the mouthpiece of special interest groups.

If the ABA were really interested in prohibiting discrimination, it would prohibit invidious discrimination against everyone. Instead, it picks and chooses which groups to protect and which to leave unprotected.

3. **The List Of Specially Protected Classes Has Deprived The ABA Of Any Principle Protecting The ABA From Future Interest Group Pressure To Further Expand The List To Include Still Other Protected Classes.** Even now there are additional groups claiming that their peculiar characteristics merit special recognition and protection. For example, The National Association to Advance Fat Acceptance (NAAFA) has resolved "[t]hat 'height and weight' be included as a protected category in existing local, state, and federal civil rights statutes." And the Wesleyan University Office of Residential Life has recognized no fewer than 15 "sexually or gender dissident communities," represented by the acronym LGBTTQQFAGPBDSM. See http://www.wesleyan.edu/reslife/housing/program/open_house.htm).

The Township of Delta, Michigan illustrates how enthrallment to the idea of protected classes results in an ever-growing and never-ending list of protected groups. Delta Township's discrimination ordinance has expanded to currently protect no fewer than 16 distinct classes, including race, color, religion, national origin, sex, age, height, weight, marital status, physical limitation, mental limitation, source of income, familial status, sexual orientation, gender identity, and gender expression.

Delta Township's experience illustrates how setting forth a list of specially protected classes establishes a construct that leads to a never-ending parade of constituents attempting to advance their agendas and enshrine their favored characteristics or behaviors within the protected classes. Arizona provides a recent example of this disturbing phenomenon.

In Arizona those seeking recognition for and protection of certain sexual behaviors in Arizona's Rules of Professional Conduct sought and were granted recognition of "sexual orientation" as a protected group. But that proved insufficient to satisfy the claims of those who sought special recognition and protection based on "gender identity," which was added to Comment [3] to Rule 8.4 of the Arizona Attorney Conduct Code in 2003 (the only state, by the way, that, to our knowledge, has added "gender identity" to Comment [3]). However, the inclusion of those two groups *still* proved insufficient to satisfy those who sought special recognition and protection based on "gender expression," and advocates pressed for that addition in 2011.

As in Arizona, it is only a matter of time before additional groups come forward to press their peculiar interests on the ABA – and on what principle will the ABA be able to reject such overtures?

For all these reasons, the Commission should reject the proposed amendments and resist the temptation to add any new protected classes to the current Model Comment [3].

F. There Is No Demonstrated Need For The Proposed Amendments.

It is striking to note that nowhere, in either the Goal III entities' letter or in the Committee's Working Discussion Draft, is any evidence presented that harassment or invidious discrimination actually exists to any significant degree in the legal profession – or that, if it does exist, it is such a serious and widespread problem that the Model Rules must be amended, and attorneys' professional and constitutional rights infringed, to address it. If such evidence exists, one would have expected to see it presented.

Where *is* the evidence that the legal profession is so rife with harassment and invidious discrimination that the Rules of Professional Conduct simply *must* be amended to address the problem? Where are all the complaints that have been filed against attorneys under Comment [3] of the existing Model Rule 8.4(d), despite the fact that Model Comment [3] has been in effect for years? Where are all the complaints that have been filed against attorneys in those states that have already taken it upon themselves to elevate Comment [3] into their Rules 8.4? Other than in Indiana – which is enforcing its new Rule 8.4(g) as a pure speech code and professionally disciplining attorneys for simply uttering politically incorrect speech – we dare say such complaints are virtually non-existent. And they are virtually non-existent because, in fact, neither harassment nor invidious discrimination are actually problems of any great magnitude within the legal profession.

Those behind the effort to amend Model Rule 8.4 evidently believe that – despite the lack of any actual evidence that attorneys are, in fact, engaged in invidious harassment and discrimination – many of their fellow lawyers are so vile and depraved that, unless the professional disciplinary authorities are armed with a new precedent-setting tool enabling them to encroach upon the sanctity of all lawyers' professional autonomy, not to mention their personal consciences and constitutional rights – dictating to attorneys who they must represent and which cases they must accept and disciplining them for using politically incorrect speech – lawyers, on the whole, cannot be trusted to behave honorably. We, who join this Comment, have greater respect for and confidence in our fellow members of the legal profession. And we take it upon ourselves – perhaps a bit presumptuously – to speak on their behalf.

There is no demonstrated need for the proposed amendments to Model Rule 8.4 – and the effort to enshrine these amendments in the Model Rules is a personal insult to members of

the legal profession. It is the equivalent of using a sledge hammer to swat a gnat. And – perhaps most disturbing of all – by enacting these amendments, attorneys appear to be forging their own chains.

G. The Proposed Amendments Would Result In Placing Significant And Unnecessary Burdens Upon Both Attorneys And The Attorney Disciplinary System.

In addition to all the substantive issues discussed above, the proposed amendments also raise practical issues, because we should not for one instant entertain the belief that it will be easy to determine with any degree of certainty whether an attorney is declining a case or client for valid professional reasons or due to an allegedly discriminatory reason.

Given the fact that no two cases are the same, how would one, in fact, determine that the reason an attorney declined a particular case was because of the prospective client having been a member of one of the protected classes, rather than because the attorney was exercising the attorney's independent professional judgment as to the merits of the case?

Further, a prospective client who is a member of one of the protected classes could easily allege that an attorney who declined their case did so for discriminatory reasons, when in fact the attorney did so for perfectly legitimate professional reasons. Indeed, the new Rule may create such apprehension that attorneys will feel compelled to accept cases they might otherwise legitimately decline, simply for fear that turning them away may result in having to face a disciplinary complaint. And because there are no adverse consequences imposed on those who bring such claims against attorneys, there is no disincentive for such claimants to refrain from making unfounded allegations against attorneys.

As a consequence, not only will the proposed amendments place attorneys in harm's way

for simply exercising their legitimate professional judgments, but the proposed amendments will result in an increased burden upon disciplinary authorities called upon to sort out these allegations in the messy and protracted litigation that such cases will present.

H. The Code Of Judicial Conduct Cannot Serve As A Model For The Rules Of Professional Conduct.

The Goal III entities refer to ABA Model Code of Judicial Conduct Rule 2.3 – which prohibits judges from exhibiting bias or prejudice in the performance of their judicial duties – as one reason why the Commission should consider making the proposed amendments to the ABA Model Rules of Professional Conduct. But comparing the Model Code of Judicial Conduct to the Model Rules of Professional Conduct is misplaced.

Judges have different professional roles and obligations than do attorneys. Judges, in order to effectively administer justice, must be neutral and unbiased, both in appearance and, one would hope, in actuality. But that's not true of attorneys. Indeed, not only are attorneys not expected to be neutral and unbiased, they are expected to be just the opposite – to zealously and unashamedly advocate their clients' positions.

Therefore, although it can be safely said that judges should not be biased, attorneys are *expected* to be so. To that extent, one cannot compare the Rules of Professional Conduct to the Code of Judicial Conduct. Therefore, the fact that the Code of Judicial Conduct prohibits judges from engaging in certain conduct does not translate into a reason for imposing the same or similar proscriptions on attorneys.

III. Conclusion

For all the foregoing reasons, the signers of this Joint Comment respectfully request the

Committee to reject the proposed amendments to Rule 8.4 and Comment [3] of the ABA Model Rules of Professional Conduct.

Respectfully submitted,

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