March 10, 2016

Submitted via E-Mail

American Bar Association
Standing Committee on Ethics and Professional Responsibility
321 North Clark Street, 17th Floor
Chicago, IL 60654

Re: Comments on Proposed Amendment to Model Rule 8.4

Dear Committee Members:

The Committee has requested comments on a proposed amendment to Model Rule 8.4. Draft Proposal to Amend Model Rule 8.4 (Dec. 22, 2015) (“Draft Proposal”). The amendment would make it “professional misconduct for a lawyer to … 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.” Id. at 2.

We are concerned that some applications of the proposed Model Rule would treat as professional misconduct legal advice from, and other conduct by, a lawyer that are not only lawful but, in many cases, required in the zealous representation of a client.¹

1. Lawyers employed by or representing a religious organization should not be covered by a rule forbidding employment discrimination on the basis of religion.


The U.S. Department of Justice (“DOJ”) has gone a step further. In a formal opinion, DOJ’s Office of Legal Counsel has concluded that, even in the absence of a statutory exemption for religious organizations, federal law is plausibly read to protect

¹ Some of the comments made in this letter about “discrimination” may apply as well to the rule barring “harassment” depending on how broadly or narrowly one construes the latter term.
the right of religious organizations to make employment decisions based on religion. Office of Legal Counsel, Memorandum Opinion, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act” (June 29, 2007). The DOJ opinion is based on the Religious Freedom Restoration Act, a federal statute that has been in place for over two decades. About 21 states have passed similar statutes. National Conference of State Legislatures, State Religious Freedom Restoration Acts (Oct. 15, 2015).

This protection has both a common law and constitutional dimension. From an early date, the Court recognized that a person who voluntarily associates with a religious organization, whether as an employee or otherwise, implicitly consents to the religious and moral convictions that animate and underlie the organization’s work. Later cases make clear that the right of church autonomy, which includes the right of a religious organization to use religious criteria in making employment decisions, is protected under the Religion Clauses of the First Amendment. This right is an essential component of the freedom such organizations enjoy to profess, teach, and practice their religion.

To its credit, Draft Comment 3 states that proposed Rule 8.4 “does not apply to … conduct protected by the First Amendment.” But this is insufficient for at least two reasons.

First, as the Committee has acknowledged, “statements in the Comments are not authoritative.” Draft Proposal at 1. Indeed, the impetus for proposed Model Rule 8.4, as recited in the commentary accompanying it, is to provide an authoritative source for treating certain specified forms of harassment and discrimination as unprofessional conduct rather than relegate such norms to the comments, which the Committee acknowledges are not authoritative.

Second, as noted above, the right of religious organizations to consider religion in employment is not confined to the First Amendment. It is also grounded in federal and state statutes, state constitutional provisions, and other authority. It should not be

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2 Available at www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf

3 Available at www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx


6 E.g., Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Col. L. Rev. 1373, 1408-09 (1981) (“[C]hurches are entitled to insist on undivided loyalty from [their] employees. The employee accepts responsibility to carry out part of the religious mission…. [C]hurches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.”).
professional misconduct to act as the law—be it the First Amendment or some other provision—permits.

That is not only the law; it is common sense. No one complains when an organization committed to the advancement of a political or social cause requires that its employees, both on and off the job, share its commitments. Likewise there is no reason for complaint when a religious organization requires that its employees share its religious convictions as manifested in each employee’s own speech and conduct. Religious organizations, and lawyers employed by or representing them, do not act unlawfully—and lawyers should not be deemed to have engaged in unprofessional misconduct—when they carry out those requirements.

For these reasons, the ABA should recognize an exemption from the proposed Model Rule forbidding discrimination on the basis of religion for lawyers employed by or representing religious organizations.

Example: James is the general counsel of a religious denomination. The denomination has an opening for a deputy general counsel and prefers a co-religionist for the position. Under federal and state law, it may act on such a preference. James does not engage in professional misconduct when he tells applicants that a co-religionist is preferred.

2. Lawyers employed by or representing a religious organization should not be covered by a rule that, in its application, would impede the organization’s right to adopt and enforce religiously-based employee conduct standards.

A religious organization may insist that persons it selects to further its mission and work—including its lawyers—share and live out the religious views of that organization, including views about marriage and human sexuality. That is, religious organizations may lawfully insist not only that their employees profess a set of beliefs, but that they actually practice them, for otherwise, the religious organization would be compelled to retain employees who undermine its religious mission by their conduct.7

A lawyer for a religious organization should not be subject to a charge of professional misconduct for implementing these conduct standards directly as a supervisor, or for facilitating their implementation as a legal advisor. If, for example, the term “sexual orientation” were construed to include same-sex sexual conduct,8 or the

7 See 42 U.S.C. 2000e(j) (defining “religion” to include both beliefs and practices). See also Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) (holding that parochial school could discharge teacher who, by divorcing and remarrying, had “publicly engaged in conduct regarded by the school as inconsistent with its religious principles”); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (New Jersey law forbidding discrimination based on sexual orientation was an unconstitutional infringement of the Boy Scouts’ right of expressive association).

8 Federal courts of appeals have uniformly held that Title VII does not forbid discrimination on the basis of sexual orientation. Larson v. United Air Lines, 482 Fed. App’x 344, 348 n.1 (10th Cir. 2012); Gilbert v.
term “marital status” were construed to include same-sex unions, then the application of the proposed Model Rule to lawyers for a religious organization that has a moral or religious objection to sexual conduct outside of marriage between a man and a woman could infringe upon the organization’s constitutional and statutory right to hire and retain staff, including legal staff, whose beliefs and practices are consistent with those of the organization.

Example: Jill is a high school teacher at a private religious school. The school has employee conduct standards forbidding public advocacy in support of positions to which the school has a religious objection. In her free time, Jill publicly advocates in support of a right to abortion notwithstanding the school’s religious objection to abortion. The school asks Bill, its lawyer, whether it can lawfully terminate Jill’s employment based on her abortion advocacy. Bill does not engage in professional misconduct when he advises the school of legal authority in support of its position that it may lawfully terminate Jill’s employment. He has a professional and ethical duty to fully and correctly advise his client.

One solution to this problem would be to clarify—whether by narrowing the definition of the prohibition or by creating an exception to that prohibition—that the proposed Model Rule does not forbid lawyers from implementing, or providing legal advice in aid of implementing, moral conduct standards of religious organizations.

3. Lawyers do not engage in professional misconduct when they advise a client about otherwise protected categories that are lawfully considered in making employment and other decisions.

It is not professional misconduct to advise a client about what may lawfully be considered in making employment and other decisions (and, in fact, it may be malpractice not to so advise a client) even if they involve categories specified in Model

9 Although the proposed Model Rule is silent on the point, the commentary accompanying the proposed Rule implies that “marital status” was included in the Rule to protect same-sex unions. Draft Proposal at 5.

10 See Curay-Cramer v. Ursuline Academy of Wilmington, 450 F.3d 130 (3rd Cir. 2006) (school did not engage in unlawful sex discrimination or retaliation when it fired teacher for abortion-related advocacy).
Rule 8.4. For example, when a protected category is a bona fide occupational qualification or, in a religious workplace, when consideration of a protected category is permissible because of the ministerial exception, the lawyer may, without risk of being charged with professional misconduct, advise the client accordingly. Indeed, under these circumstances, the lawyer may have a professional and ethical duty to do so.

Example: Tom is in-house counsel to a private hospital. The hospital asks him whether, in hiring an orderly to serve female patients, it may lawfully consider the applicant’s sex. Tom does not engage in professional misconduct when he correctly advises the hospital that there is case law, likely applicable in this case, allowing it to prefer a female applicant for female patients. Tom has a professional and ethical duty to fully and correctly advise his client.11

Example: Mary is counsel to a church. The church has an opening for an ordained pastor. The denomination with which the church is affiliated ordains only men. The church asks Mary if its decision not to allow female applicants for the position violates the law. Mary does not engage in professional misconduct when she correctly advises the church of legal authority allowing it to consider only male candidates.12 Mary has a professional and ethical duty to give the church correct legal advice. In addition, if Mary serves on the search committee for the position, she does not engage in professional misconduct by not interviewing female applicants.

The proposed Model Rule should include an exception stating that it is not professional misconduct to advise a client about categories that are lawfully considered in making employment and other decisions.

4. Lawyers do not engage in professional misconduct when they represent (or decline to represent) someone in a particular matter, or take (or decline to take) a particular position in advocacy.

Representing unpopular persons and causes is part of the historic heritage of the law and legal system in this country. No lawyer should be subject to a claim of

11 See Jones v. Hinds Gen. Hosp., 666 F. Supp. 933 (S.D. Miss. 1987) (male patients in a hospital have a right to a hospital orderly who is male); Local 567 v. Michigan Council, 635 F. Supp. 1010 (E.D. Mich. 1986) (patients in a state mental hospital have a right to a personal hygiene aide of the same sex); Backus v. Baptist Med. Ctr., 510 F. Supp. 1191 (E.D. Ark. 1981) (ob-gyn patients have a privacy right to an obstetrical nurse who is female), vacated as moot, 671 F.2d 1100 (8th Cir. 1982); Fesel v. Masonic Home of Delaware, 447 F. Supp. 1346 (D. Del. 1978) (female residents of a retirement home have a right to a nursing aide who is female). In all the cited cases, the right to patient privacy trumped a law forbidding employment discrimination based on sex.

professional misconduct because he or she represents an unpopular person or advances an unpopular cause.

Similarly, no lawyer should be subject to a claim of professional misconduct because he or she declines to represent someone on a particular matter. This would include situations in which the lawyer has a conflict of interest, including a religious or moral objection to the client’s objective. For example, individual prosecutors do not run afoul of the rules of professional responsibility if, for religious or moral reasons, they decline to represent the government in death penalty sentencing proceedings.

Example: Pam represents a baker in a proceeding in which discrimination based on sexual orientation has been alleged for the refusal to provide a wedding cake. Pam does not engage in professional misconduct by representing the baker in this matter or by advancing the position that the baker’s conduct is non-discriminatory.

Example: Sharon prepares prenuptial agreements. She declines, however, to provide such an agreement for her clients, Harry and Dennis, because she believes, on moral and religious grounds, that marriage is the union of one man and one woman. Serving as counsel in such a matter, Sharon believes, would be an unacceptable form of moral cooperation. Her decision not to provide this particular service to Harry and Dennis does not constitute professional misconduct, and in fact Sharon may have a duty to decline given her personal conflict of interest.

The proposed Model Rule should state that it is not professional misconduct to represent or decline to represent someone in a particular matter, or to take or decline to take a particular position in advocacy.

5. **Lawyers should not be subject to a rule forbidding the adoption and enforcement of workplace rules regarding grooming and garb, or the reservation of restrooms or locker rooms, based on biological sex.**

Advocates have increasingly argued that a law forbidding discrimination on the basis of “sex” or “gender identity” precludes the enforcement of workplace rules regarding grooming and garb, and the reservation of restrooms and locker rooms, based on biological sex. The law is to the contrary. Currently there is no federal statute forbidding discrimination based on gender identity. Although federal law bans employment discrimination based on sex, courts have held that workplace rules on dress, grooming, and restroom and locker room usage, when based on biological sex, do not violate federal law.\(^{13}\) Such rules are lawful, and further basic and legitimate expectations

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\(^{13}\) Dress and grooming: *Jesperson v. Harrah’s Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (“grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex” under title VII); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) (“there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards”), cited with approval in
of privacy. Therefore they are not properly a basis for a finding of professional misconduct.

Example: Jane is the managing partner of a law firm. Sarah and Tom are first-year associates. Sarah complains to Jane that Tom has been using the women’s restroom and that Sarah and other women at the firm view this as a form of harassment and an invasion of their privacy. Though he is a biological male, Tom says that he identifies as a woman and therefore should be allowed to use the women’s restroom. Jane does not engage in professional misconduct when she tells Tom that he must use the men’s restroom or a private bathroom or be subject to discipline if he refuses. In fact, the firm may owe Sarah and other employees a legal duty to protect their reasonable expectations of privacy.

Accordingly, the Model Rule should include an exception to allow workplace rules regarding grooming and garb, or the reservation of restrooms or locker rooms, based on biological sex.

**Conclusion**

The Committee should make explicit in the text of the Model Rule that:

(a) the rule against discrimination based on religion does not apply to lawyers employed by or representing a religious organization;

(b) the rule against discrimination does not apply to lawyers employed by or representing a religious organization where application of the rule would

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*Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224-25 (10th Cir. 2007); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at *8-10 (N.D. Ind. Jan. 5, 2009) (termination of transgender employee who refused to conform to dress code and grooming policy did not violate Title VII).

Restrooms: *Etsitty*, 502 F.3d at 1225 (“an employer’s requirement that employees use restrooms matching their biological sex … does not discriminate against employees who fail to conform to gender stereotypes”); *Johnson v. Fresh Mark*, 98 Fed. App’x 461 (6th Cir. 2004) (an employer did not violate Title VII when it refused to allow an employee, born male but preparing for sex change surgery, to use the women’s restroom). Title IX’s ban on sex discrimination in education is to the same effect. *G.G. v. Gloucester County School Board*, No. 4:15cv54, 2015 WL 5560190 at *6-9 (E.D. Va. Sept. 17, 2015) (school did not violate Title IX by forbidding biological female identifying as male to use the boys’ restroom); *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657, 672-73 (W.D. Pa. 2015) (“University’s policy of requiring students to use sex-segregated bathroom and locker room facilities based on students’ natal or birth sex, rather than their gender identity, does not violate Title IX’s prohibition of sex discrimination”).

14 The expectation of privacy has been recognized even in contexts when there are serious competing interests, such as prison security. *See Everson v. Mich. Dep’t of Corr.*, 391 F.3d 737, 757 (6th Cir. 2004) (“[A] convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners.”).
impede the organization’s right to adopt and enforce religiously-based employee conduct standards;

(c) the rule against discrimination does not apply to lawyers who advise their clients about categories that are lawfully considered in making employment and other decisions;

(d) the rule against discrimination does not require a lawyer to represent someone in a particular matter or to take a particular position in advocacy; nor does it forbid a lawyer to decline representation on a particular matter or advancement of a particular position in advocacy;

(e) the rule against discrimination based on sex and gender identity does not preclude workplace rules regarding grooming and garb, or restroom or locker room usage, based on biological sex.

If the Committee is unable to modify the proposed Model Rule to take into account the scenarios we have described in this letter, then it should not proceed with its proposed revision to the Rule.

Thank you for considering these comments.

Respectfully submitted,

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