LETTER REPRESENTING LAW STUDENTS AND ALUMNI,
REGENT UNIVERSITY SCHOOL OF LAW

March 9, 2016

Standing Committee on Ethics and Professional Responsibility
American Bar Association
321 N. Clark Street
Chicago, IL 60654-4714

VIA E-MAIL

Re: Proposed Amendment of Model Rule 8.4, ABA Model Rules of Professional Conduct

Dear Committee Members,

Thank you for the opportunity to make public comments on the draft proposal for an amendment to Rule 8.4. This letter represents the perspective of 39 law students and alumni of Regent University School of Law. As members and eventual members of the bar, we are continually motivated by the assurance that we will be able to practice law with integrity before our clients and before God. Knowing that we will be held to a high standard of integrity by the bar is one reason why we have a high regard for the legal profession and why we hold the Model Rules of Professional Conduct with the highest respect.

The proposed amendment to Rule 8.4 would make it professional misconduct for an attorney to “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” in any “conduct related to the practice of law.” Previously, this language appeared only in the comments section. We respectfully urge the Committee to set aside the amendment, or at the very least to narrow its language, because the amendment seriously conflicts with Model Rules 1.16, 6.2, and 8.2.

The Model Rules of Professional Conduct currently give an attorney discretion to decline representation of a client who insists on taking action that the attorney considers to be “repugnant” or with which the attorney has a “fundamental disagreement.” Model Rules of Prof'l Conduct r. 1.16(b)(4). Permission to decline representation because the attorney considers the client’s cause to be repugnant even extends to declining appointments by a tribunal when the client’s actions are likely to impair the client-lawyer relationship. Model Rules of Prof'l Conduct r. 6.2. These are significant provisions because once an attorney undertakes representation, she must “abide by a client’s decisions concerning the objectives of representation . . . .” Model Rules of Prof'l Conduct r. 1.2. Therefore it is important, if a client’s goals are repugnant to a lawyer or she has a fundamental disagreement with them, that the
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lawyer is permitted to decline representation because taking on representation would create a duty and obligation on the lawyer to further the client’s goals and objectives.

as attorneys and future attorneys, we look forward to advocating diligently and zealously for our clients, to protect their interests and achieve their goals. however, the amendment as drafted has the potential of creating an obligation to accept representation of a client whose cause is so repugnant that it would certainly impair the client-lawyer relationship. the scope of the proposed amendment encompasses all “conduct related to the practice of law,” which would include the decision to represent or decline representation. while the comments section explains that the draft amendment does not alter the circumstances under which a lawyer is permitted to decline representation, this language will not likely be strong enough to overcome the direct conflict that the text of proposed rule 8.4(g) creates with model rule 1.16(b)(4). to prevent this unintended consequence, the language regarding non-discrimination should remain in the comment section and not be moved to the text of rule 8.4.

if the amendment is to be adopted, it is imperative that the language be amended to resolve the tension created between the model rule’s acknowledgment that a lawyer may find a client’s cause to be “repugnant” and the idea of “harassment.” to resolve this tension, the rule itself should: (1) limit the scope of the provision to the representation, excluding an attorney’s decision of whether to take on representation of a client; (2) define “harass” as “conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice”; and (3) include language expressly stating that a decision to decline representation may be based on religious, moral, or ethical considerations.

furthermore the draft amendment, in its current state, will create confusion when it interacts with an attorneys’ duty to report professional misconduct. an attorney’s duty to report a violation of the professional rules is contingent on whether an attorney knows that a violation has occurred. model rule of professional conduct 8.3 (a) (stating that “[a] lawyer who knows that another lawyer has committed a violation . . . shall inform the appropriate professional authority”). without a specific definition of “harassment,” and without the requirement of “knowing” harassment, the existence of duty to report violations of rule 8.4(g) will be elusive at best and “open season” at worst. without a definition for “harassment”, there is likely to be confusion as to whether an attorney really knows or merely suspects that the rule has been violated and whether a duty to report exists.

for the foregoing reasons, we recommend against adopting the amendment as black letter misconduct. if the committee elects to adopt the amendment, we respectfully urge the committee to narrow its scope and define its terms more specifically. we adopt and support the recommended changes described on pages 14-16 of the christian legal society’s public comment, with particular emphasis on the
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recommendations to: (1) add the word “knowingly” before the word “harass”; (2) define “harass” as including “only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice.” Christian Legal Society Public Comment (citing Davis v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 633 (1999)); and (3) narrow the scope from “conduct related to the practice of law” down to “within the representation of a client.” Making these changes will help avoid many of the conflicts with other professional duties and avoid overbroad restrictions on an attorney’s speech and conduct.

Respectfully,

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