Submitted Electronically

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

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

Dear Committee Members:

Thank you for the opportunity to comment on the December 2015 Draft Proposal to Amend ABA Model Rule of Professional Conduct 8.4 and Comment 3 to the rule (the “Proposal”). Unfortunately, prior professional commitments prevent me from seeking the opportunity to discuss the Proposal with you in person. Although I write solely for myself and not on behalf of any corporation or organization, allow me to briefly introduce myself. I am a Managing Director with Aon Professional Services, where I consult with some 275 law firms on professional responsibility and liability issues. Before joining Aon in 2004, I was a partner in a major Midwestern law firm. I am enormously proud of Aon's substantial and longstanding commitment to diversity and inclusion, and I am equally proud of my former law firm’s diversity initiatives. In my mind, the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability is beyond question. At the same time, I urge the Committee to think carefully about whether the amendment of Rule 8.4 is an appropriate means of accomplishing broader policy or social goals regardless of their importance.

To start, I am aware of no demonstrated need to amend Rule 8.4 to prevent lawyers’ harassment of, or discrimination against, persons based on their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. We recently went through the extensive and thoughtful Ethics 20/20 process and Rule 8.4 emerged from that exercise without the addition of proposed Rule 8.4(g). Lawyers who discriminate or harass are already subject to liability under federal, state, and local anti-discrimination laws. In some instances they may face administrative actions. In short, there are sufficient means in place to sanction lawyers who engage in the
sort of lamentable behavior that proposed Rule 8.4(g) seeks to address and to deter such misconduct in the first place.

Second, the possible amendment of Rule 8.4 raises important practical questions. For example, what of a case where a lawyer is investigated by an administrative agency or sued civilly for alleged discrimination or harassment and is exonerated? Although we might hope that a state disciplinary authority would decline to prosecute the lawyer if he or she were also the subject of an unsuccessful administrative or civil action for the same conduct, nothing prevents such a prosecution. Nor does anything prevent a person from trying to use the disciplinary process to advance a civil or administrative action. It is no answer to say that some jurisdictions have already adopted forms of proposed Rule 8.4(g) and have reported no problems along these lines because such anecdotes are not evidence. Nor, for that matter, is past experience a reliable predictor of future conduct in circumstances such as these.

It is also debatable whether state disciplinary authorities are or can be equipped to handle allegations of the targeted misconduct if their supreme courts adopt proposed Model Rule 8.4(g). Again, there are ample public and private remedies available for discrimination and harassment by lawyers and others. Agencies and courts have developed sophisticated capabilities in resolving the complex and nuanced issues that characterize such disputes. In contrast, state disciplinary authorities generally lack the same capabilities, and they will be taxed by the need to develop the resources necessary to carry out the new responsibilities this Committee would foist on them.

Third, proposed Rule 8.4(g) and Comment 3 are at best clumsily worded and at worst deeply flawed. Proposed Rule 8.4(g) would make it professional misconduct for lawyers “in conduct related to the practice of law, [to] harass or knowingly discriminate” on the grounds stated. So, “discrimination” must be “knowing” for a lawyer to risk discipline under the proposed rule, but a lawyer may face discipline for unknowing “harassment.” That simply cannot be.

And while, according to the proposed comment, “a lawyer is usually not required to represent any specific person or entity,” proposed Rule 8.4(g) could expose a lawyer to possible discipline for declining to represent a person who is within a protected class even though the lawyer declined the representation for legitimate non-discriminatory reasons. The comment appears to make no exception for Model Rule 1.7(a)(2) personal interest conflicts of interest outside of the reference to a lawyer’s rights under the First Amendment. Beyond that, the carve out in the proposed comment for “the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation” may well solve nothing because by its terms Model Rule 1.16 addresses the declination of representations only in Rule 1.16(a) and nothing there applies in the current context. Although it might reasonably be argued that the reasons for withdrawal listed in Model Rule 1.16(b) impliedly extend to permit a lawyer to decline a representation for those reasons, disciplinary counsel have in their arsenals two appealing counter-arguments. First, hornbook rules of construction require the plain language of Rule 1.16 to be given its plain

Page | 2
meaning. Second, and relatedly, those same principles require a court or other authority to assume that the rule’s drafters meant what they wrote.

To conclude, not all of society's ills that touch the legal profession are appropriate subjects of rules geared toward professional discipline. I am concerned that the Proposal represents well-meaning but unsupported over-regulation of the legal profession and that it will unnecessarily complicate the practice of law.

Thank you for your consideration.

Sincerely,

Douglas R. Richmond

Douglas R. Richmond