



Via Mail and Email
July 22, 2016

Myles V. Lynk, Chair
ABA Standing Committee on Ethics and Professional Responsibility
c/o Dennis Rendleman
American Bar Association
312 N. Clark Street
17th Floor
Chicago, IL 60654

Re: Support of Resolution 109 to Amend Model Rule of Professional Conduct 8.4 to Prohibit Discrimination or Harassment in Conduct Related to the Practice of Law

Dear Mr. Lynk:

On behalf of the Hispanic National Bar Association (HNBA), the National Asian Pacific American Bar Association (NAPABA), the National Bar Association (NBA), the National LGBT Bar Association (National LGBT Bar), and the National Native American Bar Association (NNABA), we write to express our full support for Resolution 109 to amend Model Rule of Professional Conduct 8.4 to expressly prohibit discrimination or harassment on the part of a lawyer in conduct related to the practice of law.

Leaders from our organizations meet regularly to discuss issues of mutual concern and to advocate in support of our shared interests. Together, we represent the interests of almost 200,000 diverse lawyers, judges, law students, and 206 affiliate bar associations throughout the United States. Each of our organizations has a seat in the ABA House of Delegates.

Among our associations' highest priorities is to ensure equal representation of diverse attorneys throughout the legal profession. Resolution 109 squarely addresses this priority – a core value of the profession and of the American legal system – equality and fairness under the law. As leaders who often drive change in society, we have sadly seen that our profession has not demanded the same from its own members.

It is time for our profession to unequivocally demand that discrimination and harassment in conduct relating to the practice of law is unethical, and that all lawyers have the right to function in a profession that is free from such conduct. The ABA has already started down this path, with the establishment of Goal III, to promote full and equal participation in the association, our profession, and the justice system by all persons, and to eliminate bias in the legal profession and the justice system, with the 2007 addition of an anti-discrimination and anti-harassment provision to the ABA Model Code of Judicial Conduct, and the 2015 adoption by the House of Delegates of revised ABA Standards for Criminal Justice, which include anti-bias provisions in both prosecution and defense standards. It is now time for the ABA to adopt a black letter ethical rule staunchly prohibiting discrimination and harassment. We believe that history demonstrates that the status quo is not going to change without strong leadership.

In reviewing policy comments in opposition to the rule, we observe that they appear to be fundamentally rooted in the implicit belief that there is no real problem in the profession to be addressed because majority members have not themselves experienced such conduct. Real life examples from our experiences, and from the headlines, make it clear that discrimination and harassment persist in the profession. Our members regularly face discrimination and harassment in their day-to-day practice. There is a constant state of "otherness" that requires our members to justify their right to simply be an equal member at the bar or at the table. Far from a "presumption of competence,"¹ there exist requirements that our members demonstrate higher "objective" metrics to be taken seriously and/or to prove their value. These concerns play out in situations including, but not limited to, pay disparities and exclusion from case assignments, opportunities, development, sponsorship, or resources. Study after study has shown stagnant progress of women and diverse attorneys in the profession, against the backdrop of an America, and of a profession, that is becoming increasingly diverse. Unfortunately, diverse attorneys, already underrepresented in private law firms, have a disproportionately high attrition rate.

The Model Rules are not simply disciplinary standards, but rather set a minimum standard for lawyer conduct to be expected, regardless of whether the lawyer is disciplined for violating them. Lawyers are expected to conform their conduct to the Rules because they are professionals, not because they fear discipline. In this context, proposed Model Rule 8.4(g) is not aspirational. It sends the message that harassment and discrimination in conduct relating to the practice of law is prohibited, a necessary message.

Second, to address the concern that the proposed rule would open the floodgates to frivolous disciplinary complaints alleging discrimination or harassment, we simply observe that this has not occurred in any of the 23 jurisdictions which have ethical anti-discrimination and anti-harassment rules for lawyers, nor has it occurred in the many other non-legal professions that have such rules in their codes of ethical conduct.

Regulators in every state already know how to address non-meritorious claims of every ilk. They routinely and capably address such claims every day – and do so even in circumstance where the conduct does not necessarily relate directly to the practice of law. The profession

¹ Deborah L. Rhode, "Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that", *Washington Post*, May 27, 2015.

disciplines its members for misleading, deceptive or fraudulent conduct, regardless of its relationship to their practice. The profession disciplines its members for criminal conduct, regardless of its relationship to their practice. Proposed Model Rule 8.4(g) on the other hand, does require a relation to conduct relating to the practice of law. The proposed Model Rule is applied to a more narrow scope of conduct. Regulators know how and do distinguish and handle the meritorious cases and the non-meritorious cases.

Third, to the contention that discrimination and harassment complaints should be adjudicated in the first instance in the court system rather than the disciplinary system, we respectfully assert that such a requirement is discriminatory in and of itself, as there is no other model rule that requires such a precondition. A form of discrimination commonly faced by our members is one where facially neutral barriers are erected and applied only against those in our specific group, and no one else. It would be unfair and inconsistent if the rule creates barriers by requiring that claims be adjudicated differently from other ethical violations. It also sends the message that as a profession, we presume that complaints about discrimination and harassment are suspect from the start – when we make no such presumption for any other ethical complaint.

Such a precondition would also create burdensome obstacles to relief that would be largely insurmountable and in many respects illusory. Requiring a complainant to run the gauntlet of a public lawsuit to finality is against public policy. It encourages litigation, discourages settlement, and forces victims to face the prospect of publicly revictimizing themselves and likely committing career suicide in the process. This would be the forced result even where the complainant wants no money and only wants the behavior to stop. We would force a war when a complainant may only wish a resolution. All of this is even before addressing the fundamental problem: the discriminatory or harassing conduct.

Fourth, as to the scope of the rule, we agree that the Rule should apply to a lawyer's conduct across the board so long as that conduct is related to the practice of law, and that the Rule should not be limited in application only to certain categories of people or to certain aspects of a lawyer's practice, since the goal of the rule is to address the underlying conduct.

Finally, we note that the rule and its comments make clear that the proposed rule does not abrogate any of the other ethics rules, and that technical concerns with the application of the rule are well addressed in the proposed comments to the rule.

In the end, we think that the expressed concerns do not outweigh the deep need for the profession to take a stand, and pass an unequivocal rule. For all of the above reasons, we strongly support passage of Resolution 109, and the adoption of Model Rule 8.4(g). We thank the Standing Committee on Ethics and Professional Responsibility, and the cosponsoring Goal III entities, for this effort.

National Diverse Bar Associations Letter of Support for ABA Resolution 109
July 22, 2016

Sincerely,



Robert Maldonado
President
Hispanic National Bar Association



Jin Y. Hwang
President
National Asian Pacific American Bar Association



Benjamin Crump
President
National Bar Association



Eduardo Juarez
President
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Jennifer Weddle
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