

1     STATE OF ILLINOIS     )  
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7                   SUPREME COURT RULES COMMITTEE  
                         PUBLIC HEARING

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9                   ILLINOIS SUPREME COURT  
                  BOARD/COMMISSION/COMMITTEE/TASK FORCE

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11           Report of proceedings had at the public hearing  
12 held at the Administrative Office of the Illinois  
13 Court, 222 North LaSalle Street, 13th Floor, Chicago,  
14 Illinois 60601 inthe above-entitled cause before James  
15 Hansen, Committee Chairman, commencing at 10:32 a.m. on  
16 the 15th day of November, A.D., 2023.

1 CHAIRMAN HANSEN: Good morning, everybody.  
2 Thank you, everybody.

3 This is the Illinois Supreme Court Rules  
4 Committee. This is our public hearing. We are to get  
5 started at 10:30. We have a list of speakers, I'll do  
6 some introductory remarks, and then we'll proceed.

7 First of all, thank you all for coming. We have  
8 a list of speakers who have signed up today. As you can  
9 imagine, we have 10 minutes per speaker. As the chair,  
10 my job is to keep you to the 10 minutes; otherwise, we  
11 would be here for most of the day.

12 So my name is Jim Hansen. I'm the chair of the  
13 Committee. These are the other Committee members that  
14 are here to discuss questions they may have regarding  
15 your remarks. We will take them in order based on the  
16 sheet that we have, and we will discuss the proposals in  
17 that order.

18 For everybody that is speaking, you will need to  
19 come up to our rolling podium here. Be careful. It  
20 does move. We don't need anybody falling down. Speak  
21 into the microphone because it is streaming live on the  
22 video.

23 So with that being said, we will get started.  
24 If we do have questions, you may have to wait a second

1 because we have two hand-held mics up here, and we will  
2 have to pass the mics around to the Committee member  
3 that may have the question.

4 So with that being said, we will get started.  
5 Our first Speaker is Pat Mathis from the MCLE to discuss  
6 Proposal 23-01.

7 MR. PAT MATHIS: Good morning, Chairman Hansen  
8 and the other members of the Committee. My name is Pat  
9 Mathis. I am the chair of the Court's Minimum  
10 Continuing Legal Education Board.

11 My firm, Matthews, Marifian & Richter is based  
12 in Belleville, and my area of practice is primarily  
13 corporate and tax, not that that means much today but  
14 just a little background.

15 As the MCLE Board Chair, I am here today to  
16 present the Board's proposed change to Rule 796 to cap  
17 the fee charged to attorneys who have been removed from  
18 the master roll for MCLE noncompliance in multiple  
19 two-year reporting periods.

20 Looking back to the MCLE rules as proposed and  
21 later adopted in 2005, those rules did not include any  
22 cap on reinstatement fees or the credits needed to  
23 address an attorney's removal. As the reporting periods  
24 went on, some attorneys faced multiple removals for MCLE

1 noncompliance, and the Court approved capping the  
2 required credits to be earned at three reporting  
3 periods. That change has been well received by  
4 attorneys and is in place today.

5 As you may know, the Court's rules require that  
6 the MCLE Board be financially self sustaining, and  
7 capping the fee at three reporting periods as proposed  
8 is a revenue reduction that the Board can't absorb  
9 without seeking an increase in another line item in the  
10 Court-approved fee schedule.

11 The Board sees capping the reinstatement fee at  
12 three reporting periods as the next step in reducing an  
13 undue barrier to re-entry for attorneys who are removed  
14 from the master roll for MCLE noncompliance, but beyond  
15 that step in the Rule change, once this fee has been  
16 capped as proposed, it is the Board's plan to call every  
17 previously active status attorney who has been removed  
18 from the master roll for more than three MCLE reporting  
19 periods.

20 In the past, the ARDC has expressed an interest  
21 in participating in this outreach, and we see this  
22 outreach as a critical step to identifying those who may  
23 be interested in returning to the master roll and how  
24 the Board can assist those for whom the reinstatement



1 fee would have been undue hardship.

2 The Court has given -- the Court has given the  
3 Board a significant tool to address whether a particular  
4 fee would create an undue hardship for a specific  
5 attorney, and specifically under Rule 791(a)(7), the  
6 Board's director is authorized to give temporary  
7 exemptions and temporary extensions to attorneys in rare  
8 cases of illness, financial hardship, or other  
9 extraordinary or extenuating circumstances beyond the  
10 attorney's control. For reinstatement fees, such an  
11 exemption or extension results in a waiver of the  
12 corresponding reinstatement fee or fees.

13 Given the three reporting period cap for all,  
14 and a process by which attorneys can seek further relief  
15 based on undue hardship, the Board recommends this Rule  
16 change to cap reinstatement fees at three reporting  
17 periods to correspond to the MCLE education requirement  
18 currently under Rule 796.

19 Thank you for the opportunity to present this  
20 Rule change to the Committee today.

21 CHAIRMAN HANSEN: Thank you.

22 Any questions from any of the Committee members?

23 Okay.

24 MR. MATHIS: Thank you very much.

1 CHAIRMAN HANSEN: Thank you, Mr. Mathis.  
2 Appreciate it.

3 Next, Katie Liss from the Chicago Bar  
4 Association to discuss Proposal 22-05, which amends  
5 Supreme Court Rule 794 and the continuing legal  
6 education requirement.

7 MS. KATIE LISS: Good morning, everyone, members  
8 of the Illinois Supreme Court Rules Committee.

9 My name is Katie Liss. I am the Chicago Bar  
10 Association's Sexual Harassment Prevention Task Force  
11 Chair and the CBA's second vice president.

12 On behalf of the Task Force's June 17th, 2022,  
13 proposal, I am respectfully requesting that the Illinois  
14 Supreme Court Rule 794(d)(1) be amended to expand the  
15 definition of professional responsibility requirement as  
16 applied to MCLE credits so that it includes sexual  
17 harassment prevention as an additional definition within  
18 that category.

19 Proposal 22-05 is before you because sexual  
20 harassment is unfortunately still a prevalent issue in  
21 the legal profession, and we are asking to make a change  
22 to help better our profession through education. What  
23 we have done the last 20, 10, or even 5 years has not  
24 worked. Yes, there have been recent positive changes

1 within the law, but unfortunately sexual harassment is  
2 still a part of our culture.

3 According to the Women Lawyers on Guard Still  
4 broken study, the culture of sexual harassment and  
5 misconduct is still very prevalent after 30 years. Over  
6 the last 30 years, there's only been a reduction of 15  
7 percent of respondents who have experienced sexual  
8 misconduct often or with some frequency. 75 percent of  
9 women reported that they experienced a demeaning  
10 comment, story, or joke on account of their gender.  
11 This is not acceptable. More must be done and more can  
12 be done.

13 Since this study came out, there has been two  
14 major cases that have been highlighted in the media:

15 An ethics complaint against a prominent Cook  
16 County guardian ad litem for sexual abuse of employees  
17 and against a mother of a child he represented. This  
18 attorney lost his license, was removed from leadership  
19 positions in bar associations, and the Domestic  
20 Relations Division in Cook County amended their local  
21 Rule on civility to address sexual harassment in 2022.  
22 To my knowledge, other divisions in Cook County have not  
23 made these changes in their local rules despite  
24 requests.

1           Last year, a microphone caught a comment made by  
2   a Cook County court judge, a criminal court judge making  
3   sexist and offensive remarks against a female attorney  
4   in his courtroom.

5           These are just the highlighted cases by the  
6   media. Sadly, I would venture to say that every woman  
7   here -- and some men here -- have experienced some form  
8   of sexual harassment in the workplace. It's  
9   embarrassing that this is happening in our profession  
10   that we all love. We as attorneys work to ensure that  
11   the world is better, and we need to practice what we  
12   preach.

13           The goal of professional responsibility  
14   continuing legal education is to serve as a catalyst to  
15   increase professionalism within the legal profession.  
16   By granting our proposed amendment, the Illinois Supreme  
17   Court would be doing just that.

18           Our Task Force, which is comprised of attorneys  
19   and judges, along with the support of the Chicago Bar  
20   Association, are not the only entities that believes  
21   this. The Commission on Professionalism stated in their  
22   December 9, 2022, letter, which you have, that they  
23   support this proposal because "It highlights sexual  
24   harassment prevention as an integral facet of Illinois

1 lawyers professional responsibility and emphasizes the  
2 importance of eliminating this misconduct within the  
3 profession.

4 Additionally, the Force of Lawyers Against  
5 Sexual Harassment (FLASH), the Womens Bar Association  
6 of Illinois, the ISBA and ISBAs Women in the Law  
7 Committee, the Lady Lawyers Who Lunch, and the Institute  
8 for Inclusion in the Legal Profession all support this  
9 proposal. I have previously submitted attestations on  
10 behalf of FLASH, WBAI, WATL, ISBA Women in the Law  
11 Committee, and LLL, and members of these organizations  
12 are here today to show their support.

13 Additionally, there has been zero opposition in  
14 the public comments to our proposal online.

15 Ill spend the remaining few minutes I have to  
16 address the MCLE Boards June 14, 2023, response on this  
17 pending proposal.

18 First, the MCLE Board argued that this proposal,  
19 if granted, may confuse attorneys and providers.  
20 Respectfully, I believe that this is a hurdle that can  
21 be overcome, and it was overcome in 2017 when 794(d) was  
22 revised to include DEI and mental health CLE credits, a  
23 much larger revision than what is in our proposal today.

24 When Diversity and Inclusion was allowed to

1 qualify for ethics/professionalism credit, only three  
2 states required attorneys to complete diversity and  
3 inclusion related CLE. Illinois was one of the leaders  
4 on this issue and became the fourth state. Illinois is  
5 also one of the first states to mandate mental health  
6 and substance abuse education. Illinois has a chance to  
7 be a leader right now with respect to addressing sexual  
8 harassment within our profession and creating real  
9 change within our professions culture.

10 With respect to the 2017 amendment to 794(d),  
11 former Illinois Supreme Court Chief Justice Karmeier  
12 stated, "The Courts experience has shown that lawyers  
13 have not been seeking out or cannot find continuing  
14 legal education programs that might offer meaningful  
15 help in addressing their own substance abuse and mental  
16 health issues or those of their colleagues.

17 "We have also noted that as Illinois and the  
18 Illinois Bar have become more diverse, there has been a  
19 marked lag in interest in educational programs addressed  
20 to facilitating diversity and inclusion generally and in  
21 the legal profession specifically.

22 The Courts hope is that this amendment to Rule  
23 794(d) will help reverse these trends and foster a  
24 profession that is both healthier and more respectful of

1 the full range of perspectives and experiences present  
2 in our multicultural society.

3 The same can be said of sexual harassment  
4 prevention training. Support for increased education on  
5 sexual harassment directed at the legal profession in  
6 Illinois is crucial to addressing this problem.

7 Additionally, our proposal would promote  
8 completion of critically important sexual harassment  
9 training pursuant to Illinois law and relevant to the  
10 legal profession.

11 Second, the MCLE Board argues that this proposal  
12 will reduce courses accredited as Diversity and  
13 Inclusion credits.

14 I respectfully disagree. Currently sexual  
15 harassment prevention is categorized as Diversity and  
16 Inclusion CLE under the guidelines because there is not  
17 another option. Sexual harassment prevention is not  
18 diversity and inclusion and should not be grouped into  
19 this category.

20 The Commission on Professionalism is in support  
21 of our proposal because including sexual harassment  
22 prevention in the definition of professional  
23 responsibility highlights it as an integral facet of  
24 Illinois Lawyers professional responsibility and

1 emphasizes the importance of eliminating this misconduct  
2 within the profession.

3 Last, the MCLE Board stated that this proposal  
4 is an unnecessary addition to 794(d) because the Board  
5 already accredits sexual harassment programs and the  
6 Courts are expressing intolerance of sexual harassment.

7 Unfortunately, what is happening right now is  
8 not enough and is not working. The statistics show that  
9 sexual harassment is still prevalent in the legal  
10 profession with similar numbers to what it was 30 years  
11 ago. More needs to be done; the culture of our  
12 profession needs to change; and this issue needs to be  
13 tackled.

14 We appreciate the MCLE Board's efforts in  
15 promoting sexual harassment prevention training over the  
16 last 13 years. As of yesterday, when you do a search  
17 for CLE courses using the term "sexual harassment," 19  
18 courses were offered as of yesterday. However, only 3  
19 of those courses focused on sexual harassment prevention  
20 training as applied to law firms within Illinois. The  
21 rest were focused on employment law type issues, sexual  
22 harassment in general, or on general sexual harassment  
23 training as put on by a national provider.

24 Three courses specifically tailored to law firms



1 within Illinois for over 65,000 attorneys in our state  
2 does not provide a lot of options. The overall courses  
3 that are being offered should be more relevant and  
4 tailored to Illinois law. Granting this proposal will  
5 not stop sexual harassment from happening, but it will  
6 be a step forward in changing the culture of our  
7 practice with guidance coming from the very top.

8 These additional three words are very necessary.  
9 As Justice Karmeier stated with the 2017 amendment to  
10 794(d), I believe including sexual harassment prevention  
11 per our proposal "will help reverse these trends and  
12 foster a profession that is both healthier and more  
13 respectful.

14 In conclusion, on behalf of the Chicago Bar  
15 Associations Sexual Harassment Prevention Task Force  
16 and also all of the attendees who are here in support of  
17 this proposal, I am asking that the Illinois Supreme  
18 Court Rules Committee recommend Proposal 22-05 be  
19 granted by the Illinois Supreme Court.

20 Thank you.

21 CHAIRMAN HANSEN: Thank you.

22 Any Committee members have any questions?

23 I have one. As I read your change to the Rule,  
24 it still allows for the selection though of credits and

1 it's not a mandatory selection. It is a selection where  
2 the attorney can choose to take a class on that or take  
3 a class on diversity and inclusion or take a class on  
4 mental health and substance abuse to get the six hour  
5 minimum requirement; true?

6 MS. LISS: Correct.

7 CHAIRMAN HANSEN: Okay. And part of your  
8 position is the diversity and inclusion and equity, that  
9 that does not take care of enough of the sexual  
10 harassment prevention category by not separating that  
11 out in and of itself?

12 MS. LISS: That's correct.

13 CHAIRMAN HANSEN: Okay. And, lastly, the  
14 credits that you found yesterday -- because that was one  
15 of my questions I was going to ask you, how many classes  
16 are currently in the queue if we went to try and take  
17 some -- and you said 19. Of those, again, refresh me  
18 what you said on how many are solely dedicated to sexual  
19 harassment prevention?

20 MS. LISS: There are three with respect to  
21 sexual harassment prevention training for Illinois law  
22 firms tailored to law firms. The remainder were about  
23 sexual harassment or mentioned it in the description  
24 with respect to employment law cases or with respect to

1 -- I think there was some providers that maybe work out  
2 of state but not tailored to Illinois.

3 CHAIRMEN HANSEN: Okay. Thank you. That's all  
4 I have.

5 Anybody else?

6 COMMITTEE MEMBER MORADO: I just want to say  
7 thank you for coming before us today. It's not lost on  
8 me that you are presenting this before a panel right now  
9 that is consisting of all men, and so I do appreciate --

10 CHAIRMAN HANSEN: We do have women on the panel.

11 COMMITTEE MEMBER MORADO: We do have women on  
12 the panel, but today right in front of you. So I do  
13 appreciate you bringing this forward, and it makes me  
14 especially proud to be a member of the CBA for your  
15 advocacy on this. Thank you.

16 MS. LISS: Thank you.

17 CHAIRMAN HANSEN: Hold on.

18 COMMITTEE MEMBER HODYL: I also want to make one  
19 more comment as far as the universe of courses that are  
20 offered.

21 I think there are a lot more courses out there  
22 that are available that maybe haven't translated into  
23 CLE formal classes. For instance, at my firm we have  
24 institutional clients and insurers that require us to

1 take sexual harassment training separate and distinct  
2 from DEI training. The programs are excellent, and they  
3 are different, substantially different.

4 Those may not be rostered on the list that you  
5 have, so there might be other opportunities to bring in  
6 things from other sources that already exist as well.  
7 So I just wanted to offer that.

8 COMMITTEE MEMBER SPESIA: So are there classes  
9 in these other categories here -- civility, legal  
10 ethics, diversity and inclusion -- are there classes  
11 that solely focus on, for example, diversity and  
12 inclusion or mental health, or is this a situation where  
13 these topics that are in D1 are often grouped together  
14 or presented as one component of other courses?

15 MS. LISS: I'm sorry. I just -- just to  
16 clarify --

17 COMMITTEE MEMBER SPESIA: Sure. You told us  
18 that there aren't -- there are not classes that you've  
19 seen that solely focus on sexual harassment, and I'm  
20 wondering if we compare that to these other -- these  
21 other things that are in D1, are there classes that  
22 talk, for example, specifically and only about mental  
23 health or are these topics that are always included with  
24 other topics?

1 MS. LISS: Right. So there's -- there's courses  
2 that do talk about sexual harassment, but it's not a  
3 prevention training for Illinois attorneys. Right? So  
4 the classes within diversity and inclusion and mental  
5 health, those classes, the CLEs that are offered, it's  
6 my understanding that they are offered with respect to  
7 diversity and inclusion within the practice of law.

8 It can be -- I mean, there's a wide variety.  
9 There's a definition on the Commission's webpage on  
10 that, but mental health within the practice of law, I  
11 think there's very high guidelines that the MCLE Board  
12 has on what qualifies for that. So it's mental health  
13 within the profession, not necessarily -- I don't want  
14 to guess about that.

15 But it's how mental health is incorporated into  
16 the practice of law and how attorneys take care of  
17 themselves. So that's my understanding of the mental  
18 health component. Does that answer your question?

19 COMMITTEE MEMBER SPESIA: Yes. Thanks.

20 MS. LISS: Okay.

21 CHAIRMAN HANSEN: Okay. Thank you very much.  
22 Appreciate it.

23 Our next speaker, Seth Horvath. I thought I saw  
24 him come in. There he is. Seth is here to talk about

1 proposals 20-10 and 23-03. 20-10 to amend Rules 472 and  
2 558 on correction of certain errors in sentencing and  
3 23-03 on amended Rule 9 regarding electronic filing and  
4 373 on the date of filing papers.

5 Seth, go ahead.

6 MR. SETH HORVATH: Good morning, Mr. Chair, and  
7 good morning, Committee members. Thank you for laying  
8 that out.

9 I'm here on behalf of the the Appellate Lawyers  
10 Association. I'm the Association's secretary. I'm also  
11 the co-chair of the Rules Committee. We're always very  
12 enthusiastic to be able to appear before you all with  
13 our proposals. There's obviously a lot of important  
14 ones that are before you today, like the two that came  
15 before these, so I will be respectful of your time and  
16 sort of cut right to the case.

17 Proposal 23-03 involves what many practitioners  
18 call the mailbox rule for filing appellate papers, and  
19 Proposal 20-02 involves filing fees for motions to  
20 correct certain sentencing errors. There's an  
21 interesting history to each of these, and the ALA thinks  
22 that both proposals address very important access to  
23 justice issues. So we're urging the Committee to adopt  
24 both of them.

1           To summarize, Proposal 23-03 in a nutshell, it's  
2   to clarify that the pre e-filing mailbox Rule for filing  
3   appellate court documents by mail or by third-party  
4   commercial carrier continues to apply to pro se  
5   litigants who are not incarcerated, who are exempt from  
6   e-filing. And I know that's a mouthful, and I'll break  
7   that down a little bit.

8           The mailbox rule's under Rule 373. It makes the  
9   time of mailing the time of filing for documents  
10   submitted to the appellate court. Before e-filing, the  
11   mailbox Rule was a critical Rule for attorneys and for  
12   pro se litigants alike. It's most well known, I think,  
13   as the Rule that let attorneys and their staff avoid  
14   traveling to the appellate courthouse to complete  
15   appellate filings.

16           It was a very useful tool, especially in some of  
17   the very far flung upstate and downstate appellate  
18   districts. It was also useful in Cook County for that  
19   matter, particularly for folks who had suburban offices  
20   and for whom it was hard to get into the city to file  
21   things in person down the street at the First District.

22           I myself used that Rule hundreds of times to  
23   file documents before e-filing was instated. I think in  
24   certain circles it was known as the Rule that allowed

1 midnight filings in the days before electronic filing  
2 was rolled out statewide.

3 As a brief aside, I have a colleague who still  
4 calls Rule 373 the "Midnight Rule," and he called it  
5 that because he always knew he could go to the Harrison  
6 Street Post Office at midnight and drop off his  
7 appellate papers. So many attorneys are familiar with  
8 the Rule. I know you all are as well.

9 And what the ALA has done is reviewed this Rule  
10 and seen that some of the amendments to the Rule that  
11 appear to have happened when efilng was rolled out may  
12 have restricted the scope of the Rule a bit too far.

13 When the rules were amended to accommodate  
14 efilng, the scope of the Rule was narrowed, and it made  
15 sense because efilng lawyers could submit documents  
16 electronically without having to send them to the  
17 courthouse by mail, without having to send them to the  
18 courthouse via third-party commercial carrier. Now the  
19 Rule has been restrained or restricted in a way that  
20 does a couple things that limit the ability of  
21 non-attorneys who are pro se to invoke the Rule to file  
22 paper documents when they don't have access to efilng.

23 Our proposal really has three different legs to  
24 it. One is that we think it should be clear and



1 reinstated that non-incarcerated pro se litigants can  
2 still use the Rule. The other piece we think needs to  
3 be clarified that those individuals can still submit  
4 their filings via third-party commercial carrier and not  
5 just by mail. That is to say by FedEx, by UPS.

6 And then as an accompanying amendment, we  
7 propose amending the language of Rule 9, which is a Rule  
8 that deals with qualifying for efilings exemptions and  
9 the nature by which one files a certification to qualify  
10 for an exemption from efilings. So those are the three  
11 main pieces of the amendment that we are proposing.

12 A brief word on that last piece with respect to  
13 Rule 9. Rule 9 has specifications for efilings  
14 documents. All of the specifications are set forth in  
15 that Rule, and it lets certain litigants obtain an  
16 exemption from efilings if they submit a form in a  
17 particular way.

18 And consistent with the proposed amendments to  
19 Rule 373, we are suggesting that that procedure be  
20 revised. Under the current version, an exemption can  
21 only be filed by mail, in person, or under some local  
22 rules by email, and the proposal we're putting before  
23 the Committee would allow exemptions to be filed by  
24 third-party commercial carrier as well as definitively

1 by email.

2 So in the end, if the proposal is adopted, pro  
3 se litigants will be able to file in the appellate court  
4 by mail or by third-party commercial carrier the way  
5 that it was before efilings was rolled out. So it's a  
6 clarifying proposal that the ALA believes makes good  
7 sense, and we would urge the Committee to adopt it.

8 I'll turn now to the second proposal. It's  
9 20-10. That proposal also has a history to it.  
10 Proposal 20-10 was submitted a few years ago, but it was  
11 never voted on. The ALA proposed to amend Rules 472 and  
12 558 to clarify that fees shouldn't be charged for  
13 motions to correct certain sentencing errors regarding  
14 fines and fees, and the Supreme Court Rules Committee,  
15 you all referred that proposal to the Conference of  
16 Chief Judges for its review and for its recommendation  
17 because those two rules originated with the -- with the  
18 CCJ.

19 And so the CCJ took the entirety of the ALA's  
20 proposal regarding its sentencing motions under  
21 advisement. It's my understanding that the CCJ has now  
22 endorsed the proposal, and it is now back before the  
23 Supreme Court Rules Committee.

24 But the rules that the proposal addresses, they

1 require defendants to raise certain sentencing errors  
2 involving fees, fines, time served in a post-sentencing  
3 motion in order to preserve the rules for appeal.

4 So it's a -- there are a serious of calculation  
5 rules that have the court do certain calculations  
6 regarding time served regarding fees and fines after a  
7 conviction has been entered. And to preserve rights  
8 regarding errors on those issues under the new versions  
9 of the rules, the arguments about alleged errors have to  
10 be included in post-sentencing motions to preserve them  
11 for appeal.

12 So as a result, the appellate counsel can no  
13 longer challenge a defendant's fines and fees or raise  
14 issues regarding a defendant's sentencing credit on  
15 appeal without there being a motion filed first. Common  
16 procedure that applies in many appellate settings where  
17 you have to put something into a post-judgment motion in  
18 order to raise it before the appellate court. That's  
19 now explicit under these rules.

20 And this gets to the heart of the matter: At  
21 least one circuit court decided to charge indigent  
22 defendants to file these post-sentencing motions about  
23 improper fees or about improper calculation of  
24 sentencing credit, and from the ALA's vantage point,

1 imposing a fee to challenge fines and fees that were  
2 erroneously entered just didn't make sense. It didn't  
3 seem to be consistent with the spirit of the Rule. It  
4 didn't seem to be consistent with what the Supreme Court  
5 intended. So the proposal addresses that issue, and  
6 addresses it by just waiving the fees that would be  
7 associated with those motions.

8 Subject to further questions, the ALA would ask  
9 the Committee to adopt both of those proposals, and that  
10 concludes my remarks unless anyone has any questions  
11 that I can address.

12 CHAIRMAN HANSEN: Thank you, any questions from  
13 the Committee?

14 Thank you.

15 MR. HORVATH: Thank you, all.

16 CHAIRMAN HANSEN: Our next speaker is April  
17 Otterberg. I hope I said that correctly. April is from  
18 the ISBA. You are here to discuss Proposal 22-06 which  
19 is before us on amending Rule 5.1 and 8.4. Thank you.

20 MS. APRIL OTTERBERG: Good morning.

21 Like he said, my name is April Otterberg. I'm  
22 here today speaking on behalf of the Illinois State Bar  
23 Association in favor of the Proposal 22-06.

24 That proposal originated with the ISBA's

1 standing committee on professional conduct. I've been a  
2 member of that committee for 11 years. I've served as  
3 vice chair and the chair of that committee when this  
4 proposal was working its way through the ISBA governance  
5 and approval process. I practice here in Chicago where  
6 I'm a partner at Jenner & Block, co-chair of our law  
7 firm defense practice.

8 Proposal 22-06 seeks amendments to the Illinois  
9 Rules of Professional Conduct 8.4, which is the  
10 overarching Rule that governs professional misconduct,  
11 and to Illinois Rule of Professional Conduct 5.1, which  
12 is the Rule setting out the responsibilities of  
13 partners, managers, and supervisory lawyers. Our  
14 proposal to amend these rules seeks to address more  
15 clearly and to make it professional misconduct to commit  
16 harassment and discrimination in the practice of law.

17 This proposal began with our ISBA committee  
18 setting the issues in the fall of 2020. The debate at  
19 that time concerned ABA model Rule 8.4(g), which was  
20 passed by the ABA in 2016 and which was the subject of a  
21 prominent ethics opinion by the ABA in the summer of  
22 2020.

23 Our committee assessed the issues, developed  
24 specific proposed amendments to the Illinois rules, and

1 then wound those proposals through the ISBA, including  
2 various committees, Board of Governors, and then  
3 ultimately the General Assembly last year. The ISBA  
4 approved the proposal, and it went onto the Supreme  
5 Court for consideration. The Supreme Court's  
6 Professional Responsibility Committee then considered  
7 the proposal and made a few modifications, which I'll  
8 address in my remarks today. The result of all of these  
9 steps is the proposal that the ISBA is presenting and  
10 supporting today.

11 I give you this background because this was not  
12 a snap recommendation by the ISBA to simply adopt the  
13 ABA model Rule. It was not. And our proposal differs  
14 from the model Rule in several material ways. Our  
15 proposal is one that I believe is a long overdue step to  
16 addressing discrimination and harassment in the  
17 profession here in Illinois. Is it a perfect proposal?  
18 No. It's a balance of various competing considerations  
19 like the rest of the rules of professional conduct.

20 A perfect proposal probably does not exist. Is  
21 it a constitutional proposal? I believe so. And is it  
22 a proposal that is worthwhile for the Court to adopt? I  
23 absolutely believe so, and I hope you will come to the  
24 same conclusion.

1           So that gets me to the why of the proposal.  
2       Several of the written objections in the record suggest  
3       the proposal is effectively a remedy in search of a  
4       problem. That's not the case.

5           First, the existing rules have notable and  
6       meaningful gaps when it comes to addressing  
7       discrimination and harassment. No current Rule of  
8       professional conduct specifically makes it professional  
9       misconduct to engage in harassment in the day-to-day  
10      practice of law. The word "harassment" is nowhere  
11      mentioned in the current Rule 8.4. If it occurs, it  
12      must fit under some under Rule of professional conduct  
13      or be left unaddressed.

14           Some of the objectors have subjected that Rule  
15      8.4(d) prohibits harassment. It's a different part of  
16      the Rule. But that portion of the Rule states only  
17      that, quote, "It is professional misconduct for a lawyer  
18      to engage in conduct that is prejudicial to the  
19      administration of justice." It is ironic that some of  
20      those who object to our proposal on vagueness grounds  
21      also argue that Rule 8.4(d), which nowhere even mentions  
22      harassment at all, is somehow a better way for the  
23      profession to regulate instances of harassment. It is  
24      not.

1           This is not to say that the concept of  
2 harassment is foreign to the Rules of Professional  
3 Conduct. Harassment is prohibited in certain  
4 communications under Rule 3.5(c), which relates to juror  
5 communications, and also Rule 7.3 related to  
6 solicitation of clients.

7           The current 8.4(j), Rule 8.4(j), addresses  
8 discrimination, but it also contains a substantial gap.  
9 It prohibits lawyers from engaging in discrimination  
10 that, quote, "Reflects adversely on the lawyer's fitness  
11 as a lawyer if such conduct also violates a statute  
12 prohibiting such conduct. On top of that" -- and this  
13 is most important -- "the ARDC cannot even initiate a  
14 charge of professional misconduct unless and until there  
15 has been a full and final adjudication of the statutory  
16 violation."

17           That standard of adjudication is nowhere found  
18 anywhere else in the Rules of Professional Conduct. The  
19 ARDC's hands are tied. For example, if a matter  
20 settles, as many are wanting to do, I would think the  
21 ARDC wouldn't be able to pursue the professional  
22 misconduct issue related to that discrimination. The  
23 result is that 8.4(j) has rarely, if ever, been used to  
24 address discriminatory misconduct.



1           Second, discrimination and harassment are  
2 ongoing problems in our profession that very much demand  
3 additional remedies. The earlier speaker from the CBA  
4 described some of the studies related to sexual  
5 harassment, to take just one example, and of course the  
6 examples of bias and discrimination in the profession  
7 are real. They are out there. We can and should do  
8 better.

9           Discrimination and harassment can and do  
10 prejudice the administration of justice. Such conduct  
11 also undermines confidence in the legal profession,  
12 deepens the public distrust and negative view towards  
13 lawyers, and above all is harmful and hurtful to each of  
14 us when we witness it or when we are targets of it.

15           That brings me to the specifics of our proposal.  
16 Let me make this clear at the outset: Our proposal is  
17 not a copy of ABA Model Rule 8.4(g). Several of the  
18 written objections analyze our proposal as though it is  
19 the model Rule, and it is not. We took the ABA Rule --  
20 or the ABA language as a starting point, which is the  
21 practice here in Illinois, but we also improved upon it  
22 to make it right for Illinois.

23           So let's look at the key aspects of the  
24 language:

1 First, Proposed Rule 8.4(j) addresses harassment  
2 and discrimination, quote, "In the practice of law."  
3 The ABA model Rule, by contrast, prohibits harassment or  
4 discrimination related to the practice of law. Our  
5 proposal is narrower and intentionally so. The conduct  
6 must be in the practice of law, not related to it.

7 Proposed Comment 3 then clarifies what conduct  
8 in the practice of law actually means. It includes  
9 representing clients, interacting with witnesses,  
10 co-workers, and others when representing clients,  
11 operating or managing a law firm or law practice, and  
12 participating in law-related professional activities,  
13 such as bar association events.

14 Now, some of the objections suggest that this is  
15 too vague or that it's used within too much personal  
16 conduct, but I disagree. In each instance, the listed  
17 situation has a direct tie to the practice of law. The  
18 first involves representation of clients; the second,  
19 interactions with others when representing clients; the  
20 third, managing a law practice; and the fourth,  
21 participating in law-related professional activities or  
22 events. Situations where the lawyer is appearing or  
23 attending as a lawyer. It's not enough to limit the  
24 Rule to court-related interactions that certain of you

1 have suggested. That would ignore a substantial part of  
2 the profession who never sets foot in court.

3 Moreover, it is important for the Rule to  
4 address discriminatory harassing conduct that occurs in  
5 the various settings where we know it's taking place,  
6 and that includes places like professional events.

7 Second, the proposed Rule incorporates a usual  
8 measure of lawyer knowledge into what is defined as  
9 prohibited conduct. It encompasses conduct that the  
10 lawyer, quote, "Knows or reasonably should know  
11 constitutes the prohibited harassment or  
12 discrimination." This knows or reasonably should know  
13 standard is found throughout the Illinois rules. It is  
14 not strict liability, nor is it a standard that rewards  
15 manufactured professed ignorance. It's a middle ground.

16 It pegs directly to definitions of those terms  
17 found in Rule 1.0, governing terminology and rules.

18 "Knows" denotes actual knowledge of the fact in  
19 question. That's in Rule 1.0(f). "Reasonably should  
20 know" denotes that a lawyer of reasonable prudence and  
21 competence would ascertain the matter in question.  
22 That's in Rule 1.0(j).

23 Third, the proposed Rule defines appropriately  
24 the sort of harassing or discriminatory conduct that is

1 prohibited. This requires balancing, and I do think  
2 this proposal strikes the right balance. For example,  
3 we proposed to prohibit harassment or discrimination on  
4 the basis of one or more protected characteristics or  
5 classes.

6 This is not merely speech that someone finds  
7 offensive, as some of the objectors claim. It's speech  
8 that the lawyer knows or reasonably should know is  
9 harassment or discrimination on the basis of the listed  
10 classes and in the practice of law. Those are all key  
11 modifiers and limiters on the scope of this provision  
12 and they provide balance.

13 Proposed Comment 3(a) provides further  
14 definition regarding the nature of the limiting conduct.  
15 A number of the aspects of this comment are unique to  
16 this proposal and not found in the model Rule version,  
17 such as a statement at the outset confirming both that  
18 the rules are rules of reason and that whether conduct  
19 violates 8.4(j) quote, "Must be judged in context and  
20 from an objectively reasonable perspective."

21 Proposed comment 3(a) also makes clear that the  
22 substantive law of discrimination and harassment may  
23 guide the application of Rule 8.4(j) and that findings  
24 on such issues from other bodies may be relevant. It

1 does not make adjudication of that other law a  
2 prerequisite for discipline, but it does permit the ARDC  
3 and the involved lawyer to look to that law for specific  
4 guidance.

5 And with respect to the term discrimination  
6 specifically, the original ISBA proposal before  
7 modification by the Court's Professional Responsibility  
8 Committee stated in the Rule itself that the kind of  
9 discrimination that is professional misconduct is,  
10 quote, "unlawful discrimination based on one or more of  
11 the identified classes or characteristics."

12 The ISBA made that proposal because we  
13 recognized the law on discrimination is changing and  
14 evolving, and although an adjudication should not be  
15 required to impose professional discipline, that law  
16 does have a role to play here. We continue to support  
17 the insertion of the word "unlawful" as a qualifier to  
18 discrimination, particularly if it will help address  
19 some of the concerns expressed about this proposed Rule  
20 change.

21 Fourth, the proposed Rule expressly pars out  
22 certain conduct or speech. In particular, the Rule does  
23 not affect the ability to accept, decline, or withdraw  
24 from representation; the lawyer's exercise of

1 constitutional rights, such as the right to free  
2 expression; and the lawyer's ability to advocate for,  
3 assist, or advise a client.

4 The ISBA's proposal -- proposed language goes  
5 farther than the ABA model Rule by expressly  
6 acknowledging lawyers' constitutional rights and that  
7 the rules do not limit the exercise of such rights. The  
8 ISBA proposal put this language in the very Rule itself,  
9 not in the comment. The proposal now within the comment  
10 is a reflection of the Court's Professional  
11 Responsibility Committee. We continue to support the  
12 approach of putting it in the Rule itself, again, if  
13 that will help alleviate concerns about the Rule's  
14 scope.

15 Fifth, Comment 4 to Rule 8.4(j) includes  
16 additional language to make certain additional pieces  
17 clear, such as that the Rule does not bar diversity and  
18 inclusion efforts that are otherwise reflected in the  
19 professional CLE credit.

20 And, sixth, briefly touching on Rule 5.1, which  
21 concerns the responsibilities of supervisory lawyers,  
22 the ISBA's proposing a modest change, just additional  
23 language to an existing comment.

24 Specifically, we would propose to revise Comment

1 2 to expressly acknowledge that part of a lawyer's job  
2 in managing a firm or supervising other lawyers includes  
3 implementing procedures designed to facilitate a firm  
4 environment free of harassment and discrimination  
5 prohibited by Rule 8.4(j). This is not a true  
6 substantive change because a lawyer in a supervisory  
7 role already has obligations to take steps to ensure  
8 subordinate's compliances with the rules, but we do  
9 thinks it's an important addition to that particular  
10 role.

11 And let me just briefly address a couple of  
12 other matters, and then, of course, I'll be happy to  
13 respond to the panel's questions.

14 With respect to the First Amendment, I do not  
15 believe that the First Amendment concerns that have been  
16 expressed by the objectors provide a reason to reject to  
17 proposed Rule change.

18 For one, Proposed Rule 8.4(j) addresses conduct  
19 as well as instances of verbal activity, and I saw no  
20 contention in the objections that there is a  
21 constitutional right to engage in the conduct of  
22 discrimination or harassment.

23 As to vagueness, I think the standards are a bit  
24 different here. Lawyers are trained to evaluate the

1 meaning of words used in rules, and with a proposal that  
2 uses many of the very same words used throughout the  
3 Rules of Professional Conduct.

4 Above all, the proposal itself makes abundantly  
5 clear that the constitutionally protected speech,  
6 conduct is excluded and cannot comprise professional  
7 misconduct. What that means is that a lawyer cannot be  
8 subjected to professional discipline for such protected  
9 speech.

10 Of course lawyers have First Amendment rights,  
11 but those rights are not absolute. There are other  
12 instances where the Rules of Professional Conduct  
13 regulate speech. Those range from rules regarding the  
14 respective rights of other persons. There's rules  
15 regarding commentary on judiciary and those running for  
16 office. All of those rules regulate speech in some way  
17 as part of the profession.

18 No Rule of law or a Rule of Professional Conduct  
19 can possibly set out all of the circumstances in which  
20 it does or or doesn't apply. Adopting a Rule, however,  
21 regarding harassment and discrimination is challenging  
22 precisely because it requires a balancing of several  
23 important concerns and competing interests, but I do  
24 believe -- and I hope all of you believe -- that our



1 profession is truly a profession, not just a job, not  
2 even just a career. That means something. We have a  
3 responsibility to uphold ourselves to standards of what  
4 is and what is not acceptable in our great profession.

5 We need to do better in the areas of  
6 discrimination and harassment, and I think we can.  
7 These proposed Rule changes are a step in the right  
8 direction, and so I ask the Committee to recommend that  
9 the Supreme Court approve this proposal. I'm happy to  
10 take any questions the Committee has.

11 CHAIRMAN HANSEN: Thank you.

12 Committee members, any questions?

13 Okay. Thank you very much. We appreciate it.

14 MS. OTTERBERG: Thank you.

15 CHAIRMAN HANSEN: The next speaker is David  
16 Duggan.

17 MR. DAVID DUGGAN: Thank you. Good morning.

18 My name is David Grayson Duggan, to be  
19 distinguished from another David Duggan who was  
20 disbarred about 20 years ago. I've had to bear that  
21 cross for several years because creditors and court  
22 clerks confused us.

23 I've been an Illinois lawyer for 42 years and a  
24 New York lawyer for 43 years. I'm also the son of an

1 Illinois lawyer who was a Marine JAG officer, and the  
2 great nephew of two Illinois lawyers, one of which was a  
3 circuit court judge. I've never been disciplined,  
4 censured, or had any adverse determinations assessed  
5 against me by any court, judicial agency, or any other  
6 body. I've never been arrested, cited, or received so  
7 much as a speeding ticket in 43 years.

8 The last 30 years I've been a solo practitioner  
9 without clerical staff or any support, representing a  
10 variety of persons in both civil and criminal matters in  
11 both state and federal courts, most of those being on  
12 the lower end of the socioeconomic scale.

13 You might wonder why I am here opposing this  
14 Rule 8.4(j). I'm at the end of my career. I don't own  
15 a legal office. I don't solicit clients for causes. I  
16 have no present intent to hire anybody.

17 The reason is simple: I'm a Christian. And as  
18 a Christian, I could not, consistent with my Christian  
19 faith, ever entertain the notion of hiring a Muslim  
20 attorney to work for me regardless of whether a Muslim  
21 contained an oath to defend the the Constitution for a  
22 non-Muslim. I cannot bring myself to rely on the work  
23 of someone whose world view differs so starkly from  
24 mine.

1           The reason is that the lawyer's fundamental job  
2   is to have advocacy, which itself depends on the trust  
3   which the lawyer imposes on both the client as well as  
4   anybody working for him. If I cannot trust someone that  
5   may have an ulterior motive trying to impose Sharia law  
6   in this country, then that trust and the advocacy on  
7   which it depends goes out the window.

8           The prior Rule at least required that a court or  
9   administrative agency find that the lawyer has engaged  
10   in an unlawful discriminatory act and the finding of the  
11   court or administrative agency has become final and  
12   enforceable and any right of judicial review has been  
13   [inaudible]. No such protection can be found in this,  
14   and every lawyer could be victim of a zealous ARDC  
15   attorney trying to make his bones by bagging an  
16   outspoken member of the bar.

17           Let me diverge from the speculative to a  
18   universal example. A year ago I was a defendant in an  
19   emergency no stalking order of protection case because I  
20   had opposed the ordination of a married homosexual man  
21   with an adopted daughter. In addition to writing the  
22   bishop, I wrote a tale, posted it on social media about  
23   how this was inconsistent with the Christian gospel.

24           This newly ordained minister used these two acts

1 of First Amendment protected activity to petition the  
2 circuit court for an order of protection against me,  
3 claiming that I threatened him and his family and that  
4 constituted harassment. \$80,000-plus and a trip to the  
5 Illinois appellate court later, the circuit court  
6 dismissed the case and vacated the order.

7 My actions were completely consistent with my  
8 rights as a citizen of the United States to protest a  
9 public act which violated my conscious. Discussions  
10 between my lawyers and the lawyers representing both the  
11 priest and the diocese and the parish which employed  
12 him, the lawyer said that he had reported my conduct to  
13 the FBI and the Chicago Police Department. He later  
14 threatened to contact the ARDC.

15 If Rule 8.4(j) is enacted, my opposition to  
16 ordain homosexuals acting as ministers of the gospel of  
17 Jesus Christ would be subject to scrutiny. No legal  
18 system worthy of the name subservient to the  
19 Constitution for my father was willing to sacrifice his  
20 life, which I swore to uphold when I was sworn into both  
21 New York and Illinois can allow that.

22 I urge you to reject this intrusion into the  
23 lives of lawyers who serve a higher calling as a citizen  
24 and servant of God. Thank you.

1 CHAIRMAN HANSEN: Thank you. Appreciate it.

2 Are there any questions for Mr. Duggan?

3 Thank you, sir.

4 Our next speaker, Sally -- and I'm probably not  
5 going to say this right -- Wagenmaker.

6 MS. SALLY WAGENMAKER: Wagenmaker.

7 CHAIRMAN HANSEN: Wagenmaker. Thank you.

8 Go ahead.

9 MS. WAGENMAKER: Thank you, members of the  
10 Committee.

11 My name is Sally Wagenmaker. I appreciate the  
12 opportunity to speak here today. I lead a law firm here  
13 in Chicago. We have about a dozen attorneys. I've been  
14 an attorney for over 30 years.

15 I'd like to highlight certain sections of the  
16 joint comment that I submitted, which was joined by  
17 nearly 60 other Illinois licensed attorneys. That joint  
18 comment addresses the matters raised by Ms. Otterberg  
19 and other supporters of the proposal. I speak  
20 personally here asking that the proposed Rule 8.4(j) not  
21 be amended as proposed.

22 Similarly to the ABA model Rule, the Illinois  
23 version of this proposed Rule sweeps too far. It raises  
24 grave constitutional problems, notwithstanding the nod

1 to, quote, "lawyers' expression of views of matters of  
2 public concern as constitutionally protected," and I'll  
3 explain that.

4 This overbreadth is particularly of concern  
5 since the rules, as per Comment 3(a), are to be judged  
6 in terms of context. Well, whose context? How? And at  
7 what cost? A lawyers very livelihood? And with what  
8 type of recourse for potential error or licensing  
9 authority overreach? None. That is too much,  
10 especially in light of the proposed rule's severe  
11 constitutional defects and enormous potential harm to  
12 individual attorneys. The current Rule is sufficient.  
13 Nothing further is warranted.

14 Our joint comment is extensive and sets forth  
15 many important points, each of which is sufficient to  
16 end this inquiry and stop. Other states have made this  
17 same conclusion correctly so, protecting lawyers' rights  
18 without any resulting harm to others.

19 Here are six points, each of which I will  
20 address briefly:

21 First, people do not surrender their First  
22 Amendment speech rights when they become attorneys,  
23 including when they act in their professional capacities  
24 as lawyers. The word "balancing" has been put forth.

1 There's no balancing here. We have First Amendment  
2 rights that are to be protected, and I'll explain that  
3 more and other speakers following me will do so as well.

4 The ABA itself has acknowledged this very  
5 principle, as noted in our joint comment. Specifically  
6 the ABA has stated, quote, "That much speech by a lawyer  
7 falls at the core at the First Amendment when  
8 balancing."

9 Further, the Supreme Court has never recognized,  
10 quote, "professional speech" as a category of  
11 lesser-protected expression and has repeatedly  
12 admonished that no such new classification be created.  
13 That's from the ABA, not from me. Such protection was  
14 expressly recognized by the Supreme Court in the NIFLA  
15 case, which is in the last few years, and is cited in  
16 our joint comment.

17 In particular, the Supreme Court recognized that  
18 quote, "Regulating the content of professional speech  
19 imposes the inherent risk that the government seeks not  
20 to advance a legitimate regulatory goal, but to suppress  
21 unpopular ideas and information."

22 Attorneys thus do not surrender their  
23 constitutional rights when they enter the legal  
24 profession or subject them to some sort of balancing

1 test as somebody might deem best, and that includes when  
2 they're speaking in their professional capacities. In  
3 other words, the state, Illinois and no other state, may  
4 violate attorneys' constitutional rights under the guise  
5 of professional regulation.

6 Second, conduct is at issue here. If  
7 proposed rules prohibit harassment and discrimination,  
8 and under the proposed Rule procure speech can  
9 constitute both harassment and discrimination. And the  
10 Comment 3(a) of the proposal expressly prohibits what it  
11 calls verbal conduct, which, of course, is a euphemism  
12 for speech and the joint comment goes into a lot of  
13 detail there.

14 Third, significant opposition to the proposed  
15 rule, even the Illinois version, I submit that the  
16 modifications that Ms. Otterberg spoke of, are not  
17 sufficient but rather opposition is already expressed it  
18 is overwhelming and the problems were not fixed in the  
19 Illinois version. Another speaker today will further  
20 address countervailing arguments as asserted today and  
21 through the comments and support of the Rule.

22 But keep in mind that when the ABA opened up the  
23 model Rule, which again, is very, very similar here,  
24 there were a total of 481 comments and of those 481



1 comments, 470 opposed them, so that's something to take  
2 very, very seriously, and most of them were on the  
3 grounds of the ruling unconstitutional, the same defects  
4 exist here, state's attorney general have also  
5 resoundingly criticized the model Rule along with dozens  
6 of law professors and, again, the problems have not been  
7 fixed here in Illinois.

8 Fourth, the proposed Rule is unconstitutionally  
9 vague. It remains so. And as lawyers, we need to be --  
10 to pay careful attention to definition. I'm sure every  
11 single one of you have understood that in spades. As a  
12 supervising attorney myself, I speak constantly about  
13 the decision of words and we are lawyers and words have  
14 meaning, words have power, so we have to be very careful  
15 with how we define our words. That problem here in this  
16 context raises significant First Amendment concerns  
17 because of the obvious chilling effect on free speech.

18 Among other things, the proposed Rule prohibits  
19 attorneys from engaging in harassment as you've heard.  
20 What is harassment? Is it what the law says? Is it  
21 what I say? Is it what someone might interpret? Do I  
22 feel harassed? Am I actually harassed? We're in the  
23 context of attorney licensing when people's livelihoods  
24 are at stake and no redress is available beyond the

1 licensing board. That vagueness is untenable.

2 Moreover, as many of us know, we live in a  
3 constantly changing culture, indeed we have a cancel  
4 culture, what was acceptable yesterday or perhaps a few  
5 years ago, suddenly is no longer so, and we're seeing  
6 that, that the landscape continues to shift. I can  
7 bring up countless examples and maybe you can think of  
8 some yourselves. It's not fair and, indeed, it's  
9 unconstitutional for an attorney's likelihood and  
10 reputation to be mired in such changing circumstances,  
11 especially those that may be right for abuse and  
12 canceling.

13 Because the term harassment as used in the  
14 proposed rule is vague, it allows those charged with  
15 enforcing the rules of professional conduct to enforce  
16 the proposed Rule arbitrarily and selectively. A  
17 vagueness would show an attorney's speech, not knowing  
18 what harassment is, where it begins and ends, and  
19 therefore will be forced to censor their free speech  
20 rights in an effort to avoid violating the proposed  
21 Rule.

22 These concerns are especially problematic, even  
23 abhorrent for a profession that is founded in justice  
24 and the opportunity to speak up for clients and for

1 ourselves. The term discrimination is likewise  
2 unconstitutionally vague. Unfortunately the problems  
3 have not been solved with the Illinois version.

4 A key question is what legal standards? Is it  
5 the law? Maybe. It's unclear though, and that's  
6 unacceptable for a profession dedicated to a lot, to  
7 legal standards, to justice, to the Rule of law.  
8 Another speaker following me will address this further  
9 from his experience in working with the legal -- in the  
10 legal trenches of discrimination law.

11 What about the term "harmful" how is that to be  
12 used in this attorney discipline context as part of the  
13 Rule? Is it egregious harm? Is it material harm? Is  
14 it any harm? As we've worked with contracts in our  
15 various legal jobs we think of those words as very  
16 important. What kind of harm? What does that mean?  
17 What does it mean to breach the contract? Who does it  
18 mean to be sanctionable as an attorney? Is it in the  
19 eyes of the beholder? It's supposed to be reasonable,  
20 what's reasonable? Faced with such dizzying and  
21 intimidating potential applications, a cautious attorney  
22 would most certainly be inclined to shrink back from  
23 activities, speech and contact that should be entirely  
24 unsanctionable. Note, too, that some speech may be

1 offensive, stating my beliefs and opinions and values  
2 may be offensive, maybe it would be offensive to me if  
3 you state your values, your beliefs, and opinions, but  
4 doing so isn't necessarily unethical. It might violate  
5 the proposed Rule, but I don't think it should be  
6 unethical. Again, many examples may come to mind for  
7 you and there are some listed in our joint comment.

8 Last, what does that phrase "in the practice of  
9 law" mean? The Illinois proposed Rule has modified the  
10 model Rule, but it still is unacceptably vague. What if  
11 I talk to someone at church or my book club or my  
12 sport's activity organization about something that could  
13 be deemed offensive or discriminatory or harmful, again,  
14 we have those words and we don't know what they mean as  
15 lawyers. Offensive to whom? Harmful to whom? What if  
16 I debate deep questions of Judeo Christian doctrine  
17 about Biblical sexuality and whether --

18 CHAIRMAN HANSEN: Hold on. You need to stop for  
19 a second. We need to get the mic fixed. It appears  
20 there is.

21 MS. WAGENMAKER: Okay. Great.

22 CHAIRMAN HANSEN: Well, we'll just speak loudly  
23 and continue. How about that.

24 MS. WAGENMAKER: Speaking about the practice of

1 law and it's vagueness, what if I want to debate deep  
2 questions of Judeo Christian doctrine about Biblical  
3 sexuality at work or somewhere else? Is adultery a sin?  
4 Is same sex activity morally wrong? That might be  
5 harmful to some. Is it sanctionable is the question.  
6 But should -- the bigger question, should the price tag  
7 of practicing law be now that I cannot engage in these  
8 discussions, I can't belong to these groups, I'm afraid  
9 of losing my livelihood and the opportunity to serve  
10 others as I have done for over 30 years. Again, there  
11 are so many examples. As noted in our joint comment,  
12 not even the chair of the ABA policy and implementation  
13 committee, when asked, could identify what the phrase  
14 related to the practice of law and I can submit that in  
15 the practice of law is no better. His answer was it's  
16 extraordinarily broad. I don't know where it begins or  
17 where it ends. In the practice of law, I'm still not  
18 sure. If someone comes up and asks me a legal question  
19 informally or if I'm at my workplace and talking about  
20 various issues with my staff, is that in the practice of  
21 law? I think so.

22 My fifth point, and on a related note, the  
23 propose Rule still is unconstitutional in the sense of  
24 being overbroad. A key question here is -- and really

1 the goal of any attorney ethical Rule is, what should  
2 render an attorney unfit to practice law or otherwise  
3 sanctionable? Certainly not belonging to organizations  
4 that adhere to long established traditional religious  
5 organizations with Biblical sexuality standards as is  
6 true today. Such activities may be considered offensive  
7 to some, and we can read about that in the news, but  
8 that fact is not -- should not disqualify anyone from  
9 practicing law because a proposed Rule would prohibit a  
10 broad swath of protected speech and would show the  
11 lawyers constitutionally protected speech. The proposed  
12 Rule would not pass constitutional muster. Our  
13 profession should be about diversity of thought with  
14 robust and, hopefully, fruitful dialogue, not censoring  
15 or chilling speech.

16 Sixth, and last in my comments, the proposed  
17 Rule will -- would violate attorneys' free exercise of  
18 religion and free association rights. Inescapable  
19 tension here exists. The solution is not to adopt a  
20 proposed Rule. There are other solutions out there that  
21 have been raised between courts issues, training, all  
22 sorts of remedies. I'm a member of the Christian legal  
23 society, a national organization with chapters all over  
24 the country. I should not have to forfeit that

1 membership as a cost of practicing law, any more than  
2 any attorney should forfeit membership or other  
3 involvement in other organizations that may engage in  
4 activities that could be considered harassment or  
5 discrimination and under this proposed Rule.

6 I've also been a female attorney for a long  
7 time. I have been subject to harassment before. I  
8 won't go into those details. I've never needed this  
9 type of a rule for any type of protection for other  
10 redress, and I wouldn't want to jeopardize my or other  
11 attorney's free speech or religious freedom rights  
12 through this rule. I also certainly wouldn't want to  
13 damage our profession through such a vague overbroad and  
14 otherwise problematic rule as so many other have already  
15 recognized with respect to the ABA model rule and other  
16 states that contain similar defects.

17 In conclusion, and thank you for listening, and  
18 as explained in the extensive comments submitted, and  
19 this will be further addressed at today's hearing,  
20 proposed Rule 8.4(j) should be rejected. Let's avoid  
21 the myriad constitutional and other enormous problems  
22 with this proposed Rule and, instead, rely on other  
23 available legal remedies that are already in place which  
24 are sufficient to protect and to foster high standards

1 for our legal profession.

2 Thank you. I'm happy to listen to questions.

3 CHAIRMAN HANSEN: Yeah. I have one questions.

4 So the comments mentioned when you're discussing what  
5 constitutes discrimination or harassment, the comments  
6 specifically say that the substantive law of  
7 anti-discrimination and anti-harassment statutes in case  
8 law may guide the application of paragraph J and the  
9 evaluation of whether specific conduct constitutes  
10 discrimination or harassment. Is your position that  
11 doesn't go far enough or doesn't --

12 MS. WAGENMAKER: It's insufficient to say "may  
13 guide," I mean again, as lawyers, words have power and  
14 that is very hard interpret, may guide, must guide, must  
15 dictate, must determine. It's unclear what that means.

16 CHAIRMAN HANSEN: Okay.

17 Other questions?

18 Okay. Thank you very much.

19 Next, Jeff Fowler.

20 MR. FOWLER: Perhaps showing what kind of lawyer  
21 I am, may it please the committee.

22 My name is Jeffrey Fowler. I'm speaking in  
23 opposition to proposal 22-6 today. I am the current  
24 chairman of the board of the Christian Legal Society,



1 and to that extent, I commend your attention to the  
2 comments that the Christian legal society has submitted.  
3 I think they're comprehensive and pretty good, although  
4 I didn't have any hand at all in drafting them which is  
5 probably why they're comprehensive and pretty good.

6 I'm speaking here today from a different  
7 perspective. I'm speaking here today as a labor  
8 employment attorney who has spent my entire career  
9 dealing with discrimination and harassment issues here  
10 in Chicago. I want to be very, very clear. Sexual  
11 harassment and discrimination has absolutely no place  
12 whatsoever in our profession. Period. But we're not  
13 talking about sexual harassment and discrimination in a  
14 vacuum here. The Illinois Human Rights Act already  
15 prohibits sexual harassment and discrimination as it  
16 relates to employers. It prohibits it as it relates to  
17 public accommodations, and last I looked, most law firms  
18 are employers. The law already requires employers to  
19 provide training. We provide -- my firm -- provides  
20 training for law firms as employers on sexual harassment  
21 issues and has done so for years. I'm a little bit  
22 cautious about saying that because of sounds  
23 self-serving when I state my next statement. I think  
24 22-05 is great. And that's the problem. Is that

1 despite the fact that we've been litigating sexual  
2 harassment and discrimination claims for decades,  
3 despite the fact that there have been multimillion  
4 dollar judgments against law firms on sexual harassment  
5 and discrimination issues, those concepts really are not  
6 well understood, not even by regular attorneys, let  
7 alone by the public.

8 People regularly say or think that they've been  
9 discriminated against when they haven't. People think  
10 that they've been harassed because a supervisor wants  
11 them to do their job. That's not harassment.

12 The problem -- and so I think the training and  
13 education is absolutely crucial, but it's the fact that  
14 these concepts are so misunderstood that's part of the  
15 problem here. The national organization that's  
16 responsible for enforcing discrimination and harassment  
17 is the U.S. Equal Employment Opportunity Commission, and  
18 technically with the way that a discrimination or  
19 harassment charge is started it to file a charge with  
20 the EEOC, then it goes through its investigation process  
21 and after that, it can go to Court. According to the  
22 EEOC in '21, 17.4 percent of all charges were resolved  
23 based on the merits in favor of the complaint. 17  
24 percent. The year before that, it was 15 percent.

1           What that means is that more than 4 out of 5  
2       complaints are deemed by this neutral agency to be  
3       baseless. In California, there was a recent study that  
4       said that number was more like 2 percent. And I have to  
5       say that's more like my own experience.

6           The -- for employers, discrimination and  
7       harassment charges are just part of the cost of doing  
8       business. You know, once you decide to employ somebody,  
9       there's costs associated with that, and that includes  
10      responding to charges. I regularly counsel employers  
11      that despite the fact that you are effectively being  
12      called racist or sexist or any other "ist," you have to  
13      step back and not take these allegations personally.  
14      That you have to treat this as a business decision and  
15      deal with it on that kind of basis. That must not be  
16      the case for Illinois lawyers. We can't allow our  
17      profession to denigrate into a business like that.  
18      We -- you know, I'm very, very proud of the fact that in  
19      my entire career I have never once faced any kind of  
20      ARDC charge, any form of discipline, any inquiry of any  
21      kind. I think -- I'm really proud of that.

22           But I also don't think I'm unusual in that way.  
23      I think that our profession is filled with people that  
24      are focused on trying to always do the right thing. Are

1     there some bad apples? Of course. But we live today in  
2     a society that more and more if someone disagrees with  
3     me, that's my call to action to go to war against them.  
4     Simply because there's a disagreement. In other words,  
5     if I don't actively support what they believe, I'm the  
6     enemy. And then when I'm the enemy, that justifies  
7     complaints, it justifies everything else.

8             You know, I heard the reference earlier that  
9     there's a limitation in the law -- in the proposal here  
10    saying "reasonably should know." Really? I have never  
11    ran across anybody who believes that they've been  
12    discriminated against or harassed who would say, you  
13    know, did the other side reasonably should know that  
14    what they were doing was wrong. Of course not. If they  
15    believe they were discriminated or harassed, it doesn't  
16    matter why, they will automatically believe that the  
17    other side was evil and did it on purpose. What the  
18    effect of this is that it exposes the lawyers in  
19    Illinois to baseless charges. Now, whether it's 98  
20    percent baseless or 83 percent baseless, it doesn't  
21    matter, but it transitions us to having to respond to  
22    these things so that responding to ARDC charges becomes  
23    the norm rather than something to avoid at all costs.

24            The issue here is not just statistics. I have

1    been for years serving as a facilitator for the Illinois  
2    Supreme Court's commission on professionalism, and for  
3    those of you who don't know, that at the beginning of  
4    every law school class, there's an orientation program  
5    and the Illinois Supreme Court has one of the justices  
6    come in and speak to the students on the issue of  
7    professionalism and ethics and as part of that, there's  
8    a breakout session where the students are separated into  
9    groups and there are lawyers like me who come in and  
10    help lead discussions on issues of ethics. One of the  
11    things that I have always appreciated is the commission  
12    has provided scenarios, and one of those scenarios is  
13    exactly on point here. The scenario has two parts, and  
14    the idea is you're supposed to give part A to half of  
15    the students and part B to the other half of the  
16    students, and the scenario is tell the story of a  
17    conflict between a law firm partner and a young female  
18    black associate that ultimately concludes in she's  
19    feeling like she's been discriminated against when the  
20    reality is when you hear this from each of their  
21    different perspectives, both of them are reasonable,  
22    legitimate entirely good faith people trying to do the  
23    right thing, but forgive me for the Star Trek reference,  
24    we don't have the Vulcan mind melt. We don't have the

1 ability to understand what other people are thinking.  
2 We see what they do, we interpret that according to our  
3 own lenses based upon our own experience, so we  
4 attribute things to them that may not be true. I would  
5 love, if you all would permit, I would love to circulate  
6 the copies of the scenarios that I was referring to from  
7 the Illinois Supreme Court Commission.

8 CHAIRMAN HANSEN: We'll pick them up when you  
9 finish.

10 MR. FOWLER: The other aspect that I want to  
11 address is that in our legal profession there are dozens  
12 of what I call affinity partners. You know, in addition  
13 to the all-purpose bar associations, the state bar  
14 associations, the county bar associations, there are  
15 dozens of groups of people who get together because of  
16 something that's unique to them.

17 The Women's Bar Association, makes sense. When  
18 you look at their website, as I did yesterday, if you  
19 look at the photos of the board of directors, it's all  
20 women. It makes sense. It should be that way. The  
21 Muslim Bar Association is an example, The Decalogue  
22 Society of Lawyers, where on their website they say, For  
23 over 80 years, Decalogue has supported Jewish lawyers in  
24 the legal community in Chicago and throughout Illinois.

1 These affinity bar groups are important and they're an  
2 important part of our profession.

3 In 2017, Vincent Cornelius, who was then  
4 president of the Illinois State Bar Association wrote to  
5 all of the ISBA members, quote, "I've been struck by a  
6 common theme across each ethnic and minority bar  
7 association I have visited, acceptance and belonging. I  
8 consistently heard accomplished lawyers say it was in  
9 the company of such bar associations that they felt  
10 embraced, encouraged, or just understood." Adopting  
11 proposal 22-06 says, "To all whose association is based  
12 on race, sex, religion, ethnicity, or any other  
13 protected characteristic, your desire to feel embraced,  
14 encouraged, or just plain accepted is wrong." We can't  
15 allow that because it would be an affiliation based upon  
16 the characteristic that would be presumed by others to  
17 exclude because they would feel discriminated against or  
18 harassed because this group says, we're for this group  
19 and not for you. We should not be going that far.

20 Enacting proposal 22-6 as proposed will do one of two  
21 things. As I mentioned a minute ago, it will either  
22 turn our ethics rules into new battlegrounds for social  
23 issues where being subject of an ARDC complaint becomes  
24 the norm rather than something to avoid at all costs.

1 Or it will chill lawyers willingness to participate in  
2 worthy conduct, worthy causes because of fear that if  
3 this other person doesn't know exactly what I'm  
4 thinking, they may misconstrue and I may get a beef.  
5 That's not the situation that we want to prosper or  
6 encourage.

7 Again, I want to emphasize, I don't denigrate  
8 anybody's feelings about sexual harassment, but this  
9 doesn't deal with just sexual harassment. I think that  
10 there are provisions already in a place, you know, the  
11 only example that I've heard today that doesn't actually  
12 cover it be is, you know, if there was conduct during a  
13 Bar Association function, that doesn't -- it's not  
14 covered under the Illinois Human Rights Act, I get it.  
15 It's not covered under federal law, I get it. But I  
16 also can't imagine any organization that would allow  
17 conduct like that to continue. There would be remedies.

18 But with that, even if there isn't, the better  
19 approach is the approach taken by the Hawaii Supreme  
20 Court that went effective in -- on January 1st, 2022,  
21 amending their Rule 8.4(g) to specifically address  
22 sexual harassment. I would support that. I know the  
23 Christian Legal Society would support that.

24 As the comment earlier, there's no perfect



1 solution. I think that the best solution would be to  
2 enact the training, see how that goes, see what the next  
3 steps are, but if the committee or the Court were to  
4 conclude that some additional action is required, I  
5 strongly recommend to you what the Hawaii Supreme Court  
6 ruled. And, again, I have copies of that as well that  
7 I'll --

8 CHAIRMAN HANSEN: Great. Thank you. Any  
9 questions for Mr. Fowler?

10 Thank you very much.

11 MR. FOWLER: Thank you very much.

12 CHAIRMAN HANSEN: Okay. Next speaker, Patrick  
13 Eckler.

14 MR. PATRICK ECKLER: Good morning. Thank you  
15 for the opportunity to speak with you today about this  
16 important proposal. My statements today are my own and  
17 not made on behalf of any organization which I'm a  
18 member, including my firm or its clients.

19 In the many years that I have written and spoken  
20 on issues related to model rule 8.4(g) on multiple  
21 publications and CLEs and other forum, I learn something  
22 new every time I pick up the proposal, and one of those  
23 new things was something that the previous speaker  
24 mentioned and I want to put it into the record so we're

1 clear on what the Hawaii Rule 8.4(h) is. It is narrowly  
2 tailored to sexual harassment. The -- both a proposed  
3 modification of 5.1, as well as the other comments from  
4 this list earlier today, relate to sexual harassment,  
5 which as he we say in our comment, has no place in the  
6 practice of law.

7 What 8.4(h) in the Hawaii Rule says is this, "In  
8 a professional capacity, a lawyer shall not engage in  
9 sexual harassment." Period. Simple. Straightforward.  
10 No implications of First Amendment problems. No  
11 implications of any other issues. It deals with the  
12 issue. If the issue to be addressed is sexual  
13 harassment, then say it. And then they go on to define  
14 what the professional capacity is.

15 In the course of client representation,  
16 interactions with coworkers or personnel jurors,  
17 witnesses, operation and management of a law firm. Goes  
18 on further, and then Bar Association, bar organization,  
19 legal education conferences or events.

20 And then it defines sexual harassment very  
21 narrowly -- or clearly, I would rather say. Under this  
22 rule means -- not includes, not related to, clear words  
23 -- means unwelcome sexual advances, request for sexual  
24 favors, and other verbal or physical harassment of a

1 sexual nature which a reasonable lawyer would know are  
2 offensive. There are no First Amendment problems there.  
3 There is no unclarity. It is very clear as to what is  
4 being prohibited.

5 A similar rule could be drafted that dealt with  
6 discrimination. That is in conformity with current law  
7 and not -- doesn't run afoul of the First Amendment, and  
8 we wouldn't be here opposing this. We would all say,  
9 sure, that is a fine rule. That is what the Rule should  
10 be. But that's not what we have. What we have is a  
11 proposal to kill a mosquito with a cinder block, and it  
12 misses both.

13 And so let me turn to the problems with the  
14 proposal and the comments offered in support. The  
15 written comments in support of 22-06 contain no  
16 citations to all except for a reference to the appellate  
17 court opinion in Greenburg, which is a case that dealt  
18 with standing only at the appellate court, and twice  
19 found Pennsylvania's version -- which for reasons  
20 addressed in our comment, which I will talk about today  
21 -- is different substantively from the Illinois  
22 proposal.

23 They -- they mischaracterize about what the  
24 proposal provides, what other states, other similar

1 rules have said. And there's a failure to really engage  
2 with what's proposed, and we heard more of that from Ms.  
3 Otterberg earlier today, and I'll address those when I  
4 get done with my prepared comments.

5 As with nearly every argument in favor of Model  
6 Rule 8.4(g) and its progeny since its adoption by the  
7 ABA in 2016, the position of the proponents is that the  
8 bar regularity of this case, the ARDC, is to be trusted  
9 with broad authority over lawyer's speech, instead of  
10 evening attempting to meet this high burden, the ISBA  
11 states in its comments that, quote, "doing something,"  
12 end quote, apparently anything, is what is required to  
13 address harassment and discrimination in a profession.  
14 But do something about the scope of a problem that they  
15 fail to qualify.

16 The proponents have come forward with nothing  
17 compelling of a proposal, instead what Proponents have  
18 offered in their written comments is a self-reported  
19 survey of no scientific value from the comment in the  
20 women lawyers on guard and a classroom survey of law  
21 students referenced in comment of the institute for  
22 inclusion or for profession. Neither provides any basis  
23 that Illinois lawyers are rampant sexual harassers and  
24 discriminators that justifies modifying the current

1 version of Rule 8.4(j).

2 The current rule, unlike the proposal, keeps the  
3 ARDC focused on its core mission of addressing uniquely  
4 lawyer-related regulation issues, client communication,  
5 or lack of it, trust accounting, conflicts and the like.  
6 If the Illinois lawyers are to be -- if Illinois lawyers  
7 were as the proponents described, one would expect to  
8 find on the review of the ARDC website, more than four  
9 prosecutions under 8.4(j) since 2005.

10 Only one in the last nine years. Indeed, three  
11 of the four prosecutions are on reciprocal petitions.  
12 So that's one prosecution in 18 years. I understand  
13 that there may be a chill on people willing to make a  
14 claim or to advance it, but I would expect we'd find  
15 more than one prosecution in 18 years.

16 As set forth in exhaustive detail with extensive  
17 reference to applicable law and commentary about the  
18 scholars of the First Amendment are the numerous  
19 affirmatives with the proposal. The reason there is no  
20 similar legal defense of the proposal by the supporters  
21 is because there simply is not one that can comply with  
22 the Constitution that requires -- what the Constitution  
23 requires when seeking to abridge a fundamental right.

24 In the case of the First Amendment, it is the

1 chill that is the damage in the first instance and if  
2 enacted, the proposal will chill lawyers' speech. The  
3 ISBA comment correctly notes that the Illinois  
4 disciplinary process is not a star channel [phonetic]  
5 and that is true, but what lawyer is going to get  
6 anywhere near exposing themselves to a complaint under  
7 this proposal, if enacted?

8 Indeed, my discussions with others, on this  
9 proposal in seeking other individual lawyers and groups  
10 to oppose it and offer comments on it, many lawyers  
11 refuse to even comment on the Rule, to stand where I am  
12 standing where others have and to offer comments out of  
13 fear of what will be thought of them.

14 This Rule hasn't even passed and it is chilling  
15 speech because people are afraid of what will be thought  
16 if they oppose this Rule. With that, as set forth in my  
17 written comment of discrimination and harassment, have  
18 no place in the practice law. But contrary to the  
19 supporters' position, that is not the question  
20 presented. The question presented is how to address  
21 that issue.

22 I submit that the current version of 8.4 (j)  
23 does that appropriately, both substantively and  
24 procedurally. It is that substance procedure that is so

1 lacking for the proposal. Despite being aware of the  
2 rules in other states --New York in particular, and as  
3 referenced in the ISBA's comment -- the ISBA chose to  
4 ignore the language of that rule and the constitutional  
5 carve out (contained therein. I referenced that  
6 specifically in our -- in this link to in our comment.

7 The ISBA also chose, in the face of the Supreme  
8 Court decision this summer in Counterman v. Colorado,  
9 showing how disconnected the ISBA is from the First  
10 Amendment jurisprudence to weave an unconstitutionally  
11 objective standard for one of the means of determining  
12 mens rea of the speaker. This is a standard projected  
13 in the Pennsylvania version of the Rule because  
14 Pennsylvania only has an objective standard -- or, I'm  
15 sorry, a subjective standard for what the lawyer knows,  
16 not what knows or should know. It's the should know  
17 that isn't there and that is improper under the  
18 Counterman case.

19 There are just some of the proposal that show  
20 the lack of care with which this proposal was drafted.  
21 I heard Ms. Otterberg describe a year's long process.  
22 They apparently didn't engage with the law on the issue,  
23 and it's evidenced in their commentary. It isn't any  
24 reference to the law. All lawyers take an oath to

1 uphold the state and federal constitutions.

2 In the face of an obviously constitutionally  
3 improper proposal, the obligation of this Committee is  
4 to recommend that it be rejected bring the Supreme  
5 Court. The current version of 8.4 (j) is both  
6 substantively and procedurally proper and correctly  
7 balances the interests and the practical realities of  
8 the ARDC's capabilities. It does not burden the ARDC in  
9 the fashion sought by the proponents to do something  
10 about which they have come forward with no evidence of  
11 support that exists.

12 I want to address a couple of comments that  
13 Ms. Otterberg made. First, with regards to her comment  
14 that it is a balanced proposal. That simply flies in  
15 the face of what the Constitution requires. The  
16 balancing test with regards to the First Amendment is  
17 startling and dangerous as set forth by the Supreme  
18 Court in Brown versus Entertainment Merchants and also  
19 the United States versus Stevens when the Supreme Court  
20 said, quote, "The First Amendment's guarantee of free  
21 speech does not extend only to categories of speech that  
22 survive at ad hoc balancing of relative social costs and  
23 benefits. The First Amendment itself reflects the  
24 judgment by the American people that the benefits of its



1 restrictions on the government outweigh the costs. Our  
2 Constitution forecloses any attempt to revise the  
3 judgment simply on the basis that some speech is not  
4 worth it." End quote.

5 Ms. Otterberg referenced that the word  
6 "discrimination" is not in the current version of  
7 8.4(j). To the contrary, it's there three times, the  
8 word "discrimination" or "discriminatory" is there.  
9 It's there because it references the kinds of things  
10 that can get a lawyer in trouble for professional  
11 misconduct, following an adjudicated proceeding in the  
12 forum where we send those items.

13 Ms. Otterberg also referenced that it doesn't --  
14 the Rule doesn't intend to go beyond the practice of law  
15 with regards to social events. It's directly in the  
16 Rule. It says, "Social events connected with the  
17 practice of law."

18 So, yes, it does deal with those things, they  
19 haven't narrowed it. It's exactly the expansive scope  
20 that the ABA adopted in that regard and as  
21 Ms. Wagenmaker pointed out, related to an in, there's no  
22 substantive difference there, yeah the word is changed,  
23 the meaning hasn't.

24 The knowledge standards that I've referenced

1 is -- is in comment 3A, says "objectively reasonable  
2 perspective." That is a standard that the Supreme Court  
3 expressly rejected, not five months ago. So there  
4 are -- the other speech rules that Ms. Otterberg  
5 referenced all deal with conduct and speech that relates  
6 to the administration of justice and they are  
7 appropriate and they are long-standing and there is  
8 certainly no unfettered First Amendment right, but the  
9 current speech codes that lawyers have to abide by,  
10 speech we can't make underneath 1.6, speech we must make  
11 under 3.3 to disclose, because we have both compelled  
12 speech and forbidden speech, but those deal with the  
13 administration of justice.

14 For all of those reasons and the reasons set  
15 forth in our comment, we ask that proposal 22-06 be  
16 rejected.

17 Thank you very much.

18 CHAIRMAN HANSEN: Thank you. I have one  
19 question I'd like to ask. You referenced the amount of  
20 prosecutions under 8.4 (j) in the ARDC, isn't the  
21 counter that has been brought forth part of the problem  
22 and the Rule is, no charge of professional misconduct  
23 may be brought pursuant in this paragraph until a Court  
24 or administration agency or a competent jurisdiction has

1 found the lawyer has engaged in an unlawful  
2 discriminatory act and that that finding has become  
3 final and enforceable, so is it part of the problem that  
4 the ARDC can't bring anything forward because most of  
5 these cases are settled and you won't have anything  
6 until you have a final, nonappealable Rule and thus we  
7 have only the four prosecutions under that act because  
8 those are the only four that had that final ruling from  
9 an administrative agency?

10 MR. ECKLER: Two responses. The first is that  
11 that is a response -- so if -- as we point out in our  
12 comment, we have one of two things. Either there are no  
13 charges being brought against lawyers and there's not  
14 no -- this is a solution in search of a problem, or we  
15 have a situation where the ARDC simply isn't doing what  
16 it's supposed to do under what it already has the  
17 ability to do. You would expect if this was as bad as  
18 they thought, as bad as they claim that it is, you would  
19 expect to see far more than four and only one that  
20 originated in Illinois.

21 But the requirement of an adjudication gets to,  
22 are we going to turn the ARDC into an appointed agency?  
23 Because that's -- that's what we're looking at, because  
24 if we're going to replace the EEOC the Illinois

1 Department of Human Rights, the -- and the Courts after  
2 that, with the ARDC as it relates to lawyers. Are  
3 lawyers -- is that really what the ARDC has the funding,  
4 the skills, the training, the staff to handle? Is  
5 that -- if it's as bad as they claim, then we're going  
6 to change entirely the focus of the ARDC, and doesn't  
7 the ARDC already have a big enough problem trying to  
8 deal with trust accounting and client communication  
9 among other issues that are specific to lawyers?

10 So I agree that that number is problematic, but  
11 it's problematic for the proponents of the proposal, not  
12 for the objectors.

13 CHAIRMAN HANSEN: Any other questions?

14 MR. ECKLER: Thank you very much.

15 CHAIRMAN HANSEN: All right. Thank you.

16 Our final speaker, Mike Wang.

17 MR. WANG: Good morning.

18 CHAIRMAN HANSEN: Good morning.

19 MR. MIKE WANG: My name is Mike Wang. I'll keep  
20 my comments brief. I think it's still morning actually.  
21 So hopefully this will be the best news -- the best news  
22 of the day is that I don't plan to talk for 10 minutes.

23 So, briefly, I do agree and support several of  
24 the others who spoke just before me just now with the

1 last few regarding the comments as well in regards to  
2 Proposal 22-06. And for the record, my opinion and my  
3 thoughts are purely mine personally. They don't  
4 represent my employer or anyone else or any  
5 organization. So thank you, again, for seeking input on  
6 proposal 22-06 to amend the Illinois rules of  
7 professional conduct 8.4(j).

8 Although I do applaud the efforts to prevent  
9 harassment, discrimination in the legal profession, I  
10 believe that approving a vague and overbroad Rule like  
11 proposed Rule 8.4 (j), one that potentially hinges on  
12 the First Amendment rights of Illinois attorneys is not  
13 the tool to accomplish this, especially when the  
14 existing rules, I believe, are more than sufficient.

15 Proposed Rule 8.4(j), as stated before, I  
16 believe it's just simply a modified version of ABA Model  
17 Rule 8.4(g) which was adopted by the ABA in 2016, and  
18 after seven years of deliberations in the United States  
19 across the country, only two states, Vermont and New  
20 Mexico, have fully adopted this Rule. In contrast, at  
21 least 14 states have concluded after a careful study  
22 that ABA Model Rule 8.4(g) is both unconstitutional and  
23 unworkable.

24 And the Supreme Court of Wisconsin, I believe is

1 the latest state to reject the ABA Model Rule 8.4(g), so  
2 just a few months ago in July of 2023. A number of  
3 scholars that characterize ABA Model Rule 8.4(g) as a  
4 speech code for lawyers, the late professor Ronald  
5 Rotunda, a highly respected scholar in constitutional  
6 law and legal ethics has warned that this model Rule  
7 threatens lawyers' First Amendment rights and regarding  
8 the new Rule, he and another professor wrote in the 2017  
9 and 2018 edition of Legal Ethics that the lawyers' desk  
10 book on professional responsibility that the ABA's  
11 efforts are well-intentioned but raise problems of  
12 vagueness, overbroad, and chilling protected speech under  
13 the First Amendment.

14 And since -- so I'm just going to conclude right  
15 here. So I believe that Illinois attorneys should not  
16 be subject to a Rule that closely resembles one of  
17 questionable constitutionality. I respectfully request  
18 that we fully reject Proposal 22-06 and leave 8.4 (j) as  
19 currently written.

20 Thank you for your consideration.

21 CHAIRMAN HANSEN: Thank you. I appreciate that.  
22 Anybody have any questions?

23 Thank you very much for your time.

24 MR. WANG: Thank you.

1 CHAIRMAN HANSEN: That will conclude our public  
2 hearing. We want to thank all of the speakers and we  
3 will now adjourn into our committee meeting. Thank you.

4 (12:08 p.m., proceedings concluded.)  
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STATE OF ILLINOIS     )  
                                          )                   SS.  
COUNTY OF COOK        )

CERTIFICATE OF REPORTER

Isaiah Roberts, being first duly sworn, on  
oath says that he is a Certified Shorthand Reporter,  
Registered Professional Reporter doing business in the  
City of Chicago, County of Cook and the State of  
Illinois;

That he reported in shorthand the proceedings  
had at the foregoing Public Hearing;

And that the foregoing is a true and correct  
transcript of his shorthand notes so taken as aforesaid  
and contains, to the best of his ability, all the  
proceedings had at the said Public Hearing.



Isaiah Roberts, CSR, RPR  
Illinois CSR #084-004890

SUBSCRIBED AND SWORN TO  
before me this 30th day of  
January A.D., 2024.



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