STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

SUPREME COURT RULES COMMITTEE
PUBLIC HEARING

ILLINOIS SUPREME COURT
BOARD/COMMISSION/COMMITTEE/TASK FORCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

fee would have been undue hardship.

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

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

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

CHAIRMAN HANSEN: Thank you.

Any questions from any of the Committee members?

Okay.

MR. MATHIS: Thank you very much.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When Diversity and Inclusion was allowed to

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

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

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

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

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

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

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

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

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

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

emphasizes the importance of eliminating this misconduct within the profession.

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

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

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

Three courses specifically tailored to law firms

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

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

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

Thank you.

CHAIRMAN HANSEN: Thank you.

Any Committee members have any questions?

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

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

MS. LISS: Correct.

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

MS. LISS: That's correct.

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

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

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

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

Anybody else?

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

CHAIRMAN HANSEN: We do have women on the panel.

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

MS. LISS: Thank you.

CHAIRMAN HANSEN: Hold on.

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

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

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

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

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

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

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

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

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

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

COMMITTEE MEMBER SPESIA: Yes. Thanks.

MS. LISS: Okay.

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

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

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

Seth, go ahead.

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

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

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

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

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

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

I myself used that Rule hundreds of times to file documents before efiling was instated. I think in certain circles it was known as the Rule that allowed

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

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

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

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

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

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

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

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

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

by email.

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

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

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

But the rules that the proposal addresses, they

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

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

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

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

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

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

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

Thank you.

MR. HORVATH: Thank you, all.

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

MS. APRIL OTTERBERG: Good morning.

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

That proposal originated with the ISBA's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It pegs directly to definitions of those terms found in Rule 1.0, governing terminology and rules. "Knows" denotes actual knowledge of the fact in question. That's in Rule 1.0(f). "Reasonably should know" denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question. That's in Rule 1.0(j).

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

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

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

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

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

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

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

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

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

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

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

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

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

Specifically, we would propose to revise Comment

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN HANSEN: Thank you.

Committee members, any questions?

Okay. Thank you very much. We appreciate it.

MS. OTTERBERG: Thank you.

CHAIRMAN HANSEN: The next speaker is David Duggan.

MR. DAVID DUGGAN: Thank you. Good morning.

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

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

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

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

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

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

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

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

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

This newly ordained minister used these two acts

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

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

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

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

CHAIRMAN HANSEN: Thank you. Appreciate it.

Are there any questions for Mr. Duggan?

Thank you, sir.

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

MS. SALLY WAGENMAKER: Wagenmaker.

CHAIRMAN HANSEN: Wagenmaker. Thank you.

Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

licensing board. That vagueness is untenable.

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

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

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

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

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

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

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

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

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

MS. WAGENMAKER: Okay. Great.

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

MS. WAGENMAKER: Speaking about the practice of

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

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

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

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

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

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

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

for our legal profession.

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

CHAIRMAN HANSEN: Yeah. I have one questions. So the comments mentioned when you're discussing what constitutes discrimination or harassment, the comments specifically say that the substantive law of anti-discrimination and anti-harassment statutes in case law may guide the application of paragraph J and the evaluation of whether specific conduct constitutes discrimination or harassment. Is your position that doesn't go far enough or doesn't --

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

CHAIRMAN HANSEN: Okay.

Other questions?

Okay. Thank you very much.

Next, Jeff Fowler.

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

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

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

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

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

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

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

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

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

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

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

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

The issue here is not just statistics. I have

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

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

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

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

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

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

In 2017, Vincent Cornelius, who was then president of the Illinois State Bar Association wrote to all of the ISBA members, quote, "I've been struck by a common theme across each ethnic and minority bar association I have visited, acceptance and belonging. I consistently heard accomplished lawyers say it was in the company of such bar associations that they felt embraced, encouraged, or just understood." Adopting proposal 22-06 says, "To all whose association is based on race, sex, religion, ethnicity, or any other protected characteristic, your desire to feel embraced, encouraged, or just plain accepted is wrong." We can't allow that because it would be an affiliation based upon the characteristic that would be presumed by others to exclude because they would feel discriminated against or harassed because this group says, we're for this group and not for you. We should not be going that far. Enacting proposal 22-6 as proposed will do one of two things. As I mentioned a minute ago, it will either turn our ethics rules into new battlegrounds for social issues where being subject of an ARDC complaint becomes the norm rather than something to avoid at all costs.

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

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

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

As the comment earlier, there's no perfect

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

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

Thank you very much.

MR. FOWLER: Thank you very much.

CHAIRMAN HANSEN: Okay. Next speaker, Patrick Eckler.

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

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

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

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

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

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

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

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

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

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

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

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

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

version of Rule 8.4(j).

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

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

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

In the case of the First Amendment, it is the

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

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

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

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

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

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

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

uphold the state and federal constitutions.

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

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

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

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

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

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

The knowledge standards that I've referenced

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

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

Thank you very much.

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

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

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

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

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

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

CHAIRMAN HANSEN: Any other questions?

MR. ECKLER: Thank you very much.

CHAIRMAN HANSEN: All right. Thank you.

Our final speaker, Mike Wang.

MR. WANG: Good morning.

CHAIRMAN HANSEN: Good morning.

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

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

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

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

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

And the Supreme Court of Wisconsin, I believe is

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

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

Thank you for your consideration.

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

Thank you very much for your time.

MR. WANG: Thank you.

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

(12:08 p.m., proceedings concluded.)

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

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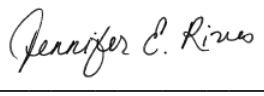
before me this 30th day of
January A.D., 2024.



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