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Illinois Courts Building
219 North LaSalle Street, 13th Floor
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Re: Proposed Change to Rule of Professional Conduct 8.4(J)

I write in strong opposition to changing current Illinois Rule of Professional Conduct 8.4(J) to conform to ABA Model Rule 8.4(G). The proposed change to Rule 4.4(J) is wholly unnecessary and would exchange a Constitutional and reasonable rule which prohibits attorneys from engaging in illegal discrimination, including harassment, for one which is unconstitutional for several reasons, amounting to a speech code for lawyers. The current rule provides:

Illinois Rule of Professional Responsibility 8.4: Misconduct. It is professional misconduct for a lawyer to: ... (j) violate a federal, state or local statute or ordinance including, but not limited to, the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.) that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects
adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found 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 exhausted.

The proposed rule provides:

ABA Model Rule 8.4.
It is professional misconduct for a lawyer to: ... (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with the Rules.

Comment 3: Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
Comment 4: Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Truly discriminatory behavior is already prohibited by several disciplinary rules, including but not limited to the current Rule 8.4(j), Rule 3.3(1), Rule 4.4(a), Rules 8.4(a), 8.4(b), 8.4(c), 8.4(d), 8.4(G), and 8.4(h).
Comments are not black letter language, but they make clear how the drafters expect the rule to be interpreted. Comment 3 purports to define discrimination as "harmful verbal or physical conduct". "Verbal conduct"—that is to say speech—is not conduct. The First Amendment to the United States Constitution and Article I of the Illinois Constitution guarantee freedom of speech. Unless the speech constitutes a criminal threat or a threat prohibited by Illinois Rule of Professional Conduct 8.4(g) or a similar rule, defamation, perjury, or prohibited misrepresentation, it is protected. Current disciplinary rules already prohibit unprotected speech. Political speech is the most protected category of speech, and, because uninhibited, robust debate is essential to a free society, it should be. Most speech that this rule seeks to regulate is political speech. Defining speech as "harmful verbal conduct" makes clear that the drafters seek to regulate far more than the narrowly defined categories of unprotected speech. They seek to silence any view with which they disagree.

The expansion of the purview of the rule makes that intention even clearer. Currently, rules regulate conduct which occurs during client representation, when an attorney is performing other job functions, or in those rare cases when an attorney performs a particularly pernicious act. Under Comment 4, regulated activities can extend to any activity even remotely connected with the practice of law, including social functions, teaching, and debates. Two lawyers could be having lunch and discussing a legal issue or controversy. A third person not involved it in the discussion could overhear it and hear something with which he or she vehemently disagrees, associate it with discrimination, and one or both attorneys could face ARDC complaints. Big Brother is truly watching. The problem becomes even more pronounced when one considers debates on controversial issues or any form of class: continuing legal education, college, graduate school, or law school. In the name of diversity, this rule kills the most important diversity in a free society: diversity of thought. No wonder at least one federal court has already deemed the rule unconstitutional.

As a blind attorney, this insipid virtue signaling infuriates me. If the Illinois Supreme Court is so concerned about diversity, why was Tyler Technologies not fired for failing to develop an efiling system which was wholly accessible to screen readers when the Supreme Court mandated electronic filing in 2018? Web Consortium Access Guidelines had existed since 1999. Why does the Supreme Court not mandate that every CLE provider in this state provide fully accessible courses and course bundles for every product it offers—including fully accessible websites with the ability to evaluate courses and accessible written materials? That, too, has been possible since 1999. In light of all that, this ill-advised, unconstitutional rule is a joke and should be roundly rejected.

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