ILLINOIS STATE
BAR ASSOCIATION™

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Committee Secretary
Supreme Court Rules Committee
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Re: Proposal 20-10 (P.R. 00289)
Proposal 22-05 (P.R. 00308)
Proposal 22-06 (P.R. 00309)
Proposal 23-01 (P.R. 00314)
Proposal 23-03 (P.R. 00316)

Dear Committee Secretary:

On behalf of its approximately 25,000 members, the Illinois State Bar Association ("ISBA") requests that ISBA past Professional Conduct Committee Chair April Otterberg be permitted to address the Committee on Proposal 22-06 at the upcoming November 15, 2023, public hearing. Brief comments on the Proposal are set out below.

In addition to the ISBA's comments on Proposal 22-06, the ISBA asks the Committee to consider its written comments on the other proposals referenced above. Those comments are also included below.

1. **Proposal 22-06** (IRPC 8.4 and 5.1, Offered by the ISBA)

The ISBA's rationale for Proposal 22-06 is set out in its June 21, 2022, letter to the Committee as well as an August 15, 2023 letter to the AOIC. That rationale will not be repeated here. Nevertheless, in part based upon public comments about the proposal posted on the Court's website, a few general comments are warranted. The ISBA continues to believe that the proposed amendments to Illinois Rules of Professional Conduct ("IRPC") 8.4(j) and 5.1 are

important, reasonable, and consistent with ensuring a vibrant legal profession now and in the future.

At the outset, it is important to consider the context and environment in which we are operating as Illinois lawyers. A number of states, including most recently New York, Connecticut, and Pennsylvania, have adopted rules directed to addressing discrimination and harassment in the profession (resulting in litigation in some states). Few states have adopted the ABA Model Rule 8.4(g) verbatim, but in general, there is a movement among a number of states to address lawyer harassment and discrimination in a better and clearer way than before, even if their rules of professional conduct addressed such matters at all. Adopting a rule regarding harassment and discrimination is challenging. The "perfect" rule that balances all perspectives and concerns may not exist. But overall, the ISBA believes—and hopes the Committee does as well —that Illinois should not be content with the status quo and instead should be on the side of *doing something* about harassment and discrimination in the profession.

The ISBA does not share concerns that its proposed amendments to IRPC 8.4(j) would negatively impact free speech. First, several states have rules of professional conduct similar to the ISBA proposed amendments. The ISBA is unaware that the lawyers in these states – particularly those states where such rules have been in place for some time - have experienced any limitations on their speech or that those state's disciplinary agencies have used, intentionally or unintentionally, those rules to penalize lawyers or prohibit, or even chill, lawyer speech.

Second, the IRPC has long limited certain kinds of lawyer speech related to the practice of law, typically speech involving criticism of judges (IRPC 8.2), harassment of clients (IRPC 4.4), and stating or implying an ability to improperly influence a government official (IRPC 8.4(e)). The ISBA is not aware of any concerns raised by the courts or the practicing bar that these longstanding restrictions are an improper limitation on lawyer speech.

Third, consistent with existing IRPC limitations, the proposed amendments to IRPC 8.4(j) are narrowly drawn to focus solely on matters in the practice of law. Nothing in the ISBA Proposal limits the speech (or imposes professional discipline) of a lawyer to make whatever statements they may choose to make in the public square – or more aptly, social media – no matter how offensive, harassing, or discriminatory others might view it.

Fourth, the proposed rule comments include a carve-out for speech that is protected by the Illinois or U.S. Constitutions.

Fifth, the recent case of *Greenberg v. Lehockey*, 81 F.4th 376 (3rd Cir. 2023) provides insight on the interpretation of Pennsylvania's new RPC 8.4, which is similar to the ISBA's

proposed amendment to 8.4(j). In *Greenberg*, the Third Circuit held that plaintiff Greenberg lacked standing to contest Pennsylvania's new professional conduct rule 8.4 because his contemplated speech – making presentations where he would use and discuss cases and authorities citing various epithets – did not fall within the prohibitions of the new rule. That new rule (and its comments), like the ISBA proposal, specifically exempted certain speeches, debates, communications, and presentations. In addition, in a concurring opinion, Justice Ambro commented favorably of the "robust safeguarding" of lawyers' free speech rights in the professional conduct rules of Maine, New Hampshire, New York, and Connecticut – all similar to the safeguards included with the ISBA proposed amendments.

The ISBA believes concerns about "due process" are also not at issue with its Proposal. Such concerns are often expressed as: a preference for current IRPC 8.4(j)'s "prior adjudication" requirement, fear of unchecked disciplinary prosecution by the ARDC, fear of using proposed 8.4(j) as leverage in civil matters, and vagueness because all possible situations are not addressed in the proposed rule.

The prior adjudication requirement of IRPC 8.4(j) is an anomaly within the IRPC (and also in other states' professional conduct rules). No other IRPC requires a prior adjudication before the ARDC can proceed with a disciplinary prosecution. In fact, the ARDC has the authority to prosecute a lawyer for criminal conduct even if the lawyer has not been charged or convicted of a crime – and it has done so on numerous occasions. Regardless of this existing authority, the proposed amendments provide for the consideration of judicial or administrative findings involving the same conduct in any disciplinary proceeding.

With respect to disciplinary process, it must be recognized that the ARDC is not a star chamber. In addition to staff investigation, the disciplinary process involves an Inquiry Board, a Hearing Board, a Review Board, and ultimately review by the Illinois Supreme Court. A lawyer facing disciplinary prosecution under proposed IRPC 8.4(j) is not without significant due process protections.

With respect to using an allegation of sexual or discriminatory conduct against a lawyer as leverage in a civil matter, and not to minimize that possibility, but that is the case with all allegations of misconduct. (Of course, it would be improper for a lawyer to make such an allegation under IRPC 8.4(g)). The proposed rule does nothing to encourage making such allegations. And, given the proposed rule's narrow reach, limiting guidance, and the intensive fact finding of the disciplinary process, the attempted use of the disciplinary process as leverage in a civil matter – especially if the allegations were spurious - would appear minimal.

Finally, as to any potential vagueness of the proposed amendments by not being express enough, no IRPC includes every possible fact pattern or circumstance that might result

in a disciplinary prosecution. Such precision is unworkable and inappropriately precludes a case-by-case determination.

In conclusion, as noted in the proposed comment to IRPC 8.4(j), the IRPC are rules of reason, and potential violations must be viewed in context and from an objectively reasonable perspective. The ISBA asks the Committee to be mindful of the role this important guidance plays in interpreting the proposed rule.

2. **Proposal 20-10** (Rules 472 and 558, Offered by the Appellate Lawyers Association)

The ISBA **supports** Proposal 20-10. Upon review by several ISBA substantive law and practice groups, the proposed amendments were seen as important and commonsense clarifications to motions seeking to correct certain types of sentencing errors.

3. **Proposal 22-05** (Rule 794, Offered by the Chicago Bar Association)

The ISBA **supports** Proposal 22-05. The ISBA concurs with the CBA and the Professionalism Commission that the amendment to S. Ct. Rule 794 would appropriately highlight the important issue of sexual harassment prevention within the legal profession. As those organizations noted, the proposed amendment would reinforce the obligation of most lawyers to comply with the State of Illinois' mandated sexual harassment training (and perhaps encourage legal organizations to prepare and offer legal-centric prevention training). Finally, the amendment is an important compliment to the ISBA's proposal to amend IRPC 5.1, requiring law firms to have in place policies and procedures designed to "promote a firm environment free of the harassment and discrimination."

4. **Proposal 23-01** (Rule 796(h), Offered by the MCLE Board)

The ISBA generally **supports** Proposal 23-01 but suggests that the Rules Committee nevertheless consider an alternative proposal. As the Committee knows, the Proposal addresses the amount of the reinstatement fee that a lawyer must pay to be reinstated on the master roll of attorneys after they have been removed for MCLE noncompliance.

Currently, a lawyer must pay a reinstatement fee ($500) for each reporting period for which the lawyer was removed from the master roll due to MCLE noncompliance. The MCLE Board proposal would cap that reinstatement fee at three reporting periods ($1500). (The lawyer must also obtain the required number of CLE credits for each reporting period they have been removed from the master roll, but it is already capped at three reporting periods.)

Capping the reinstatement fee (as is the required number of CLE credits) is an appropriate amendment. It lessens the burden on lawyers who may have left the practice of law for any number of business or life reasons, but often to raise children or care for elderly relatives. That burden has most often has fallen on women lawyers. Lawyers wishing to be reinstated on the master roll so they can return to legal positions should not be penalized by significant monetary barriers. Accordingly, the ISBA would suggest that an appropriate cap on reinstatement fees should be limited to one reporting period.

5. **Proposal 23-03** (Rules 373 and 9, Offered by the Appellate Lawyers Association)

The ISBA **supports** Proposal 23-03. Upon review by several ISBA substantive law and practice groups, the proposed amendments were seen as important, common sense, and clarifying improvements to assist, in part, self-represented litigants.

The ISBA appreciates the opportunity to provide its comments on the above proposals.

If you require any additional information or have questions about the comments, please do not hesitate to contact me.

Very truly yours,

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