

November 8, 2023

Statement of Women Lawyers On Guard, Inc. Regarding Illinois Supreme Court Rules Committee’s November 15, 2023 Hearing on Proposed Amendments to Rule 8.4

On behalf of Women Lawyers On Guard, Inc. (“WLG”), a 501(c)(3) tax-exempt organization, we hereby submit these comments in support of the Illinois State Bar Association’s (“SBA”) Proposal 22-06, which would amend Section 8.4 of the Rules of Professional Conduct and its Committee Comments. WLG is a national network of lawyers and non-lawyers of all genders addressing sexual harassment, women’s reproductive rights, workplace and gender equity, and other salient issues affecting women, lawyers, and families.

WLG’s recent report, entitled: “Still Broken,” discussed its seminal nationwide, experiential research survey of sexual harassment and misconduct in the legal profession. See <https://womenlawyersonguard.org/still-broken/>

“Still Broken” demonstrated that, after 35+ years, existing policies and training are quite simply not enough to eradicate sexual harassment in all legal employment settings. Something more is needed: we submit that one such change can be found in enhancements of a State’s ethical Rules of Professional Conduct and Comments, such as those recommended by the Illinois SBA.

Notably, “Still Broken” revealed that a broad spectrum of sexual misconduct and harassing behaviors—from criminal or civilly actionable to simply unconscionable—continue to plague all walks of the legal profession. In many workplaces, harassment remains embedded within the job culture. But even when the culture did not tolerate sexual misconduct, harassment and misconduct still occur. Such behaviors include, for example: sexual ridicule, sexualized name-calling, unwanted requests for dates, unwanted communications of a sexual nature, intrusive sexually explicit questions, offensive jokes, stalking, attractiveness ratings, sexual sounds or gestures, ogling/leering, and attempted or actual sexual assault. The often-unacknowledged story of the effects of such behaviors on those harassed include reports of loss of employment, loss of productivity, loss of confidence, fear of retaliation, and negative impact on careers.

Given these details and to effectuate changes successfully, there needs to be individual consequences for sexual harassment behaviors: first, because only 1/2 of reported incidents have any consequences to the perpetrators (and 86% incidents are unreported - due to multiple reasons including no confidence that there will be any consequences other than retaliation against the person harassed); second, the employer mostly “takes it on the chin” and the perpetrator often just goes to the next place of employment; third, transparency is essential: thus, taking the situation to the Bar disciplinary process, as expressed in Proposal 22-06, means that the person harassed (and other employees as well as the public) will actually know that there were consequences - encouraging other victims to report; and finally, independent investigations must be conducted: these are often lacking in the employment setting- where the HR department is motivated to protect the employer rather than dig for the truth.

Several commenters previously have expressed concerns that Proposal 22-06 will infringe on the First Amendment rights of lawyers. Lawyers are or should be aware that freedom of speech is not absolute. Federal and many state laws have long forbidden speech that constitutes harassment in the employment context. Additional restrictions on lawyers’ speech, when they are acting in a professional capacity, have long been viewed as necessary to the integrity of the justice system. Indeed, other jurisdictions have enacted similar rules that have not been struck down on First Amendment grounds. Further, the Supreme Court has consistently upheld ethical rules enacted to regulate the legal profession’s speech and conduct in the face of First Amendment objections.

Proposal 22-06 is properly viewed as prohibiting abusive behaviors that threaten the credibility of lawyers and are inconsistent with the profession’s values, and it targets abusive behaviors by lawyers directed at other persons in connection with the lawyers’ practice of law. Lawyers have been leaders of social change in the United States since the formation of the country. Our influence extends to all aspects of society and, as a leadership profession, we cannot ignore or fail to take action against our own misbehavior. Changes in behaviors must begin within our own places of employment.

Illinois SBA Proposal 22-06 and its Committee Comments will act to strengthen the tools currently available to counter egregious behaviors such as those described

above. Together, they are particularly helpful because: (1) they make clear that the behavior has to be directed at another person; and (2) they clearly define discrimination and harassment, which should obviate any raised First Amendment concerns.

For all these reasons, Women Lawyers On Guard, Inc. strongly supports adoption of Proposal 22-06 and related Committee Comments.

Respectfully submitted,

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