

**Institute for Inclusion in the Legal Profession's
Statement in Support
of
Proposals 22-05 and 22-06**

Honorable and respected members of the Rules Committee:

The Institute for Inclusion in the Legal Profession ("IILP") submits this Statement in Support of Proposals 22-05 and 22-06.

IILP is the legal profession's leading diversity, equity, and inclusion ("DEI") think tank. Our work examines and considers DEI in the legal profession across the United States and, occasionally abroad. We are proud to be headquartered in the State of Illinois, a state with a history of notable achievements for women in the law beginning with Myra Bradwell and Alta May Hulett.

Since 2009, IILP has provided the profession with a unique set of empirical tools to facilitate a more diverse, equitable, and inclusive legal profession that is reflective of the society which it serves. Widely recognized as the authoritative source for DEI in the legal profession, IILP's innovative educational programs, research, and publications focus upon the profession as a whole rather than upon a particular practice setting or a specific type of diversity.

IILP supports 1) Proposal 22-05 by the Chicago Bar Association, whereby Illinois Supreme Court Rule 794(d)(1) would be amended to include sexual harassment prevention among the topics that would satisfy each attorney's Professional Responsibility Requirement; and 2) Proposal 22-06 by the Illinois State Bar Association whereby Rule 8.4 would be amended to include provision (j) under which it would be professional misconduct for a lawyer to "engage in conduct in the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, military or veteran status, pregnancy, or socioeconomic status."

The Illinois General Assembly has defined sexual harassment. Per the Illinois Human Rights Act, 775 ILCS 5/1 et seq., "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

It is unfortunate that our profession needs to explicitly state that sexual harassment is unprofessional and should be treated as professional misconduct but sadly, we must.

Ours is a profession whose responsibilities include representation of the public and service as officers of the court. We are integral to the maintaining public confidence in the integrity of the profession and the

legal system; with that kind of responsibility, lawyers are (and should be) held to a higher standard of behavior.¹ A license to practice law is a profound privilege.² It is unconscionable to think that sexual harassment could be acceptable under any circumstances. If we do not explicitly reject sexual harassment as acceptable behavior, then we leave those who perpetuate such behavior with a murky area open to different interpretations.

As Women Lawyers on Guard (“WLG”) reported in their 2020 national study, “Still Broken: Sexual Harassment and Misconduct in the Legal Profession,”³ there is significant, current evidence of sexual misconduct and harassment in the legal profession. The survey underlying that report asked female lawyers whether they had ever experienced discrimination, harassment, or sexual harassment and revealed that more than one out of every two women had. Seventy-five percent of women reported that they experienced a demeaning comment, story, or joke on account of their gender. The Report states, “A broad spectrum of sexual misconduct and harassing behaviors—from criminal to civilly actionable to simply unconscionable—continues to plague all walks of the legal profession.”⁴

Opposition to the proposals seem premised primarily on concerns that it impinges upon First Amendment rights due to vagueness or overbreadth. A deeper reading of the proposals as well as the ABA’s Comment⁵ and Opinion⁶ on Model Rule 8.4g (upon which Proposal 22-06 appears to be premised), and the proposed comments [3], [3A], and [3B] that are part of Proposal 22-06 underscore that the plain language of the rule cannot be read to apply to any conduct of a lawyer.⁷ Instead, an ordinary lawyer exercising common sense could sufficiently understand and comply with its terms. In short, the rule provides that a violation may only occur (1) when conduct is taken against one of the delineated categories of victims, (2) when the lawyer knows or reasonably should know that it constitutes harassment or discrimination, and (3) when it is related to the practice of law. When the rule is read in light of its official comments, which further narrow its scope, the rule provides a reasonable roadmap of potentially triggering scenarios. Of significance is the fact that the rule explicitly does not regulate nor attempt to regulate conduct wholly unconnected to the practice of law, despite several other long-upheld Rules of Professional Conduct doing so.⁸

Further, First Amendment rights are not absolute. The WLG report states that “The consequences of sexual harassment range from loss of productivity and billable hours (which negatively affects career trajectories and the economics of employers), to anxiety, loss of sleep, and worse. . . . the Survey results

¹ <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/>.

² <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/>.

³ <https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf>, p.4.

⁴ “Still Broken: Sexual Harassment and Misconduct in the Legal Profession” Executive Summary, p. 7, Women Lawyers on Guard (2020). <https://womenlawyersonguard.org/wp-content/uploads/2020/03/Still-Broken-Executive-Summary-FINAL-3-14-2020.pdf>.

⁵ https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/.

⁶ ABA Formal Ethics Op. 493 (2020).

⁷ <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/> citing ABA Formal Ethics Op. 493 (2020).

⁸ <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/> citing Model Rule. of Pro. Conduct 8.4(b)

document the devastating and long-term effects of harassment, even for behaviors that might not be actionable in court.”⁹ When considered in terms of the harms caused by sexual harassment, Proposals 22-05 and 22-06 represent a balanced and reasonable approach.

IILP and Loyola University Chicago Law School present a course each fall titled "Diversity and Inclusion: A Social and Professional Responsibility." We raised Proposals 22-05 and 22-06 with our class to see what they thought. What we learned from these future lawyers is that they believe it is an important facet of leadership to set what ought to be an obvious boundary regarding some statements and behaviors that are not appropriate and that can prove more harmful and hurtful than any helpful motivation for such behavior or statements might warrant. From their vantage point, the profession should affirmatively avoid allowing differences of opinion about Proposals 22-05 and 22-06 to be framed as zealous advocacy versus harassment. To our students, the slippery slope concern is a red herring that forces already marginalized groups to have to justify a desire for fair, equitable, and civil treatment and behavior. In their eyes, at a time when courses like Professional Identity Formation are becoming required law school courses, Proposals 22-05 and 22-06 are long overdue.

We have a duty and responsibility to the legal profession and to its future members to make the profession one in which anyone who is a part of it can feel safe from sexual harassment. That is not too much to ask or expect.

⁹ <https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf>
p. 23.