Comment in Opposition to Proposal 22-06 Offered by the Illinois State Bar Association

I. Introduction

Harassment and discrimination have no place in the practice of law. If there is a proven instance of such conduct by an Illinois licensed attorney, in addition to any civil or criminal penalties, the perpetrator should be punished through the currently applicable Illinois Rules of Professional Conduct. But that uncontroversial position is not the issue presented by the proposal to amend Rule 8.4(j) of the Illinois Rules of Professional Conduct. Instead, the issue presented is what is the best means to address harassment and discrimination among the regulated legal community. Contrary to the position implicit in the proposal, the currently existing avenues to address such conduct through the EEOC, the Illinois Human Rights Commission, and other administrative agencies—and ultimately through the state and federal courts—and only then through professional discipline, is the appropriate means by which to litigate and determine whether any person, including a lawyer, has committed acts of unlawful harassment or discrimination. That means is already codified in the current version of Rule 8.4(j), which should remain unamended.

The proposal to amend Rule 8.4(j) would essentially convert the Illinois Attorney Registration and Disciplinary Commission into an employment agency, by making it professional misconduct for a lawyer to "manifest[] bias or prejudice on the basis of" a number of listed protected categories. The ARDC is not funded and staffed and its staff is not trained to handle such claims.

Implicit in the proposal is that there are a large number of Illinois licensed attorneys who have committed harassment and discrimination and that for some reason the current means of addressing that conduct has been unsuccessful. Given that, if the amendment to Rule 8.4(j) were adopted, the ARDC would soon be overrun with complaints. To the extent that there would be no flood of complaints because by and large Illinois licensed attorneys comport their conduct with the law and common decency, the proposal to amend Rule 8.4(j) is a solution in search of a problem.

And in the absence of a showing that there is such rampant and unpunished harassment and discrimination amongst the Illinois bar, the burden of proof for which is on the proponents of the proposal to amend Rule 8.4(j), that brings the discussion to the substantial First Amendment problems with the proposal. Those problems have well documented and discussed for the near decade that proposals of this kind have been circulating. See Model Rule of Professional Conduct 8.4(g); Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law," 30 Geo. J. Legal Ethics 241 (2017); Michael Ariens, Model Rule 8.4(g) and the Profession's Core Values Problem, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 180 (2021); Comment of Professors Josh Blackman, Eugene Volokh, and Nadine Strassen, May 28, 2021; Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities," Wash. Post, Aug. 10, 2016; Edwin Meese III, August Letter to ABA House of Delegates, and

Texie Montoya, The Past, Present, and Future of ABA Model Rule 8.4(g) in Other States and Idaho, September 28, 2023.

The proposal to amend Rule 8.4(j) is a near identical facsimile of American Bar Association Model Rule 8.4(g). As discussed below, the modifications to Model Rule 8.4(g) in the current proposal to amend Rule 8.4(j) do not ameliorate the threat to free speech by the proposal and it should be rejected as not only unnecessary, but contrary to the oath taken by Illinois lawyers to "support the constitution of the United States and the constitution of the state of Illinois."

II. Specific First Amendment problems with Proposal 22-06

A. Scope of the Proposal

Proposal 22-06: "engage in conduct in the practice of law …" which is then defined in the comment as "[c]onduct in the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others when representing clients; operating or managing a law firm or law practice; and participating in law-related professional activities or events, including law firm or bar association educational or social events."

Model Rule 8.4(g): "engage in conduct … related to the practice of law" which is then defined in the comment as "[c]onduct 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."

The ARDC is competent in regulation of the practice of law in areas such as trust accounting, conflicts, and client communication. In the context of lawyer regulation, the government properly has an interest in regulating lawyer speech and has, among other rules, done so in Rules 1.6, 3.3, 3.6, 4.3, and 7.1-7.3. However, the Proposal, based upon the Model Rule, seeks to regulate conduct well beyond that and into a lawyer's life outside of what has been the usual conception of the practice of law.

It is important to contrast the Proposal with the current version of Rule 8.4(j). Under the current Rule, one of the factors to be considered in whether discipline will be imposed following a finding that a lawyer violated a federal, state or local statute or ordinance that prohibits discrimination is "whether the act was committed in connection with the lawyer's professional activities." The current Rule recognizes the limitations of what the government can regulate and any change to Rule 8.4(j) should keep this limitation.

Both the Model Rule and the Proposal seek to regulate large aspects of a lawyer's activities that have nothing to do with the representation of a client or even the administration of justice that demonstrate that the proposal is riven at its opening provision with First Amendment infirmities. For example, and this will be discussed further below with respect to the Constitutional carveout in the Proposal, a conversation at a cocktail party attendant to a bar function would be covered by the Proposal. A person does not give up their free speech rights just because they become a lawyer. See *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018).

Pointing to *NIFLA*, a decision that even the ABA's own publication acknowledged likely doomed its version of Rule 8.4(g), the Idaho Supreme Court in rejecting a version of Rule 8.4(g) stated "professional speech [is] not a separate category of speech that [is] less protected than any other type of speech: 'Speech is not unprotected merely because it is uttered by 'professionals.' This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" The Court concluded that "the language of the resolution goes beyond the regulation of employment practices and is instead a content-based regulation of speech protected by the First Amendment" and that strict scrutiny applies for it to survive.

B. Definition of "discrimination"

The Model Rule and the Proposal are nearly identical in their definition of discrimination which in the Proposal is defined to mean "harmful verbal or physical conduct directed at another person or group that manifests bias or prejudice on the basis of any characteristics identified."

As to discrimination, what it means to "manifest bias or prejudice toward others" illustrates the viewpoint discriminatory nature of the Proposal. If a speaker at a social event attendant to a bar function, which is plainly covered by the scope of the Proposal, and a lawyer took any of the following positions it could be clamed to have manifested bias or prejudice toward others:

- That *Obergefell v. Hodges* was wrongly decided;
- That *SFFA v. Harvard* was correctly decided and the Constitution generally prohibits racial preferences;
- That Hamas was justified in its October 7 attack on Israelis;
- That birthright citizenship is not inconformity with the Fourteenth Amendment; and
- A refusal to use a person's preferred pronouns.

These positions are plainly protected by the First Amendment, yet could subject a lawyer to professional discipline. The Proposal, if adopted, would chill speech because few lawyers want to be, and no lawyer should be, the test case, with their bar license on the line, if the ARDC prosecutes a lawyer for their statements.

As the Supreme Court stated in *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988), "Speech does not lose its protected character … simply because it may embarrass others or coerce them into action …. And, as we stated in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978): '[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.' See also *Street v. New York*, 394 U.S. 576, 592 (1969) ('It is firmly settled that … the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers')." Offense of the hearer is precisely what the Proposal seeks to prohibit and in that regard it is manifestly unconstitutional.

C. Definition of "harassment"

The Proposal defines harassment as "includ[ing] conduct directed at another person or group that is invasive, pressuring, or intimidating in relation to any characteristic identified" while the Model Rule defined it as "includ[ing] sexual harassment and derogatory or demeaning verbal or physical conduct."

While the Model Rule had its own problems in defining harassment with regulating the use of "derogatory or demeaning" speech in view of the Supreme Court's holding in *Matal v. Tam*, 137 S.Ct. 1744, 1750 (2017) that "disparaging" or "contemptuous" speech was protected speech, the Proposal's attempt to correct the problem by replacing those words with "invasive," "pressuring," or "intimidating" just creates a different problem. Those terms in Proposal are so vague as to have no meaning, especially in relation to their use against a protected class. This vagueness is amplified by the use of the word "includes" such that the definition in the comment is without limit. In addition, those words are not legal terms of art and thus the reference to antidiscrimination and harassment statutes will provide no guidance to either the ARDC in applying the Proposal should it become the Rule or lawyers in trying to comply.

In addition, the Proposal seems to make it acceptable for a lawyer to be invasive, pressuring, and intimidating, so long as the harassment of that nature is neutral as to a protected class. The solution for a person that is subject to conduct of a lawyer which is "invasive," "pressuring," or "intimidating" (regardless of whether it is based upon a person's status in a protected class) is to remove one's self from the situation, not make it professional misconduct. It also must be said that speech that is "invasive," "pressuring," or "intimidating" cannot be sanctionable and in accord with the First Amendment. *Snyder v. Phelps*, 562 U.S. 443 (2011).

The problems with these definitions are crystallized in the following observation from Justice Brennan: "[i]f there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

D. *Mens Rea* requirement

Both the Model Rule and the Proposal allow for professional discipline to be imposed under both an objective or a subjective standard stating in the Proposal that it is prohibited for a lawyer "to engage in conduct in the practice of law that the lawyer knows or reasonably should know." The inclusion of a subjective standard runs afoul of the Constitution as recently articulated by Supreme Court in *Counterman v. Colorado,* 600 U.S. 66 (2023), which held that true threats must be shown through an objective standard of at least recklessness. Imposing a lower standard for the manifestation of bias or prejudice on lawyers would thus be unconstitutional. If there is to be such a rule, it should only include an objective standard.

E. Viewpoint carveouts

The Model Rule and the Proposal include carveouts for both diversity and inclusion and for a lawyer that limits their practice to representation of underserved populations. These

carveouts along with the Constitutional carveout discussed below, lift the veil on the First Amendment violations in the Proposal.

The insertion of the diversity and inclusion carveout demonstrates that the Proposal runs afoul of the Constitution's prohibition against viewpoint discrimination. It is obvious that such programs "manifest bias or prejudice" toward others that is expressly prohibits otherwise, but because the ABA and apparently the ISBA favor such programs, those organizations have included this carveout. That this carveout is necessary to protect such programs is demonstrated especially in light of the decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) ("Eliminating racial discrimination means eliminating all of it.")

By expressly allowing for diversity and inclusion programs and by prohibiting discrimination based upon socioeconomic status, this Proposal will potentially subject lawyers to claims of professional misconduct if they choose only to hire lawyers from particular kinds of law schools, whether those are lawyers who attended upper-echelon law schools or ones who exhibited grit and determination by attending night school while working two jobs and raising three kids.

If there is any doubt about the viewpoint discriminatory nature of the Proposal, it is shown in the need for a carveout to allow lawyers to discriminate against socioeconomically advantaged persons by allowing lawyers to limit their practice to those that are underserved. There can be no argument that access to justice is a substantial problem and lawyers should be allowed to so limit their practice if they choose, but the point here is that the Proposal needed this carveout to allow such a practice limitation. This demonstrates that the drafters understood the sweep of what was being proposed and that absent the carveout it would prohibit commendable conduct and speech. It also demonstrates that the Proposal improperly discriminates on viewpoint.

Lastly, the Constitutional carveout, which is not present in the Model Rule, is a but a fig leaf and does nothing to resolve any of the problems with the Proposal. The plain text of the carveout only applies to conduct and only modifies a paragraph in the comment, not the proposed rule itself.

In referring to speech, the carveout only protects that speech which is made in the "context of teaching, public speaking, or other forms of public advocacy." As set forth above, the comment at a cocktail party related to a bar event is covered by this Proposal and not protected by this carveout because such a comment is not made in the limited protected contexts. The carveout makes clear that the purpose of the Proposal is to substantially limit lawyer speech well beyond which is constitutionally permitted.

Other contexts where this might apply would be the following:

- Posts and comments on LinkedIn or other social media platforms, which because of its business purpose of marketing certainly relates to "operating or managing a law firm or law practice" (and read closely it is clear that the list of conduct within the practice of law is not limited to the list in the Proposal);

- Editorials and letters to the editor commenting on legal issues in newspapers, online fora, bar journals, and other publications; and
- Comments at a board non-profit meeting, even where the lawyer is not acting as counsel for the board.

What is carved out of the Proposal demonstrates the scope and unconstitutionally of what the Rule seeks to regulate.

III. Conclusion

Rooting out discrimination and harassment from the legal profession is a laudable goal, but the Proposal presented seeks to do that in a form that is at once practically unworkable and unconstitutionally infirm. The proposal should be rejected in its entirety and the current version of Rule 8.4(j) left in place.

Short of that salutary corrective the following changes to the proposal would ameliorate some of the problems:

1. A *mens rea* requirement like that in Pennsylvania's version of Rule 8.4(g) that only applies to speech and conduct that is knowing;

2. A return to a traditional definition of the practice of law that does not include activities tangential or further removed from the administration of justice by replacing practice of law with "conduct that implicates a lawyer's fitness to practice law";

3. A requirement that the prohibited forms of discrimination and harassment be "severe and pervasive" in Comment 3;

4. Providing that only the substantive federal law of anti-discrimination and anti-harassment will (not may) guide the application of Rule 8.4(j);

5. The inclusion of a constitutional carveout in the text of the Rule, not just the comment. Two suggestions for such an inclusion are:

    a. "This Rule does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule. For example, this Rule does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums." or

    b. That which was adopted by New York and provides "This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules: (b) express views on matters of public concern in the context of

> > > teaching. public speeches. continuing legal education programs, or other forms of public advocacy or education. or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution. See Joint Order of the Departments of the New York State Supreme Court, Appellate Division.
>
> Indeed, with a change to the *mens rea* requirement, an adoption of New York's version of Rule 8.4(g) wholesale would both accomplish the stated goals of the those proposing a revision to Rule 8.4(j) and address many, if not all, of the concerns of those who object to the Proposal.

Donald Patrick Eckler, Freeman, Mathis, & Gary, LLP (for identification purposes only)
Chicago, November 8, 2023

Cosigners:

Scott Anderson
Anderson Law Office, P.C. (for identification purposes only)

Terry Fox
Schouest, Bamdas, Soshea, BenMaier, & Eastham (for identification purposes only)

Theodore Frank
Director of Litigation and Senior Attorney
Hamilton Lincoln Law Institute

Randall Wenger
Chief Counsel
Independence Law Center

Adam Schulman
Senior Attorney
Hamilton Lincoln Law Institute

Ilya Shapiro
Director of Constitutional Studies
Manhattan Institute (for identification purposes only)