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To: Members of the Florida Bar

From: Starlett Massey, Jonathan B. Lewis, Nikki Barker

RE: Amending Florida Bar Rule 4-8.4 to include a provision banning harassment 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.

Dear Members of the Florida Bar:

Rule 4-8.4 of the Rules regulating the Florida Bar was adopted in 1994, and for many years was substantially similar to its counterpart in the model rules promulgated by the American Bar Association ("ABA"). However in 2016, the ABA amended its Model Rules on Professional Conduct to make clear that harassment on the basis of, among other things, sex, race, religion, disability, age or gender identity, in conduct related to the practice of law will not be tolerated. In 2018, the Supreme Court enacted an Administrative Rule to address the same. The Florida Bar should follow the lead of the ABA and amend its Rule on Professional Conduct to address these issues directly.

Differences and Similarities of ABA Model Rule 8.4 (est. 2016) and Florida Bar Rule 4-8.4 (est. 1994)

In 2016, the American Bar Association (ABA) revised its Model Rule on Misconduct, Model Rule 8.4. Prior to 2016, ABA Model Rule 8.4 addressed discrimination. The 2016 revision distinguishes harassment from discrimination, thereby clarifying the types of behavior that is prohibited by the Rule. ABA Model Rule 8.4 states, in pertinent part:

It is professional misconduct for a lawyer to:

[…]

> (d) engage in conduct that is prejudicial to the administration of justice;
>
> […]
>
> (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 these Rules.

The counterpart to ABA Model Rule 8.4 is Florida Bar Rule 4-8.4, which states, in pertinent part:

A lawyer shall not:

> (**d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice**, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic**;**

Florida Rule 4-8.4(d) and ABA Rule 8.4(d) both prohibit members of the bar to: **engage in conduct in connection with the practice of law that is prejudicial to the administration of justice**.

However, Florida Bar Rule 4-8.4(d) adds: including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic**.**

ABA Model Rule 8.4(g) expands upon the prohibition against discrimination by addressing harassment, and states it is prohibited for an attorney 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 these Rules.

While the ABA Model Rule on its face prohibits discrimination or harassment against virtually any person an attorney comes into contact with, the Florida Rule limits its application to "conduct in the practice of law which is prejudicial to the administration of justice." Limiting the class of protected people in such a way leads to the question of whether Florida Bar Rule 4-8.4 prohibits an attorney behaving in this manner in the workplace and opens the conversation about whether the Florida Bar Rule protects employees from harassment or misconduct on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

In addition, Florida Bar Rule 4-8.4(d) employs the terms "disparage, humiliate, or discriminate" in regard to prohibited behaviors, whereas ABA Model Rule 8.4(g) uses the terms harassment or discrimination. The importance of the semantics in this situation is paramount. The legal definition of harassment is well established, whereas the legal definitions of the terms "disparage" and "humiliate" are decidedly murkier.

According to the United States Equal Employment Opportunity Commission (EEOC), "sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964." Sexual harassment is defined by the EEOC as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature …when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

The law recognizes two types of harassment cases: (1) *quid pro quo*, which are "based on threats which are carried out" or fulfilled, and (2) hostile environment, which are based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), *see also Branch-McKenzie v. Broward Cty. Sch. Bd.*, 254 So. 3d 1007, 1012 (Fla. Dist. Ct. App. 2018).

Adopting the term harassment in the Florida Bar Rule will clarify the type of behavior that is prohibited. In addition, expanding the protected class of people to include any person that an attorney comes into contact with will protect fellow employees, clients, etc., in addition to litigants, jurors, witnesses, court personnel, or other lawyers who are covered by the existing Rule.

Caselaw Established Under Florida Bar Rule 4-8.4 Does Not Adequately Address Harassment in the Workplace

Florida Bar Rule 4-8.4 was established in 1994, and significant case law has been written in its path. However, none of these case findings under Florida Bar Rule 4-8.4 have dealt directly with the issue of sexual harassment in the workplace. It can be deduced from the egregious behavior that has been dealt with under Florida Bar 4.8-4 that sexual harassment does take place regularly in the practice of law. However, cases of workplace sexual misconduct and harassment are not raised under Florida 4-8.4. It may be argued that this is because there simply are no cases of sexual harassment in the practice of law. A far more likely explanation is that victims of these cases do

not have clear standing under Florida Bar Rules to raise this issue. Adopting the ABA Model Rule will provide a clear and safe path for members of the bar to institute conduct appropriate for the legal profession and to maintain the standards that the bar strives to achieve with workplaces free from sexual and other forms of harassment and misconduct.

While remedies may exist under local, state, and federal law to redress some forms of sexual harassment which would be encompassed by the proposed rule, compelling reasons still exist for the implementation of the rule. First, smaller employers are typically not covered by these laws, leaving many small or solo law practices outside of their purview. Second, many bar rules currently address misconduct which is also prohibited under state, federal or local law, and the two are not mutually exclusive. Finally, incorporating the prohibition in the bar rules serves an important signaling function that conduct of this nature will not be tolerated in the profession. This amendment will assist in combatting the troubling trend of lawyers who are discouraged from the practice of law due to harassment or discriminatory conduct[1].

Florida Bar Rule 4-8.4 clearly prohibits sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship (Florida Bar Rule 4-8.4(h)), as well as prohibits an attorney from engaging in "conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic." Florida Bar Rule 4-8.4(d).

Cases with findings under these provisions of the Florida Bar Rule deal mostly with attorney misconduct regarding the attorney client relationship. The Florida Supreme Court has "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Fla. Const. art. V, § 15. In *The Fla. Bar v. Blackburn*, 244 So. 3d 168, 170 (Fla. 2018), the Florida Bar Referee recommended an eighteen month suspension, but the Supreme Court imposed disbarment. The underlying facts in this case involved an attorney who on separate visits with two incarcerated female clients, coerced the clients into trading sexual favors for fees. *Id.* The Court held that "under no circumstances should an attorney representing a client expose that client to unwanted sexual relations of any kind." Furthermore, the Court found that "Respondent's conduct, which exploited his clients' circumstances for his own personal benefit, "breeds contempt and distrust of lawyers," "demonstrates severe moral turpitude," and such actions "are wholly inconsistent with approved professional standards."" *The Fla. Bar v. Blackburn*, 244 So. 3d 168, 172 (Fla. 2018), quoting *Florida Bar v. McHenry*, 605 So.2d 459, 461.

[1] *See Report: The Problem of Sexual Harassment in the Legal Profession and Its Consequences,* The American Bar Association Commission on Women in the Profession, February 2018 – Scharf, S., available online at: https://www.scharfbanks.com/sites/default/files/assets/docs/report.pdf

Revising Florida Bar Rule 4-8.4 to include the ABA Model Rule provision prohibiting "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," and would codify the standards in *Blackburn,* wherein the Court disbarred the attorney for exposing his clients to unwanted sexual advances and exploited his client's circumstances. It naturally follows from the Court's reasoning that harassment in the workplace should also be banned under the Florida Bar Rules, as lack of such a rule leaves employer-employee relationship in the legal world rife with exploitation. Of note, there are no cases for disbarment under Florida Bar Rule 4-8.4 for harassment or discrimination in the workplace.

In addition, in 2018, the Supreme Court of Florida implemented its own Administrative Order which recognizes the destructive effect of harassment in the workplace. Administrative Order of the Supreme Court 1806 states:

> Sexual harassment occurs if there are unwelcome sexual advances; unwelcome requests for sexual favors; or unwelcome verbal or physical conduct of a sexual nature from or involving an employee's supervisors, peers, subordinates or other persons in contact with an employee during the course of the conduct of the employee's business when:
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> 1. Submission to such conduct is either explicitly or implicitly a term or condition of employment; or
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> 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual or as the basis for any official action; or
>
> 3. Such conduct has the purpose or effect of interfering with an individual's work performance or creates a persistently intimidating and hostile environment, as that term is defined in state and federal law.

The policy defines "sexual misconduct" as any behavior of a sexual nature that is committed without consent or by force, intimidation, coercion, or manipulation, and further states that "[s]exual misconduct can occur between strangers or acquaintances, including people involved in an intimate or sexual relationship, and is not necessarily actionable sexual harassment." AOSC1806. The Florida Supreme Court's adoption of this policy demonstrates the recognition of the pervasiveness of harassment in the workplace and the Court's willingness and desire to correct it.

Finally, there is ample caselaw demonstrating that sexual misconduct is grounds for disbarment by the standards of the Florida Bar and Supreme Court of Florida. As noted above, an attorney coercing two incarcerated inmate clients into sexual acts was grounds for disbarment. *The Fla. Bar v. Blackburn*, 244 So. 3d 168 (Fla. 2018). Pressuring a client for sexual favors and lying

during the investigation of the claims was grounds for disbarment. *Florida Bar v. Senton*, 882 So.2d 997, 1003 (Fla. 2004). Attorneys have been disbarred for coercing vulnerable clients to engage in unwanted sexual conduct. *Florida Bar v. Scott,* 810 So.2d 893 (Fla.2002). The Supreme Court has disbarred attorneys for sexual misconduct in presence of clients. *Florida Bar v. McHenry*, 605 So.2d 459 (Fla. 1992).

Following this caselaw, it would stand to reason that harassment and discrimination beyond the attorney-client relationship should also be banned, as this too "breeds contempt and distrust of lawyers," "demonstrates severe moral turpitude," and such actions "are wholly inconsistent with approved professional standards."" *The Fla. Bar v. Blackburn*, 244 So. 3d 168, 172 (Fla. 2018), quoting *Florida Bar v. McHenry*, 605 So.2d 459, 461.

Implementing ABA Model Rule 8.4

Enforcing the adapted ABA Model Rule 8.4 would generally follow current procedure for violations of the Florida Bar Ethics Rules. Complaints would be assigned to a committee or task force, similar to the Attorney Consumer Assistance Program. The task force will be trained on sexual harassment and discrimination issues. Cases that are deemed to have a substantive basis can be referred to programs to educate attorneys on appropriate behavior.

Current programs provided by the Florida Bar work to maintain the level of integrity and professionalism expected of its members. "Even in cases in which the Bar does not pursue discipline, lawyers can be ordered to complete remedial programs to improve their practices. These programs include ethics school, professionalism workshops, advertising rule workshops, trust accounting workshops, stress management courses, law office management consultation service and a myriad of CLE courses in specific areas of practice. The Bar may require that a lawyer be referred for treatment regarding alcohol/chemical dependency and/or mental health counseling." (See Footnote 2.) As the purpose of the Rule is to prevent unwanted behaviors, identifying and educating Bar members on what behaviors are discriminatory and/or considered harassment is a key first step to preventing these behaviors from continuing.

Attorneys who continue to receive substantiated complaints as determined by a grievance committee of the Florida Bar after receiving education and counseling programs can be referred to a higher level of discipline. Depending on the severity of the findings after an investigation, the Task Force can determine appropriate remedy, such as public reprimand, suspension or disbarment. If harassing and discriminatory behavior continues after training and education, there must be consequences in order to prevent these behaviors in the legal profession.

The Florida Bar regulates more than 103,000 lawyers. As such, education is a major component in identifying and correcting unwanted discriminatory behavior. The Florida Bar also "has many proactive programs designed to assist its members in abiding by the rules of professional

conduct."[2] The Florida Bar currently mandates at least five continuing legal education credit requirements be fulfilled through classes on legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs. Requiring a credit to educate members on harassment and discrimination would naturally follow suit with programs the Bar currently requires, and would aid in, preventing unwanted behaviors by educating members on what is appropriate behavior in the workplace and legal profession. Implementing the ABA Model Rule would further the Florida Bar's goal of maintaining integrity and professionalism within the legal profession.

Training, education and discipline will help to remove harassment and discrimination from the legal profession. The Florida Supreme Court has recognized the need to address these behaviors through Administrative Order. Updating the 1994 Professional Conduct Rule will clarify for Bar members what is unacceptable behavior in the legal profession. Sexual and other forms of harassment and discrimination are certainly not acceptable in the legal profession. The Rules should reflect as such.

[2] https://www.floridabar.org/public/acap/acap001/#9.%20Does%20The%20Florida%20Bar%20look%20only