To: Committee on Standards of Attorney Conduct

From: Labor & Employment Law Section Ad Hoc Committee to Address COSAC Proposal to Amend 8.4(g)

Re: Proposal by the Committee on Standards of Attorney Conduct to Amend Rules of Professional Conduct 8.4(g)

This Memo is submitted jointly by an ad hoc committee of the Labor & Employment Law Section comprised of two lawyers who represent individuals (Wendi S. Lazar of Outten & Golden LLP, and Jon Ben-Asher of Ritz Clark & Ben-Asher LLP), two management attorneys (Michael Bernstein of Bond Schoeneck & King, PLLC and Chris D'Angelo, in-house at Con Edison), and one neutral (Tim Taylor). Chris D'Angelo is the current Chair of the Section, and Tim Taylor is the Chair-Elect, who will assume the position of Chair on June 1, 2021.

The Committee was appointed in January, and worked on this issue for several months, through virtual meetings, phone calls, and emails. Many drafts of the Memo were circulated, reviewed, revised, and discussed. The Memo was presented to the Executive Committee of the Section and reflects the Section's consensus view of the proposal by COSAC to amend Rule 8.4(g) of the Rules of Professional Conduct, which is set forth below.

The COSAC proposal finds discrimination and harassment to be acts of misconduct under our ethics rules without the requirement that remedies that otherwise would be available under existing federal, state or local law first be exhausted. As stated below, we strongly endorse that proposal, with one critical exception, and one dissenting view on another point.

The Current Rule

New York's RPC 8.4(g) currently reads:

> A lawyer shall not… (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that

the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

The Proposed Rule and Comments

The proposed revised rule would read:

A lawyer or law firm shall not:

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, status as a member of the military, or status as a military veteran.

(3) "Harassment," for purposes of this Rule, means conduct that is:

a. directed at an individual or specific individuals in one or more of the protected categories;
b. severe or pervasive; and
c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm (i) to accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.

(5) "Conduct in the practice of law" includes:

a. representing clients;
b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
c. operating or managing a law firm or law practice; and
d. participating in bar association, business, or professional activities or events in connection with the practice of law.

COSAC's proposed comments to the rule are:

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers.

[5B] "Unlawful discrimination" refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication.

[5D] A lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that "adversely reflects on the lawyer's fitness as a lawyer").

Recommendations of the Labor & Employment Law Section's Ad Hoc Committee

The proposed amendment is a vast and critical improvement over the current 8.4(g), and largely follows the text of the American Bar Association's Model Rule 8.4(g), which was amended in 2016. Except for one point which we recommend COSAC reconsider, it is eminently fair to both potential complainants and lawyers, as indicated in Section A., below. The portion of the proposal that we unanimously do not recommend is set forth in Section B., below. Finally, there is one area where the Committee is split, as discussed in Section C., below:

A. <u>The Ad Hoc Committee Unanimously Recommends These Comments To The COSAC Proposal</u>

1. The current rule requires that before a claimant can file an ethics complaint with the Disciplinary Committee, a charge of discrimination or harassment with a "tribunal" with jurisdiction to hear it must first be filed: in other words, the claimant must file a charge with either the EEOC or a state or local human rights agency or file a complaint in state or federal court. This requirement is a substantial and unnecessary barrier to claimants bringing an ethics charge since many will either be unable to afford counsel to file an administrative or judicial complaint or be unwilling to bring a complaint in a public forum. It is also entirely outdated, since it is only relevant to claims of employment discrimination, and under the proposed amendment, discrimination or harassment in several non-employment contexts is deemed unethical. We agree with its deletion from the proposed rule.

2. The amendment broadens the coverage of 8.4(g) beyond the current "hiring, promoting or otherwise determining conditions of employment," to include "Conduct in the practice of law." This term is defined to mean representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or professional activities or events in connection with the practice of law. As the COSAC proposal notes, most discriminatory or harassing behavior by lawyers takes place outside the employment context: "We also recognized (based on research cited by the ABA) that a majority of the misbehavior occurred in non-litigation matters and in locations other than the office or courtroom, at law firm social events, or at bar association functions." Adversaries, witnesses, court personnel, and people interacting with lawyers in professional activities should not be subjected to discriminatory or harassing conduct by lawyers and deserve to have an avenue to redress it.

3. The amendment specifies the types of discrimination or harassment that can be the basis of an ethics complaint as including age, race, creed, color, national origin, sex, disability, marital status, sexual orientation or gender identity. This definition is largely in line with categories set out in the New York State Human Rights Law ("SHRL"). However, in contrast to the SHRL, it does not include gender expression, predisposing genetic characteristics, familial status, or domestic violence victim status. ***It is our recommendation that those categories should be added.*** We agree with COSAC's choice not to include "socio-economic status," which is in the ABA Model Rule, since that term is susceptible of widely differing and subjective definitions and interpretations.

4. The COSAC proposal provides that nothing in 8.4(g) is intended to limit the scope or applicability of current Rule 8.4(h), which prohibits a lawyer from engaging in conduct, whether in or outside the practice of law, that "adversely reflects on the lawyer's

fitness as a lawyer." Under 8.4(h), Disciplinary Committees have authority to investigate and remedy a host of ethical violations which entail neither discriminatory nor harassing behavior, and the COSAC proposal makes clear that authority remains intact.

B. The Ad Hoc Committee Unanimously Disagrees With COSAC Regarding Its Inclusion of the Severe Or Pervasive Standard

1. We do have one *strong and unanimous* disagreement with the COSAC proposal. It states that for harassment to rise to the level of an ethical violation, it has to be "severe or pervasive." However, the "severe or pervasive" standard is no longer in effect under either the State or New York City Human Rights Law. The State Human Rights Law was amended in 2019 to encompass harassment "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." Executive Law Sec. 296(1)(h). The standard is also irrelevant to liability under the New York City Human Rights Law. *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 73-80 (2009). Including "severe or pervasive" imposes a standard of proof that the courts, the State legislature, and the New York City Council have firmly rejected as outmoded.

C. Split of Opinion

1. The COSAC proposal prohibits "conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes (1) unlawful discrimination and (2) harassment, whether or not unlawful…" Proposed Comment 5B explains that "'Unlawful discrimination' refers to discrimination under federal, state and local law."

(a) Discrimination Should Not Have To Be "Unlawful"

The consensus view of the of the Committee is that the term "unlawful" just prior to "discrimination" should be removed, and that the appropriate standard is in the new ABA Model Rule, 8.4g which states that "The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." The use of substantive law as a guidance permits claims based on discrimination which might not come within judicial constructions. The limitation of subparagraph (1) above to only discrimination which is "unlawful" makes ethical conduct dependent on legal rules. Rule 8.4 has never been limited in that way. Rule 8.4(c), for example, refers to "dishonesty," "deceit" and, "misrepresentation," conduct that is not limited to legal standards, but nonetheless is unethical. In addition, the requirement that the conduct be "unlawful" creates unnecessary confusion and the potential for inconsistent application, given the absence of consistency and vast dichotomies in the definition of "protected categories" of individuals.

An ethics violation need not be unlawful; It simply needs to be unethical, like so many of our other ethics rules. We should look to substantive law for guidance concerning both discrimination and harassment, not a double standard that demands that discrimination, but not harassment, be unlawful in order to be unethical.

There are other reasons to move away from an "unlawful" standard for both discrimination and harassment. First, there is a clear dearth of cases to look to in regard to the legal profession in the area of discrimination, and even more so in sexual harassment. Many reasons have been posited for this lack of jurisprudence. Some argue that courts are reluctant to regulate other members of the profession accused of wrongdoing. Many firms have compulsory arbitration agreements, binding on both partners and employees of the firm. Claimants raising allegations against a partner must also overcome the obstacle presented by *Clackamas Gastroenterology Assoc., P.C. v Wells*, 538 US 440, which established an extremely rigorous standard to establish that a law firm partner is covered by anti-discrimination laws as an employee. Whatever the reason, given that there have been so few cases brought by attorneys, the term "unlawful" in this context is severely limited to the few cases that actually go to trial and don't settle. Requiring the acts of discrimination to be unlawful before they would be considered unethical would place an undue burden on those filing grievances against attorneys under this proposed Rule.

One member of the Committee is not in agreement with this view, and believes that the COSAC standard for "discrimination" is the appropriate and fair one: If lawyers are subject to an ethical violation and possible loss of their livelihood based on discriminatory acts, the ethical rule should make very clear what "discrimination" means. The law of discrimination -- which has been thrashed out for over fifty years by the courts, Congress and State legislature since the enactment of Title VII -- is only something that "may guide" the Disciplinary Committee. If so, by what standards, the member asks, other than the law of discrimination, should the Committee apply, and how is a lawyer to know what "discrimination" means? While other ethical violations are not defined by references to statutes, discrimination is, inherently, a creature of statutory construction. In any event, to the extent that improper lawyer conduct doesn't reach the level of "discrimination" under our very liberal State and NYC Human Rights Laws, Rule 8.4(h) affords ample basis for the discipline of conduct that "adversely reflects on the lawyer's fitness as a lawyer."

Another member of the Committee shares these concerns, particularly as to issues of fundamental fairness, due process and evidentiary standards likely to surface where claims of discrimination and/or harassment are asserted. This member believes, however, that COSAC's inclusion of the law as a "guide", in the context of the "knows or reasonably should know" standards, provides both for the structure we seek and the flexibility required in settled approaches to rules of ethics.

(b) "Harassment" Should Be Changed To "Sexual Harassment"

Finally, one member of the Committee raises an additional change in this regard. We understand that the use of the term "harassment" in subparagraph (3) is actually under reconsideration by the ABA. This Committee member believes strongly that COSAC can "fix" this drafting error now rather than amend it later. It is clear from the context of the testimony before the ABA disciplinary committee in 2017 before the HOD unanimously passed 8.4g, that what the ABA drafters meant was "sexual harassment," not harassment that would otherwise be included in the context of the broad term of what "discrimination" is, and how it is defined under our law. This Committee member believes the word "harassment" should be preceded by the word, "sexual," so that it is clear we are talking about something very different from, say, gender, race or other forms of discrimination. Sexual harassment is different in kind. It is different because in addition to the discrimination based often on race and gender, the harasser is not necessarily trying to push out or exclude the other person; quite the opposite, the harasser is trying to get physically closer and more intimate with the other person or use sex for a "quid pro quo"—a favor. It could also be intersected with other forms of discrimination, but the two acts (discrimination and sexual harassment) are distinct and differentiated under the law. That is why, according to this view, sexual harassment is different from gender, race or other kinds of discrimination. By way of example again, the discriminator wants to keep women out of the law firm; the harasser wants to bring women into the law firm so they can harass them and use their power and position to demean and sexualize them.[1]

Thus, using the word "harassment," generically in this context is ineffective. The word harassment in this context should follow popular usage; it should be used in the phrase, "sexual harassment." Finally, whether or not "harassment" is changed to "sexual harassment" cannot be cured by bifurcating a different standard in this rule for "discrimination" (unlawful) and "harassment" (whether or not unlawful) as they should both simply be unethical and again, we can look to substantive law as a guide to do so [2]

[1] The most recent study evidencing sexual harassment in the legal industry showing its prevalence in law firms and in the courts is: Still Broken, www.womenlawyersonguard.org/still-broken. 2019 "Zero Tolerance" Best Practices for Combatting Sex-based Harassment in the Legal Profession, ABA publication, 2018, Edited by Lazar, Chiarello and Connoly, Preface by Anita Hill. This is a useful anthology of the law, issues and best practices around sex-based harassment in the Industry and reference many other studies and publications.

[2] One member of the Committee suggests that there is not a dispute within the Committee that a claim of harassment also may well entail a claim of discrimination, and that each claim of discrimination and/or harassment will present its own essential elements. In some cases that may include not just derogatory or demeaning verbal conduct, but also unwelcome physical contact or activity, particularly where a claim of sexual harassment is alleged. Similarly, it may or may not entail the examples cited above. To be sure, a claim of sexual harassment may well involve distinctly different issues and behavior. This Committee member does not believe there is a difference of opinion on these points; or that the import of a claim of sexual harassment is diminished by the COSAC approach to these issues. It is more a question of how it is expressed.

Respectfully submitted,

New York State Bar Association
Labor & Employment Law Section
Ad Hoc Committee to Address COSAC Proposal to Amend 8.4(g)

Jon Ben-Asher, Co-Chair
Wendi Lazar, Co-Chair
Michael Bernstein, Co-Chair
Chris D'Angelo, Member
Tim Taylor, Member

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