Prohibited Rule 8.4(f)-(g), a dissenting view

Thank you for the opportunity to respond to the Committee's April 25, 2020, Draft of Proposed Rule 8.4(f)-(g). Last August, we submitted our Joint Comments to the Committee, expressing our concerns that the Proposed Rule had certain material defects. We appreciate the Committee's recent efforts to ameliorate the Proposed Rule, but we remain concerned.

As we address the Alaska Supreme Court, we note that a lawyer should not discriminate in the employment context in its employment context. The second paragraph of Proposed Rule 8.4 prohibits, essentially, employment discrimination. It is certainly a salutary provision that, in order for the Commission to conduct to be actionable under Commission rules, the complainant must succeed in a final agency or judicial determination of professional misconduct or discrimination. The charge is for the purpose of proving the complaint is true in a final agency or judicial determination of professional misconduct or discrimination. There are, however, several ways in which this provision should be improved.

First, the language should be modified to read: "In addition, it is professional misconduct for a lawyer to knowingly engage in unlawful harassment or discriminatory practices in the workplace, by reason of adherence to employment discrimination statutes — to what sort of conduct is prohibited. If the conduct is prohibited in statutes or ordinances that prohibit harassment and discrimination in the workplace, then that is precisely the sort of conduct that is also prohibited in civil employment, and not some other sort of conduct.

Second, the requirement should be that the conduct "results in a final and unappealable adverse finding or judicial determination." As long as an agency or judicial determination is appealable, the lawyer should be able to pursue that appeal before being found to have engaged in unlawful harassment or discriminatory practices.

The phrase "unlawful harassment or discriminatory practices in the workplace, by reason of adherence to employment discrimination statutes" should be added to the proposed rule. The phrase should also be under Commission rules.

Finally, the phrase "unlawful harassment or discriminatory practices in the workplace, by reason of adherence to employment discrimination statutes" should be added to the proposed rule.