Memorandum

To: Faculty
Chancellor Weiss

From: Ray Diamond

re: proposed policy statement and proposed amendment to the Code of Student Professional Responsibility

Date: April 24, 2015

I. INTRODUCTION

This academic year has been the scene of an ugly set of occurrences. In the fall of 2014 in one of the 1L sections, a student was accused by classmates of using epithets based on race and on sexual preference. The accusation has it that these epithets were used inside the law school and inside the classroom. Perhaps as a function of peer pressure, the student in question has apologized. Moreover, the 1L section in which the actions in question took place established a dialogue on diversity, surely a positive development. Yet, no discipline under the Code of Student Professional Responsibility has taken place.

The Fall 2014 incident does not stand in a vacuum. In October of 2012, the Law Center suffered an egregious injury to the peace of the community. At a Law Center function, a drunk white student addressed a black student, using a racial epithet. The victim of this insult instituted a complaint under the Code of Student Professional Responsibility. In accordance with the procedures attendant to the Code, a preliminary hearing committee was appointed, "to determine whether probable cause exist[ed] to warrant a Disciplinary Hearing." Amazingly, the preliminary hearing committee found that no probable cause existed to find a violation of the Code. As it was explained to me by members of the committee, the committee found that even if all of the facts of the victim's complaint were true, the Code did not proscribe addressing another student using a hateful epithet.

This was a curious and objectionable conclusion. The Code notes that "[l]aw school is the first step toward becoming a member of the legal profession," members of which "are subject to the highest standards of professional conduct," and the Code is explicit that not only "lying, cheating, plagiarism, and theft" are prohibited, but also "*other forms of student misconduct*." There are eleven forms of student misconduct that are stated in the Code, but the Code is explicit in its statement that "student misconduct *includes, but is not limited to*" the listed examples. (emphasis supplied.)

The use of a racial epithet directed to one student by another, at a law school event, is not unlike the use of a racial epithet by an attorney under similar circumstances. Such conduct has been

reprobated by the legal profession as attorney misconduct. And because such conduct by a student is disruptive to the educational program of the Law Center and to the ability of students to benefit from exchange among one another, we need a similar understanding here.

I. THE ABA MODEL RULES ESTABLISH THAT THE USE OF RACIAL EPITHETS BY AN ATTORNEY ACTING IN A PROFESSIONAL CAPACITY MAY CONSTITUTE PROFESSIONAL MISCONDUCT.

The American Bar Association's Model Rules of Professional Conduct at Rule 8.4 govern attorney misconduct.[1] Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." An official comment to Rule 8.4 speaks directly to the use of epithets such as the one that was used in October 2012, and suggests that an attorney is proscribed from using racial epithets in a professional capacity, at least when the use of such epithets is not advised as a matter of "legitimate advocacy:"[2]

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[1]Under the heading "Maintaining The Integrity Of The Profession," Model Rule 8.4 provides:

> It is professional misconduct for a lawyer to:
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> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

[2]Comment 3 to Rule 8.4(d) provides:

> "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).[3]

II. LOUISIANA RULES OF PROFESSIONAL CONDUCT AND THE TREATMENT OF RACIAL EPITHETS AND RACIALLY DEROGATORY TERMS.

Louisiana has not explicitly adopted a rule designating as professional misconduct attorney usage of racial epithets in a professional capacity outside of legitimate advocacy. The matter is under current consideration, however.[4] Nevertheless, the Louisiana Rules of Professional Conduct have adopted ABA Model Rule Rule 8.4, including part (d). Comment 3 to the corresponding Model Rule 8.4 would therefore suggest that in Louisiana, attorney usage of racial epithets in a professional capacity is not immunized against professional misconduct charges. As Dane Ciolino, our colleague at Loyola University - New Orleans and an expert on professional responsibility, has put it recently in opining on the very subject, while "Louisiana has no disciplinary rule, comment or other authority prohibiting the use of racially-offense language by a lawyer, [none] is . . . necessary. . . . Any words or conduct that are 'prejudicial to the administration of justice' violate the model rule and would also violate Louisiana Rule 8.4(d)."[5]

III OTHER STATES' RULES OF PROFESSIONAL CONDUCT AND THE TREATMENT OF EPITHETS AND RACIALLY DEROGATORY LANGUAGE.

The Rules of Professional Conduct of the Indiana Rules of Court have adopted the substance of Comment 3 to Model Rule 8(4). The Supreme Court of Indiana determined in 2005 that Indiana Rule 8.4(g)[6] "prohibits a lawyer from engaging in conduct in a professional capacity manifesting,

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[3] The comment adds that "[a] trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

[4]See Dane S. Ciolina, "Should a Lawyer Who Uses Racially-Offensive language be Subject to Discipline?" Louisiana Legal Ethics Webpage at http://lalegalethics.org/lawyer-uses-racially-offensive-language-subject-discipline/#fn-6303-1, citing "Complaint to Bar Association Prompts Negative Campaign Attacks in North Shore DA Race," New Orleans Times-Picayune (Oct. 24, 2014) at http://www.nola.com/politics/index.ssf/2014/10/north_shore_da_race.html.

[5]Id.

[6]Indiana Rule 8.4(g) provides that it is professional misconduct for a lawyer to :

> engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability,

by words or conduct, bias or prejudice based upon race." *In re Thomsen*, 837 N.E.2d 1011 (Ind., 2005) (professional misconduct for an attorney in a divorce proceeding to make racially derogatory comments about the companion of the opposite spouse).

The Indiana Supreme Court confirmed this position in *In re McCarthy*, (Supreme Court Cause No. 41S00-0910-DI-437, 2010), stating that attorney usage of "racially derogatory terms in a professional capacity constitutes professional misconduct under Indiana's Rule 8(g)." In this case the respondent had used the term "nigger," the same epithet used in the October 2012 incident. See http://www.in.gov/judiciary/files/atty-disc-2010-41S00-0910-DI-437.pdf.

Similarly, in *In re Mann,* 353 S.C. 471 (2003), the Supreme Court of South Carolina determined that it was a violation of the South Carolina Rule of Professional Conduct 8.4(e), the correspondent to Model Rule 8.4(d), for a lawyer and clerk of court to "state[], in effect, that if he tried to second guess a judge he would be perceived as though he were 'an uppity nigger on an old south plantation.'" This was considered to be "engage[ment] in conduct that is prejudicial to the administration of justice."

Rules like Model Rule 8.4(d) and Indiana Rule 8.4(g) go well beyond the use of racial epithets or racially derogatory terms. Loyola University-New Orleans Prof. Dane Ciolino has written:

> Some states have incorporated language from either [predecessor unadopted] ABA proposals or [comment 3] into their versions of Rule 8.4. Minnesota, for example, prohibits a lawyer from harassing "a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with the lawyer's professional activities." See Mn. Rules of Prof'l Cond. R. 8.4(g); *In re Woroby*, 779 N.W.2d 825 (Min. 2010) (finding misconduct arising out of harassment on the basis of religion). Indiana prohibits a lawyer from engaging "in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors" but notes that "[l]egitimate advocacy respecting the foregoing factors does not violate this subsection," nor does "[a] trial judge's finding that preemptory challenges were exercised on a discriminatory basis . . . ." See Ind. Rules of Prof'l Cond. R. 8.4(g); *In re Barker*, 55S00-1008-DI-429 (Ind. Sep. 6, 2013) (suspending lawyer for 30 days for calling a party "an illegal alien"). Colorado, Florida, Ohio, Michigan, and Rhode Island have likewise adopted similar rules. See Co. Rules of Prof'l Cond. R. 8.4(g); Fl. Rules of Prof'l Cond. R. 4-8.4(d); Ohio Rules of Prof'l Cond. R. 8.4(g); Mich. Rules of Prof'l Cond. R. 6.5(a); R.I.

> sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule."

Rules of Prof'l Cond. R. 8.4(d).[7]

IV. OUR SITUATION AT THE LAW CENTER CALLS FOR ACTION.

As Chancellor Weiss wrote after the preliminary hearing committee issued its report on the October 2012 incident:

> [T]here is no question about the reprehensible business of a face-to-face racial slur directed at a fellow student, or at any member of our law school community, or for that matter, at anyone at all. Words of this kind can inflict injury and humiliation more lasting and more serious, even, than many physical blows. Both as Chancellor and as one member of this law school community, I condemn unequivocally the use of this hateful word in the circumstances of the Halloween party incident. To be sure, there are serious constitutional issues surrounding the use of "hate speech" in other, very different contexts. But a one-on-one racial taunt delivered in person, with physical conflict a distinct and immediately looming possibility, enjoys no constitutional protection; it is, even for one passionately devoted to free speech, a classic example of "fighting words". The Supreme Court declared such speech outside of the boundaries of constitutional protection some 70 years ago.[8]

The Law Center is in need of a policy statement emerging from the faculty equally as strong as the Chancellor's statement. Moreover, the Law Center is in need of changes to the Code of Student Professional Conduct, to assure that no one with responsibility for advising, enforcing, or making judgments under the Code can misconstrue that certain sorts of demeaning behavior are in fact student misconduct. Anecdotal reports from students, from the Murchison report as I understand from Prof. Murchison, and no doubt from the Report of the Diversity Task Force will have made clear that demeaning epithets - not all racial - are spoken here far more often than all of us would like, as well as far more often than many of us would like to believe. Hence, I propose a policy statement with language broader than the Chancellor's, language echoing the language of the ABA's Model Rule and Louisiana's corresponding rule. I further propose an amendment to the Code based on the language of Rule 10.2 .K and R of the LSU A&M Code of Student Conduct.[9] Given the realignment of the Law Center and the A&M campus, the Law

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[7]See Dane S. Ciolina, "Should a Lawyer Who Uses Racially-Offensive language be Subject to Discipline?" Louisiana Legal Ethics Webpage at http://lalegalethics.org/lawyer-uses-racially-offensive-language-subject-discipline/#fn-6303-1

[8]Email from Jack Weiss to "LISTSERVE-ALRT-L," November 20, 2012.

[9]Section 10.2 of the LSU A&M Code of Student Conduct, to be found at http://students.lsu.edu/saa/code_10_2?destination=node/1220 provides as follows:

> "A Student may be charged with Behavioral Misconduct for any of the following conduct:

Center is bound by the LSU A&M Code, and the amendment to the Law Center Code would bring our rules in concert with the parent campus.

A. POLICY STATEMENT PROPOSAL.

The policy statement I suggest as the sense of the faculty would educate those who need it that the use of such epithets is not professional. The statement would also establish a strong prophylactic against the use of such epithets by those who know better but consciously violate professionalism standards.

Moreover, the statement I suggest would also help to protect the Law Center against a complaint based on Title VI, Title VII, and Title IX of the 1964 Civil Rights Act. The statement follows:

The faculty of the Law Center is resolved that -

- It is unprofessional for a law student, either on the Law Center or University campus or at a Law Center or University event, in addressing or describing a person or persons, to use epithets that demean on the basis of based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors; and that -

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* * *

K. Harassment

Repeated, persistent, severe, or pervasive actions directed toward specific individual(s) with the intent or effect to harass, harm, or alarm, including attempted or threatened physical contact, or acts that create the reasonable apprehension of unwanted contact;

* * *

R. Sexual Harassment

Repeated, severe, or pervasive actions of a sexual nature directed toward specific individual(s) with the intent or effect to embarrass, harass or alarm, including actual, attempted or threatened physical contact, or acts that create a reasonable apprehension of such behavior, conduct or contact of a sexual nature that creates an intimidating, hostile, or offensive campus, educational, or working environment for another person;

* * *

- The forgoing statement shall be published in the Law Center Catalogue as a policy statement, in proximity close enough to the Code of Student Professional Responsibility such that the statement may influence the understanding of those interpreting and enforcing the Code.

B. AMENDMENT TO THE CODE OF PROFESSIONAL STUDENT RESPONSIBILITY PROPOSAL.

The faculty is further resolved that the Code of Professional Student Responsibility be amended as follows:

5. Student misconduct includes, but is not limited to, the following:

* * *

l. Repeated, persistent, severe, or pervasive actions and statements directed toward specific individual(s), with the intent or effect to harass, harm, or alarm, including attempted or threatened physical contact. Particularly egregious are such acts and statements that are motivated by the race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or a similar factor relative to the specific individual(s) to whom such actions and statement are directed.

m. Acts and statements that create the reasonable apprehension of unwanted physical contact. Particularly egregious are such acts and statements that are motivated by the race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or a similar factor relative to the specific individual(s) to whom such actions and statement are directed.

n. Acts and statements that create an intimidating, hostile, or offensive campus, educational, or working environment for another person. Particularly egregious are such acts and statements that are motivated by the race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or a similar factor relative to the specific individual(s) to whom such actions and statement are directed.

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ℓ. Knowingly to communicate directly to one or more specifically identifiable person(s) an epithet i) that a reasonable person would regard as demeaning to the recipient student or students and ii) that has a direct tendency to cause acts of violence by the person or persons to whom the communication is addressed. Such epithets shall include, but shall not be limited to, epithets that demean on the basis of race, gender, religion, national origin, disability, sexual orientation, or age.

m. Repeated, persistent, severe, or pervasive actions and statements directed toward specific individual(s), that are intended to harass, intimidate, or inflict harm on the specific individual(s), or that a reasonable person would regard as having the effect of harassing, intimidating, or inflicting harm on the specific individual(s), including attempted or threatened physical contact. Such actions and statements include, but are not limited to, those that are motivated by the race, gender, religion, national origin, disability, sexual orientation, or age of the specific individual(s) to whom such actions and statement are directed.

n. Knowingly to communicate directly to one or more specifically identifiable person(s) a statement that a reasonable person would regard as a serious expression of an intent to commit an act of unlawful violence to the recipient or recipients of the statement. Such statements shall include, but shall not be limited to, statements expressing intent to commit an unlawful act of violence based on the race, gender, religion, national origin, disability, sexual orientation, or age of the recipient student or students.

o. Acts and statements that are intended to create or that a reasonable person would regard as creating the reasonable apprehension of unwanted physical contact. Such acts and statements include, but are not limited to, those that are motivated by the race, gender, religion, national origin, disability, sexual orientation, or age of the specific individual(s) to whom such actions and statement are directed.

p. Repeated, severe, or pervasive actions that create an intimidating, hostile, or offensive campus, educational, or working environment for another person. Such actions include, but are not limited to, those that are motivated by the race, gender, religion, national origin, disability, sexual orientation, or age of the specific individual(s) to whom such actions and statement are directed.

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- It is the sense of the faculty that it is unprofessional for a law student, either on the Law Center or University campus or at a Law Center or University event, in addressing or describing a person or persons, to use epithets that demean on the basis of based upon race, gender, religion, national origin, disability, sexual orientation, or age; and that -

- The forgoing statement shall be published in the Law Center Catalogue as a policy statement, in close proximity to the Code of Student Professional Responsibility.