December 30, 2015

BY EMAIL (abamodelruleamend@americanbar.org) ONLY

ABA Standing Committee on Ethics and Professional Responsibility
321 N. Clark Street
Chicago, IL 60654-4714


Dear Sir or Madam:

I write to comment upon the Proposal. I do so acknowledging the important work of the ABA Standing Committee on Ethics and Professional Responsibility (the “Standing Committee”), as well as my high regard for my friend (and fellow congregant in our Phoenix church), Chair Myles Lynk.

I write from the perspective of one who has been actively involved in multiple sections of the ABA (Business Law, Intellectual Property, and the Center for Professional Responsibility) over the last decade and a half; participated in various leadership and editorial positions within the ABA during that time; and recently, been inducted into the Fellows of the American Bar Foundation. I have made many friends through the ABA. Involvement in the ABA has enriched my law practice. I care deeply about the ABA’s future.

I also am heavily involved in professional conduct issues at the state level, having served for more than 10 years as a volunteer disciplinary investigator and prosecutor, a member of the State Bar of Arizona’s Ethics Committee, or both. I am thoroughly familiar with the practical impacts of ABA model rule changes as they manifest themselves in state ethics rule promulgation and enforcement.

From this perspective, I am compelled to comment that, in my view, adoption of the Proposal would harm the ABA’s interests while accomplishing nothing.

To take the last first, I am unaware of any problem with the current, comment-based approach of Model Rule 8.4. The absence of any substantial problem requiring a solution itself counsels against change.
Moreover, the Proposal is not made in a vacuum. As its proponents doubtless know, the Proposal’s adoption by the House of Delegates would lead those like-minded to press for its adoption by state supreme courts. Such proposals would be met with vocal opposition, likely by those who lean rightward on social and cultural issues. My home state of Arizona already suffers annual legislative assaults on judicial independence as well as the State Bar of Arizona’s status as an integrated bar. The Proposal, if adopted by the ABA and certainly if proposed at the state level, will only add fuel to their fire. However those debates turn out, those in the middle — those who still want to think of the ABA as the voice of the profession rather than as a left-wing special interest group — increasingly will be pressed to ask, “What does this organization have to do with me?”

In making these comments, I need not reach the issue of whether the purported “need for a culture shift” invoked by the Proposal properly lies within the ABA’s ken. Nor need I remind the Standing Committee that many thoughtful lawyers and judges — including Chief Justice John Roberts — think that the referenced Supreme Court decision had no constitutional basis at all. It suffices to say that the Proposal, if adopted, will further marginalize the ABA as just another voice in the din of the culture wars, and a shrill voice at that.¹

The hard truth is that, as Rich Cassidy’s September 24, 2015, commentary (among many other things) makes clear, the ABA today is under duress. Membership and interest continue to wane — in substantial part, I suspect, because of actions which force members and potential members to see the ABA not as a professional organization, but as a political organization whose views do not necessarily reflect their own. Every ABA proposal, including this one, needs to be considered from the perspective of its potential impact on the health of the ABA itself. We owe our fine organization this much.

Viewed in that light, the Proposal cannot help. It can only hurt.

Respectfully,

Andrew F. Halaby

¹ It is striking that under the rule change advanced by the Proposal, a lawyer could be exposed to discipline, not to mention all the negative consequences flowing from merely being accused of an ethics violation, regardless of the lawyer’s state of mind.