Sir/Madame—in addition to my signature on the comment from 52 members of the ABA, I wish to make the following comment to the proposed new paragraph (g), modifying Rule 8.4:

The text of the new rule should be rejected. It is based on a lack of understanding of the integrated—and constitutionally protected—way many lawyers bring all their activities, including their professional actions, under the aegis of their religious faith; it lacks a constitutionally defensible definition of the prohibited speech or conduct; and it appears on its face to abrogate long-standing freedoms to decline or withdraw from representation as currently captured in Rule 1.16.

The Standing Committee’s statement in the Notice of Public Hearing in point 4, “Constitutionally Protected Activities” reveals a fundamental lack of knowledge of the view many religious people take of the role of their faith, and thus reveals that its understanding of the protection for fundamental rights of lawyers is too limited to fit even current legal standards. When the Standing Committee writes “a lawyer does retain a ‘private sphere’ where [various fundamental freedoms are] protected by the First Amendment and not subject to the Rule,” it reveals the common misunderstanding that religious expression rights relate to the ability to hold and express religious views in one’s private life. In fact, many religious practitioners of various faiths believe that a core requirement of their faith is the integration of every aspect of their lives with the tenets of their faith. It is not consistent with Constitutional law to lay down rules based on a blanket presumption that the nature of religious adherents’ rights includes private expression only.

The Standing Committee assures the reader of its Notice of Public Hearing that “the terms ‘harassment’ and ‘discrimination’ are defined terms under law” (Notice, p. 4). No doubt they have definitions, but those definitions vary widely across jurisdictions and situational contexts and have been subject to defeat on constitutional grounds, frequently recognized as inherently problematic for use in law. They are unsuitably vague and subject to disparate interpretation for a Model Rule from the ABA in an area where the national conversation is both rapidly changing and subject to claims seen as eminently reasonable by one side and totally unreasonable by the other side of a question. The Standing Committee should provide a clear definition of conduct or speech that would constitute harassment or knowing discrimination sufficient to form a basis of finding misconduct in a lawyer’s action or speech.

The comment section is insufficient protection for the Rule 1.16 bases for declining or withdrawing from representation, given the breadth of the actual text of new paragraph (g).

The text of new rule (g) should not be adopted.

Respectfully submitted,
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