March 11, 2016

ABA Standing Committee on Ethics and Professional Responsibility
American Bar Association

Re: Proposed ABA Model Rule of Professional Conduct 8.4(g) and Comment [3]

Dear Committee Members:

I am writing briefly to comment on the proposed changes to ABA Model Rule of Professional Conduct 8.4 and Comment [3] to Rule 8.4. I appreciate the time and effort that the Committee has invested in proposing these changes and for providing this opportunity for public comment. I respectfully encourage you to reject the proposed amendments.

I am a member of the ABA, an Associate Professor of Law, and I am admitted to practice law in two states. Additionally, I have litigated several First Amendment matters in courts throughout the nation.

I concur wholeheartedly with the reasoning offered in the comments provided by the “52 ABA Member Attorneys” and Professor Eugene Volokh. Given the detailed analyses expressed therein, I will not restate those positions here. However, I would like to add my own brief addition to those insightful comments.

Point 4 (“Constitutionally Protected Activities”) of the December 22, 2015 Memorandum regarding the proposed amendments to Rule 8.4, suggests that Comment [3] adequately protects the First Amendment rights of lawyers. I respectfully disagree. First, the Memorandum mischaracterizes constitutional freedoms as belonging exclusively in a narrow “private sphere.” To the contrary, first liberties such as the freedom of speech, the freedom of association, and the free exercise of religion apply robustly in the public square subject to a few, narrowly proscribed exceptions. Second, Point 4 also appears to imply that attorneys do not retain constitutional rights in their conduct related to the practice of law. This position too, is incorrect. See Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (voiding federal law that restricted the speech of attorneys who accepted federal funds to represent indigent clients). Third, Point 4 also suggests that Comment [3] “avoid[es] ambiguity” and “address[es] the Constitutional concerns” by clarifying that the “Rule does not apply to conduct that is unrelated to the practice of law or to conduct protected by the First Amendment.” However, federal courts have held that such “disclaimers” fail to cure constitutional deficiencies such as overbreadth and vagueness. See Dambrot v. Cent. Mich. U., 55 F.3d 1177, 1182-83 (6th Cir. 1995) (voiding university’s discriminatory harassment policy due to
vagueness and overbreadth); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989) (voiding University of Michigan's anti-discrimination policy as constitutionally overbroad). In short, the draft proposal fails to properly address serious constitutional concerns raised by the proposed amendments, and therefore, the changes should be rejected.

“The practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971). The overbreadth and vagueness of the draft language imperils First Amendment liberties and the right to practice law itself. I cannot imagine this was the intent of the Committee, but the language of the proposed amendments leads me to this conclusion nonetheless. For these reasons, I respectfully urge the Committee to reject the proposed changes to ABA Model Rule of Professional Conduct 8.4 and Comment [3] to Rule 8.4.

Respectfully submitted,

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