

August 5, 2016

Patricia Lee Refo
ABA House of Delegates
400 E Van Buren St. #1900
Phoenix, AZ 85004-2202

Re: With its proposed Model Rule 8.4, the ABA threatens freedom, justice, and religious liberty

Dear Ms. Refo:

The American Bar Association (“ABA”) proposed new ethics rule for attorneys (“ABA proposal”) is a clear and extraordinary threat to free speech and religious liberty, and if adopted with the force of law by any bar, would be an unprecedented violation of the First Amendment. As many scholars and experts assert, this rule entails severe constitutional infirmities and would punish both lawyers and the clients they represent for their protected speech and personal religious and moral beliefs.¹ This proposed rule violates the very spirit—in addition to the text—of the First Amendment’s guarantees, and transgresses the most fundamental principles that American lawyers have adhered to since 1776 regarding a lawyer’s right to express and live out his own belief system, as well as the right to full and zealous legal representation on behalf of any client, including (and indeed, especially) those whose views diverge from political correctness or modern social orthodoxy.

The ABA Proposal Diminishes Free Speech and Religious Freedom

The ABA proposal goes far beyond state law; if implemented nationally, it could lead to the automatic disbarment of attorneys and judges. In its proposal, the ABA encourages states to adopt rules that will punish attorney speech, and will, as the ABA acknowledged, *encourage* discrimination against particular religious viewpoints. *See* Volokh, *supra* (indicating that under the new rule a debater who says something on only one side of controversial issues such as marriage, immigration, or bathroom usage may “well be disciplined by the state bar,” and that “a discussion with people” at dinner about “Christianity, black-on-black crime, illegal immigration, differences between the sexes,” or other topics may also result in bar discipline, including

¹ *See* Eugene Volokh, *A speech code for lawyers, banning viewpoints that express ‘bias,’ including in law-related social activities?*, Volokh Conspiracy, Washington Post (May 5 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/05/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities/>; American Bar Association, Business Law Section Ethics Committee, Keith R. Fisher, Chair, and Nathan M. Crystal, Member, Comment to ABA Standing Committee on Ethics & Professional Responsibility (Mar. 10, 2016), p. 3-7, *available at* http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (available along with other comments submitted).

banning that lawyer from earning a living as a lawyer); ABA Business Law Section Ethics Committee, *supra*, p. 4 (noting that rule “go[es] well beyond most civil rights legislation” and “appear[s] to have little relation to concerns that come up in most lawyer’s [*sic*] offices,” and could “have a chilling effect on something that has always been in the best traditions of the bar: representing minority views and unpopular positions or clients”); *id.* at 4-5 (describing how rule could be used to punish political viewpoints, memberships in organizations, including religious ones, and religious beliefs of lawyers and clients, as well as groups who want to represent religious persons).

Moreover, the new rule will punish attorney speech not just in the course of litigation, but anywhere an attorney speaks in public. It will open up ethics complaints to the general public and encourage viewpoint-based complaints. As one constitutional scholar noted, the ABA’s proposal amounts to a speech code for lawyers, and will especially impact attorney advocacy surrounding social issues that are of paramount importance for many millions of Americans—religious liberty in particular.² As the ABA’s own Business Law Section indicated, the new rule creates “an open invitation to such unprincipled behavior,”³ and the Section of Civil Rights and Social Justice admitted that that the proposed rule will punish people for viewpoints “they don’t think there’s anything wrong with,” and moreover that the proposed rule could be “used tactically against someone inappropriately.”⁴

ABA leadership clarified that they believe certain viewpoints and policies should be removed from public discussion—including legislative and legal venues—and indeed, the ABA will ban attorneys from advocating on one side of the debate in order to ensure that the law moves in a particular direction on controversial social and policy issues. ABA leaders have indicated that the proposed rule, in addition to discipline, “could be used strategically against lawyers and law firms” based upon their viewpoints and religious beliefs.⁵ One committee member, Drucilla Ramey, added that bar leadership must go “to the top of the legal profession” in order to “incentivize” attorneys to change their conscious and unconscious views and speech on everything from sex, race, gender, to law firm hiring and compensation, to “interrupt” their supposed “bias” and change their beliefs.⁶ ABA President Paulette Brown advocated that the ABA should prohibit “bias” in ways far beyond extant law.⁷ The proposed rule will punish people for viewpoints “they don’t think there’s anything wrong with,” and the proposed rule could be “used tactically against someone inappropriately.”⁸

² Volokh, *supra*.

³ ABA Business Law Section Ethics Committee, *supra* note 1, p. 4.

⁴ *Proposed Amendment to Model Rule 8.4: Public Hearing before ABA Standing Committee on Ethics and Professional Responsibility*, Feb. 7, 2016, p. 33–34, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf [hereinafter *Hearing*].

⁵ ABA Business Law Section Ethics Committee, *supra* note 1, p. 4, 6.

⁶ *Hearing*, *supra* note 4, p. 16–17.

⁷ *Id.* at 6–7; see also *ABA Report to the House of Delegates from Standing Committee on Ethics and Professional Responsibility*, p. 3 [hereinafter *Report*] (noting that ABA must go much farther in regulation of speech, citing Paulette Brown article addressing “implicit bias”).

⁸ *Hearing*, *supra* note 4, p. 33–34.

This is an inappropriate use of ethics rules, one that particularly threatens religious liberty. The ABA's new proposal may ban attorneys from effective advocacy and public communication on social issues involving claims of religious liberty, likely banning Orthodox Jews, Christians, Muslims, and adherents of other faiths from (1) practicing law, and (2) obtaining legal counsel at all on controversial issues.

The ABA Proposal Diminishes Free Speech and Religious Freedom

The purpose of this proposed rule change is chilling speech and religious practice. ABA leaders made shockingly clear that they seek this new rule precisely in order to punish speech, punish viewpoints, and remake the legal profession according to the ABA's preferred values positions. In testimony, various attorneys argued that the ABA needs this new ethics rule because it will give the bar "the power to incentivize them [*i.e.*, attorneys]" by banning them from the profession.⁹

ABA leadership repeatedly clarified that the ABA intends for this rule to eliminate "implicit bias" which may often be "unconscious" or "unintentional," according to the ABA's president.¹⁰ In fact, the ABA held a hearing on the proposed rule, at which many of the speakers emphasized the disturbing notion that the ABA *should* punish thoughts and speech. Astoundingly, the ABA *intends* to ban attorney speech, and even punish attorneys for speech that was not deliberate, as well as for actions that the ABA, in its moral and political judgment, believes "manifest bias." Such desires and intentions contravene more than two centuries of American legal and political thought, and must be emphatically rejected.

The United States Supreme Court recently held that people of faith must be allowed to hold differing views on controversial issues, including a view (or views) that "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). The ABA, by contrast, argued that it needs a new ethics rule because some attorneys continue to hold religious views that are contrary to those views held by the ABA on controversial issues and "don't realize they are [out of step] or they don't think there's anything wrong with what they're doing."¹¹ Or, as one ABA leader stated, "We are actually saying that there are people who don't know that their conduct is discriminatory and shouldn't have to learn."¹² We agree with the United States Supreme Court's declaring that marriage "has existed for millennia and across civilizations . . . based on the understanding that marriage is a union between two persons of the opposite sex[.]" and that "this view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."

⁹ *Id.* at 16–17 (statement of Drucilla Ramey).

¹⁰ *Id.* at 6–7 (statement of ABA President Paulette Brown) (advocating that the ABA prohibit "bias" in ways far beyond extant law); *accord Report, supra* note 7, p. 3 (noting that ABA must go much further in regulation of speech, citing Paulette Brown article addressing "implicit bias").

¹¹ *Hearing, supra* note 4, p. 33.

¹² *Id.* at 60–61.

The ABA's own Business Law Section reported that the rule could easily be used to discriminate against particular viewpoints and religions. The ABA Business Law Section Ethics Committee notes that the rule "go[es] well beyond most civil rights legislation" and "appear[s] to have little relation to concerns that come up in most lawyer's [*sic*] offices," and could "have a chilling effect on something that has always been in the best traditions of the bar: representing minority views and unpopular positions or clients."¹³ Several other commenters, including the United States Conference of Catholic Bishops and the Christian Legal Society, indicated how the rule would be used to punish their viewpoints and the viewpoints of their members, making it more difficult to obtain counsel, let alone to obtain counsel who will vigorously advocate on their behalf.

The ABA's proposal must be rejected

If the ABA's vision becomes reality, freedom of speech and freedom of religion will suffer. Attorneys will be banned from social discourse on contentious issues, or will avoid taking on contentious cases. An attorney could only be comfortable giving a speech or undertaking a representation if the ABA has previously given its imprimatur to a viewpoint or a client as holding an acceptable view.

ABA leadership clarified that that is exactly their purpose: to banish viewpoints—particularly religious ones—that ABA leadership disagrees with for moral or political reasons. The ABA proposal amounts to nothing more than an attempt by the ABA to enforce its own brand of discrimination, thereby disqualifying dissenters from being active members of the legal profession.

In the United States, Americans, including attorneys, have a diversity of viewpoints on moral and social issues, and that is to the nation's credit. The ABA proposal would remove that freedom from attorneys and the American people served by the legal profession.

Moreover, the legal community applauds attorneys willing to represent the most reprehensible of individuals, such as suspected terrorists and traitors. That being so, branding certain opinions on matters of race and socioeconomics, certain religious-based beliefs on marriage, abortion, and moral judgments on various subjects, as so deplorable that they should trigger draconian sanctions is truly noxious to the foundational principles of a free society. Such hostility to those who deviate from the approved orthodoxy resembles the laws and tactics of oppressive regimes around the globe that America unapologetically opposes. It is not an overstatement to say that this proposed rule borders on fascism.

For all these reasons, we accordingly urge the ABA and its membership to reject its proposed changes to Model Rule 8.4, and instead trust the profession that they purport to

¹³ ABA Business Law Section Ethics Committee, *supra* note 1, p. 4; *accord id.* at 4–5 (describing how rule could be used to punish political viewpoints, memberships in organizations, including religious ones, and religious beliefs of lawyers and clients, as well as groups who want to represent religious persons); *see also* *Hearing*, *supra* note 4, p. 16–17.

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represent. Depriving attorneys of the ability to earn an income in the legal profession because of their political or religious beliefs, or for representing clients who hold to such millennia-old beliefs, is irreconcilable with the fundamental principles enshrined in the First Amendment. The ABA must unequivocally repudiate the proposed rule change in favor of rule of law, freedom of speech, freedom of association, and freedom of religion.

Sincerely,

Edwin Meese III
75th Attorney General of the United States

Kelly Shackelford
President and CEO, First Liberty Institute