July 21, 2020

To: Ethics Committee of the North Carolina State Bar
Attn: Brian Oten, Ethics Counsel
boten@ncbar.gov

Re: Proposed changes to Rule 8.4(g)

Dear Ethics Committee;

I am writing to express my strong opposition to the proposed changes to the Preamble based on ABA Model Rule 8.4(g). I am a attorney licensed in the states of North Carolina, Arizona, and Oklahoma, as well as the U.S. Supreme Court. The proposed changes to the Preamble and comments would greatly limit my ability to practice law because I am the Executive Director of a nonprofit organization that advances public policies before the NC General Assembly and the Congress of the United States, speaks publicly to groups of people around the state, and files Amicus Briefs before the U.S. Supreme Court on issues that might be unpopular or controversial to members of the State Bar's Ethics Committee. The State Bar should not step into a hornet's nest by regulating content of speech, passing judgment on the popularity of political beliefs, or determining whether unpopular advocacy should be disciplined.

The language of the amendment would apply to me while "employed or engaged in a professional capacity" as the Executive Director of the NC Values Coalition. It is not limited to the practice of law, but has a broad scope applying to ALL of my professional actions. The question is, "What activity or speech would the Preamble amendment not reach?" Almost every activity I can imagine would apply this new amendment to me.

Specifically, it would have a punitive and chilling effect on my speech, and as such, would constitute a violation of the First Amendment. Advocacy on issues is the centerpiece of my professional activities, so the proposed rule expressly covers ALL of my advocacy, even though there is a feeble attempt in the amendment to exclude advocacy. There is no definition for the phrase "does not limit a lawyer's right to advocacy". What does it mean when applied to the many activities in which I engage as the Executive Director of a nonprofit organization whose centerpiece is advocacy? It raises the following questions:

- Will the new amendment limit the topics I can speak to when I give a speech to groups of citizens, classes, churches, or various audiences around the state?

- Will the new amendment limit my ability to hire, fire, and discipline employees on my staff? Will I be able to hire people who whole-heartedly share the ideals the organization holds and for which the organization advocates?
- Will the new amendment allow me the ability to exercise independent professional judgment about issues for which my organization advocates in the public square, in elections, and in the legislative process? Or, will it limit the issues for which our organization can advocate to issues which are acceptable and politically correct to the State Bar's Ethics Committee?
- Does the exclusion for "advocacy" include lobbying? We have lobbied on all sorts of issues that the prevailing view held in the State Bar's Ethics Committee might consider to be "discrimination". Is lobbying for pro-life laws "discrimination" against women who want to have an abortion? Is lobbying for the Marriage Amendment "discrimination" against same-sex couples? Is lobbying for HB2 "discrimination" against transgender people? If I lobby against a bill filed in the state legislature or a local ordinance that would add new protected classes to non-discrimination laws, am I subject to discipline by the State Bar? If so, this new amendment will cut at the very heart of our mission, because a licensed attorney is the head of it.
- Does the exclusion for "advocacy" include filing Amicus Briefs? We recently filed a brief in the U.S. Supreme Court in the case of *Bostock v. Clayton County, Georgia* arguing that Tom Ross had every legal right to fire an employee who was hired as a man but later desired to represent himself to the funeral home's clients as a woman. Was that "discrimination" within the meaning of the new amendment? What about our brief in the case of *Little Sisters of the Poor v. Pennsylvania* which argues that a group of nuns has every legal right to fight a government mandate that they pay for abortifacients and contraceptives in their health plan. Is that "discrimination"? We've filed so many briefs I won't bore the committee with every legal issue we've addressed.
- Am I subject to discipline when I participate in panel discussions or presentations for my job that touch on controversial political, religious, and social viewpoints?
- Am I subject to discipline for op-eds, social media posts, and white papers that I might write on controversial topics and unpopular viewpoints?
- Must I forgo media interviews on topics about which I have some professional insight because anyone listening to the interview might file a complaint?
- Am I subject to discipline for aligning myself or my organization with a candidate for political office who advocates for some controversial issue with which the Ethics Committee of the State Bar disagrees?

It is a sad reality that we live in a world where many people, including lawyers, are willing to suppress and punish the free speech of those with whom they disagree. In my "professional capacity" I am frequently the spokesperson and a leader in political, religious, or cultural movements, and this amendment that can be employed to discipline me or others similarly situated for my speech on controversial issues should be rejected! It is a threat to our First Amendment liberties of freedom of speech, freedom to exercise religious beliefs, and freedom of political belief.

The proposed amendment to the Preamble is also flawed because it does not require knowledge or intent in order to violate the standard. Mere negligence is enough to trigger the discrimination provision, with a derogatory comment or utterance that was not intentionally known or intended to be discriminatory.

The proposal also erroneously states that the Supreme Court "took no action" on this same proposal in October of 2010. The Supreme Court rejected the proposal in 2010; otherwise, it would have adopted it. Any assertion that this concept has been fully vetted and is ready for Supreme Court action without a full contemplative process is false. The State Bar should ask <u>all</u> members of the Bar if adding this type of free-speech suppressor for unpopular viewpoints and controversial topics will enhance the practice of law or will have a chilling effect on it. I contend that a substantial number of members of the Bar, even if that number is a minority, would be opposed to this amendment if they were aware of it. Nonetheless, there is no empirical evidence that adopting a Model Rule 8.4(g) type amendment will not impose an undue burden on lawyers in North Carolina.

The proposal to this committee contains a chart representing that 25 states have adopted ABA Model Rule 8.4(g) and that 11 others have adopted comments to Rule 8.4(g) like it. This representation is not true. Only one state had adopted ABA Model Rule 8.4(g) as of June 13, last year. A good number of states had adopted anti-bias rules prior to the ABA's adoption of Model Rule 8.4(g). Other states adopted a narrower version. See the attached letter from Christian Legal Society to the Iowa Supreme Court, dated August 10, 2019, where on page 18, the letter states:

> On June 13, 2019, the ABA published a summary of the states' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, nine states have declined to adopt Model Rule 8.4(g): **Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina,** and **Tennessee.** (As explained, we add **North Dakota** and **Texas**.) The ABA lists **Vermont** as the only state to have adopted ABA Model Rule 8.4(g)

It seems obvious, yet ironic, that the enumeration of the categories in the amendment to the Preamble would eliminate any hiring preferences in law firms or organizations headed by lawyers for groups like women, racial minorities, or ethnic minorities. If discrimination is prohibited on the basis of sex, race, or national origin, then hiring preferences are forbidden as well.

If the proposal for amending the Preamble is adopted, the State Bar will require attorneys to abide by a standard of conduct that is not present in any other provision of state law. Neither nondiscrimination laws in housing, employment, nor public accommodations include special categories for sexual orientation, gender identity, marital status, or socio-economic status. The State Bar should not mandate what the state's lawmakers have refused to mandate. The current nondiscrimination statutes in North Carolina include only protected categories for race, color, religion, sex, national origin, handicapping condition, or familial status. The Supreme Court should not adopt rules for the practice of law that subject attorneys to discipline and possible disbarment for actions or speech that are not forbidden by the laws of the state.

In summary, the proposed amendment to the Preamble and the proposed comments are unconstitutional violations of First Amendment rights that every citizen of the United Stated holds, including licensed attorneys. This committee should reject the requested amendments.

Sincerely,

Tami Fitzgerald

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Executive Director

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