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ABA Model Rule 8.4(g) threatens lawyers' free speech

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It is often said that words are a lawyer's stock and trade. This is because words are the tools a lawyer uses to advance the client's position. But lawyers are more than the skilled mouthpiece of their clients. Lawyers are defined by the rules as "public citizens" who have a "special responsibility for the quality of justice." That is what makes American Bar Association Model Rule 8.4(g) so dangerous.

There should be no more important political value in a free society than free speech, because without free speech there is no free thought and without free thought there cannot be a free society. Proceeded by millennia of abject human poverty as the norm, the free societies of the world have created ever rising human flourishing that has raised billions from squalor. Though the wealth created has not been distributed as some would like, without the freedom enjoyed by humans in the past two centuries there would be far less wealth against which to lodge such complaints. The bulwark of a free society are lawyers and, even in the pre-modern world, this was recognized by Shakespeare as he put into the mouth of Dick the Butcher the words "the first thing we do, let's kill all the lawyers." Now the largest bar association in the country wants to silence its own and then try to convince them that the proposed rule does not mean what it says.

Facially an anti-discrimination measure intended to make the practice of law more equal and using the current restrictions on the speech of lawyers in the context of their representation of clients to justify the expansion, this rule, if adopted, will chill the speech of lawyers in many dimensions and expose them to discipline.

In its recent Formal Opinion No. 493, the ABA Standing Committee on Ethics and Professional Responsibility essentially says "trust us" when it comes to how the rule will be applied if adopted. The ABA contends that taking positions on matters of public concern will not be prosecuted by bar regulators. However, in the current cultural climate the words of the rule itself and the comments thereto will lead to ever encroaching limits on lawyers' speech on issues of public concern.

The comments to the rule define discrimination to include "harmful verbal or physical conduct." As have become popular refrains, if not widely accepted (yet), speech is said to be violence and silence is also claimed to be violence. The redefinition of speech as harm that is in favor of or opposed to certain political positions has crept from college campuses into the wider

culture and it will eventually reach bar regulators. Indeed, the rule stealthily refers not to speech, but to "verbal conduct," as if words are actions. The contention imbedded in the rule is that restriction on speech is necessary for a free society is rooted in the Marcusian objection to free speech in its classical conception and is based upon "repressive tolerance."

More insidious is the "silence is violence" claim because speaking is not sufficient for those who advance this contention. This claim necessarily requires the mouthing of only certain words for it to be assured that one is not being harmful. Just as words have been redefined as harm and therefore can be restricted, so too will it soon be that not saying certain words will also be claimed to be harmful. The recent ABA opinion, though perhaps in the works prior to the current social unrest following the killing of George Floyd, buries in a footnote the allegiance to the claims made by the anti-racist movement.

The anti-racist movement is the current iteration of the threat to free speech because of its attempt to eliminate non-racist as an acceptable position in opposition to racism. In his book "How to Be an Anti-Racist," Ibram X. Kendi wrote, "One either believes problems are rooted in groups of people, as a racist, or locates the roots of problems in power and policies, as an anti-racist." Eschewing claims that differences in culture or individual choice could be the source of inequality, anti-racists like Kendi will only accept agreement of their view of history, politics and law as sufficiently anti-racist and deem all other positions as racist.

As lawyers often publicly take positions on issues of law and public policy, it is easy to see how advocating for certain positions will be argued as "harmful" despite the assurances of the ABA to the contrary. Examples of positions that could subject a lawyer to discipline amid the redefinition of harm and what is means to be an anti-racist include positions on criminal justice reform, including efforts to defund the police and the elimination of cash bail as well as taking positions on reparations and affirmative action. In addition, a lawyer taking a position on the ministerial exception and whether a religious employer has a right to not provide certain kinds of health care could likewise be subjected to discipline. As the comments to the rule intend for it to cover "participating in bar association, business or social activities in connection with the practice of law" a wide variety of activities undertaken by lawyers will be controlled in a way that never have before.

As it should, Rule 8.4(j) of the Illinois Rules of Professional Conduct holds that it is misconduct for a lawyer to discriminate, but such a finding of misconduct can only be lodged after there has been a final judgment by a tribunal and all appeals have been exhausted. This rule does not infringe on free speech while allowing for the punishment of lawyers who act in a manner that is inconsistent with anti-discrimination laws.

Free speech is central to a free society because without it there can be no free thought. A rule that threatens the livelihood of lawyers for taking (or not taking) particular political or legal positions, threatens discourse, it does not enhance it.
