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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
(ANTI-DISCRIMINATION)

CASE NO. 81,010

COMMENT ON PETITION TO AMEND RULES REGULATING THE FLORIDA BAR

This is to comment concerning the proposed non-discrimination amendments to Rule 4-8.4, Rules Regulating The Florida Bar, entitled "Misconduct." While I applaud much of the intent of these amendments, as proposed they contain an exceedingly overbroad proscription on pure expression, based solely on the viewpoint of such expression, and therefore violate the First Amendment to the United States Constitution.

The proposed amendments plainly prohibit pure expression. Specifically, they reference as misconduct to "disparage" or "humiliate" others on account of their membership in certain protected categories. As such, the prohibited misconduct goes well beyond non-verbal acts, such as employment discrimination. In this regard, the Supreme Court of the United States recently has made clear that the government may not lawfully regulate expression based on its viewpoint. *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992) (ordinance prohibiting expression "which [a person] knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" held unconstitutional). Similarly, the United States Court of Appeals for the Seventh

Circuit struck down as unconstitutional an ordinance prohibiting materials portraying women as victims of sexual abuse or violence or as being sexually submissive. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). There, the Seventh Circuit confirmed the First Amendment right to communicate disfavored or "politically incorrect" viewpoints:

> People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas . . .."

Id. at 328, *citing Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Thus, to the extent the proposed amendments could be construed to prohibit an attorney from expressing his or her viewpoints, however unpopular they may be, the amendments are unconstitutional.

The proposed amendments also contain an overbroad and vague proscription on expression in that they fail to place attorneys on adequate notice of what expression might constitute a violation. The end result is an extreme chilling effect on expression of one's viewpoint. For example, attorneys may feel that they would "disparage" or "humiliate" many women and blacks and be subject to a grievance with The Florida Bar if they express the viewpoint that blacks or women should not be allowed to vote, even though expression of that viewpoint is constitutionally protected. *See Hudnut*, 771 F.2d at 328. In this regard, the amendments' prohibition is at least as vague and overbroad as the statute prohibiting a

"contemptuous" display of the American flag which the United States Supreme Court found unconstitutional. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

Many forms of expression, which are politically incorrect or indeed highly offensive, enjoy constitutional protection. *United States v. Eichman*, 496 U.S. 310 (1990) (burning of American flag held protected); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) ("outrageous" material protected); *Cohen v. California*, 403 U.S. 15 (1971) ("f--k the draft" jacket protected); *Hudnut*, 771 F.2d 323 (7th Cir. 1985) (discriminatory "pornography" afforded constitutional protection). Furthermore, the direct impact on those who are subject to the expression cannot justify viewpoint-based regulation. *R.A.V. v. City of St. Paul.*

Similarly, the amendments do not constitute proper time, place and manner regulation since the proposed regulation is patently viewpoint-based. Moreover, the proposed regulation is not limited to particular contexts, such as conduct within the courtroom, and appears to govern any expression "while engaged in the practice of law," wherever or whenever the expression occurs.

Again, policy considerations aside, nothing in the United States Constitution prohibits The Florida Bar from regulating non-verbal conduct of its member attorneys in the area of discrimination. However, where a rule can easily be read to regulate pure expression, based solely on the viewpoint of that expression, the First Amendment is violated. This constitutional defect is compounded, as in this situation, where the proposed regulation of speech

also does not clearly define what attorneys can and cannot say without fear of government-sanctioned discipline. Therefore, I respectfully request that the Supreme Court of Florida disapprove of the proposed amendments in their current form.

Respectfully submitted this 3rd day of February, 1993.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comment on Petition to Amend Rules Regulating The Florida Bar has been furnished by United States first class mail upon John F. Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 3rd day of February, 1993.

Attorney