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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE: PETITION
TO AMEND RULES REGULATING
THE FLORIDA BAR
(ANTI-DISCRIMINATION)
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CASE NO: 81,010

COMMENT ON PETITION TO AMEND
RULES REGULATING THE FLORIDA BAR

The American Civil Liberties Union Foundation of Florida, Inc. ("ACLU") submits the following comment concerning the proposed non-discrimination amendments to Rule 4-8.4, Rules Regulating the Florida Bar, entitled "Misconduct."

While the ACLU is committed to eradicating discrimination, it is equally committed to protecting the right to freedom of speech as guaranteed by the First Amendment. The proposed amendments must be rejected because they go far beyond non-verbal acts of discrimination. 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 define as misconduct "disparaging" or "humiliating" others on account of their membership in certain protected categories. This prohibited misconduct goes well beyond non-verbal acts, such as employment discrimination, and proscribes expression that conveys a particular message. It is clear that the government may not lawfully regulate expression based on its

viewpoint. R.A.V. v. City of St. Paul, 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). Speech cannot be silenced simply because some find it offensive. "The Constitution does not permit our government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." Erzoznick v. Jacksonville, 422 U.S. 205 (1975). In fact, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978). 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.

In addition, the proposed amendments are overbroad and vague. They fail to give attorneys adequate notice of what expression might constitute a violation. The end result is an extreme chilling effect on expression. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (legal restraint invalid if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected expressive rights); Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) (resulting deterrent to protected speech is not effectively removed if "the

contours of regulation would have to be hammered out case-by-case -- and tested only by those hardy enough to risk [sanctions] to determine the proper scope of the regulation."). For example, attorneys may feel that they would "disparage" or "humiliate" women and blacks and be subject to sanction by 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 Erzoznick, 422 U.S. 205. Because the proposed amendments, in their current form, purport to proscribe such speech, attorneys will be forced to refrain from engaging in constitutionally protected expression. The First Amendment does not tolerate this chilling effect.

For these reasons, the ACLU respectfully requests that the Supreme Court of Florida disapprove the proposed amendments in their current form.

Respectfully submitted this 4th day of February, 1993.[1]

Nina E. Vinik

NINA E. VINIK
American Civil Liberties Union
Foundation of Florida
225 N.E. 34th Street, Suite 102
Miami, FL 33137
(305) 576-2337
Florida Bar No: 0909882

W/call back
W/not participate in O.A.

[1] On Thursday, February 4, 1993, the ACLU received a telephone call from the clerk of this Court indicating that its motion for extension of time was granted, allowing it until Monday, February 8, 1993 to file this Comment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 4th day of February, 1993 to John F. Harkness, Executive Director of the Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

Nina E. Vinik

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