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12/05/2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688



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DEC 05 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Montana Supreme Court
PO Box 203003
Helena, MT 59620-3003

Re: Professional Rules of Conduct- Rule 8.4

Honorable Members of the Court,

12/1/16

In your order of October 26, 2016 regarding case number AF 09-0688 you have called for public comment on the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As President of the Montana District of The Lutheran Church—Missouri Synod, representing 68 congregations within the state, I hereby submit my request that you decline the adoption of this rule for the following five reasons.

1. A Threat to Freedom of Speech.

By the adoption of this rule Montana Lawyers will find their “verbal conduct”ⁱ severely limited, even in social activities “in connection with the practice of law.”ⁱⁱ This limitation on free speech is a dangerous precedent. No one expects free speech to be abolished in one fell swoop. It may happen as small groups of citizens, particularly those with less access to public appeal, have their rights limited. This incremental erosion is of great concern. Who will be next? A threat to the freedom of speech for one class is a threat to the freedom of speech for all.

Most importantly, from my perspective, this rule does not allow for sincerely held religious beliefs. Such beliefs may lead a lawyer to speak against certain behaviors associated with a sexual orientation, gender identity or marital status, without acting in a discriminatory manner. Lawyers with such religious beliefs may, by those beliefs, voluntarily limit their clientele. The adoption of this rule, threatens their very livelihood on the basis of their speech. If they speak their beliefs they may be disciplined.

2. A Threat to Religious Freedom.

Montana lawyers may find themselves under the threat of discipline by associating themselves with religious organizations that hold certain behaviors, connected to a sexual orientation, gender identity or marital status, to be contrary to their belief system. This appears to be an overt threat to the religious freedom of Montana attorneys. In addition, this may bring about a chilling effect on access to legal advice if lawyers are reluctant to grant pro-bono work, or to sit on the governing boards of congregations or not-for-profit companies. The lack of access to such legal advice may create a serious threat to religious freedom in Montana.

3. A Threat to the Purpose of the Court.

The ABA Committee on Ethics' Memorandum of December 22, 2015, explaining the purpose of the proposed rule change favorably quotes the sentiment that there is "a need for a cultural shift in understanding the inherent integrity of people..." In other words, the rule change was not proposed for the sake of protecting clients, for protecting attorneys, or for protecting the court. It was proposed because the American Bar Association felt the need to promote a cultural shift. This type of social engineering is clearly outside the auspices of the court. Such an expansion of the purpose of the court threatens the very fiber of the judicial estate. Once the court determines that it is to be the arbiter of cultural values, instead of interpreting the law, it crosses a bridge that ends in the crumbling of the rule of law.

4. A Threat of Class Warfare.

Comment 4 to Rule 8.4(g) says that "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees..." If so interpreted, this rule will provide the foundation for exacerbating class warfare. The favored classes will enjoy the support of Montana attorneys. The disfavored classes will suffer. A lawyer would face discipline if he were to say, "I will hire you because you are a white male." A lawyer would be free to say, "I will hire you because you are a lesbian."

5. A Threat to Common Sense.

The final sentence of the proposed rule states, "This paragraph does not preclude legitimate advice or advocacy consistent with these rules." Since Rule 8.4(g) is included in "these rules," the effect of this sentence is, "Rule 8.4 does not preclude legitimate advice consistent with rule 8.4." Rules for the professional conduct of attorneys ought not to contain circular reasoning. What protection could that sentence possibly give to a Montana lawyer?

On the basis of the above reasoning I urge the court not to adopt the proposed change to Rule 8.4 of the Professional Rules of Conduct.

Sincerely,



Pastor Terry Forke
President Montana District LCMS

ⁱ From Comment [3] Whether the Montana Court adopts the comments attendant to Rule 8.4(g) is inconsequential. Montana Lawyers, seeking to interpret the rule will, as a matter of course, reference the comments of the ABA model rules.

ⁱⁱ From Comment [4]