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IN THE SUPREME COURT
STATE OF ARIZONA

IN THE MATTER OF: PETITION TO AMEND COMMENT [3] TO ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	Supreme Court No. R-12-0018 **Comment in Support of Petition to Amend Comment [3] to ER 8.4, Rule 42, Arizona Rules of the Supreme Court**

Fifty-four concerned Arizona attorneys, whose names appear hereon, do hereby submit this Comment in support of Cathi W. Herrod's Petition to Amend Comment [3] to ER 8.4, Rule 42, Arizona Rules of the Supreme Court. Ms. Herrod's Petition proposes to amend Comment [3] to ER 8.4, Rule 42, Arizona Rules of the Supreme Court, so as to read as follows: *"A lawyer may violate this Rule when, in the course of representing a client, (a) the lawyer uses words or engages in conduct that the lawyer knows or should have known invidiously discriminates against, threatens, harasses, intimidates, or defames an individual and (b) those words or that conduct creates a substantial likelihood of material prejudice to the administration of justice by undermining the impartiality of the judicial system. This Rule does not preclude legitimate advocacy. This Rule shall not limit or impair the right of a lawyer to accept, decline, or withdraw from the*

[1] Firm information is provided for identification purposes only. The concerned attorneys are asserting their positions for themselves and not on behalf of any organization with which they may be affiliated.

representation of a client. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule."

We support Ms. Herrod's proposed amendment for several reasons.

First, the proposed amendment resolves a serious defect with the current Comment [3], which prohibits an attorney from "*knowingly manifest*[ing] *by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status*." An ethical requirement that "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law". *Cramp v. Bd. Of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278, 287 (1961). The current Comment [3] has several terms so vague as to violate due process of law.

For example, the terms "bias" and "prejudice" and "manifest" leave trained attorneys to speculate about their meaning and application. Therefore, the current Comment [3] is so vague as to fail to provide attorneys with sufficient notice of what behavior is prohibited. Since a violation of the Rule can lead to professional discipline, attorneys deserve to know with reasonable certainty what behavior is proscribed. The result is that attorneys' valid speech is chilled for fear of offending against a standard whose parameters are lost in the mists of ambiguity. Uncertain terms require attorneys "to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quotation and citations omitted).

The proposed amendment cures these constitutional defects by clarifying the standard and making clear that the only acts that violate the Rule are, first of

all, acts of "invidious" discrimination (which should remove the danger that attorneys may face discipline for acts that are merely offensive or "politically incorrect") or acts that threaten, harass, intimidate, or defame an individual (which are all terms that have a definite legal meaning and that constitute actions rising to the level of something more than a merely subjectively offensive act) **and** that create a substantial likelihood of material prejudice to the administration of justice by undermining the impartiality of the judicial system (which insures that complained of acts must have some actual adverse affect on the administration of justice apart from their having merely occurred). These clarifications are essential in order to avoid the constitutional problems posed by the current Comment – and, unlike the current Comment, would provide clear, constitutional guidance to the Bar when it engages in its disciplinary role and professional self-policing efforts.

Second, the proposed amendment removes the current reference to a specified list of protected classes and, instead, specifically prohibits invidious discrimination and certain conduct against any person if such discrimination undermines the impartiality of the justice system. This amendment serves several salutary purposes.

By removing the list of specified protected groups, the Comment is rendered inclusive rather than exclusive. If we, as a profession, are really concerned about discrimination, then we should be concerned about discrimination against any person, regardless of whether or not that person is a member of a certain group. Specifying certain groups for protection and not others implies that the Arizona Bar is only concerned about acts of bias if those acts affect the members of specially favored groups. All others are implicitly excluded.

Also, including a list of specifically protected groups results in the fractionalization of our profession - not to mention our society - by encouraging people to identify themselves in relation to or against other groups of individuals. Removing the list removes the construct that creates those divisions.

Furthermore, there is apparent confusion over what some of the current classifications even mean. For example, under the current Comment [3], attorneys are prohibited from manifesting bias or prejudice based on "socio-economic status." It is reported that despite extensive discussion by the distinguished attorneys serving on the Bar's ad hoc committee reviewing the Comment, they could not even discern what that classification referred to or who it protected. Likewise, even scholars who regularly study sexual orientation cannot agree on a definition for or an understanding of that term. See Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008)("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon."). A list of protected classes, the members of which cannot even be discerned, does more harm than good. Removing the list cures this defect.

In addition, providing a list of specially protected groups has pushed the Bar into the improper role of arbitrating political and social issues, including issues of personal morality. The recent controversy surrounding the injection of sexual behavior into our standards of professional conduct illustrates this danger. Certain groups have been granted recognition despite the fact that they have been unable to present any credible evidence that members of their group are, in fact, experiencing discrimination from Arizona attorneys that application of the Comment would cure. It is not appropriate for groups to use the Arizona Bar – to which all Arizona attorneys must belong – in order to advance their own political

and social agendas, especially when there is disagreement among members of the Arizona Bar as to the agendas of the groups seeking Bar support.

In addition, use of the Bar in this manner results in frequent petitions to change the Rules. This is not merely a theoretical concern. It has already occurred repeatedly in the Arizona Bar. In particular, those seeking recognition of and protection for other than heterosexual behaviors, sought and were granted recognition of "sexual orientation" as a protected group. But that proved insufficient to satisfy the claims of those who sought special recognition and protection based on "gender identity," which was added to Comment [3] to Rule 8.4 in 2003. However, the inclusion of those two groups still proved insufficient to satisfy those who sought special recognition and protection based on "gender expression," and advocates pressed for that addition in 2011. Where will such a process end? Even now there are additional groups who claim that their peculiar characteristics merit special recognition and protection (see, for example, The National Association to Advance Fat Acceptance (NAAFA) which has resolved "[t]hat 'height and weight' be included as a protected category in existing local, state, and federal civil rights statutes"). It is only a matter of time before additional groups come forward to press their peculiar interests on the Bar.

We recognize the emotional investment that many have in advocating for the political and social advancement of their particular groups. But the Bar is not the appropriate forum or vehicle to advance those agendas. In fact, allowing itself to be used in this manner damages the credibility and effectiveness of the Bar. The proposed amendment – by removing the list of specially protected groups altogether – will restrain groups from attempting to use the Bar simply to advance their own political and social agendas rather than to advance the legitimate interests of the legal profession.

Another worrying trend of the ever-expanding protected group approach to non-discrimination provisions, which the current Comment continues, is that – whereas, historically, protected classes have centered upon objective characteristics that are easily discernible and not subject to change – lately we have seen protections extended to groups based on characteristics, and even behaviors, that are neither objectively observable nor immutable. This is a problem for lawyers called upon to avoid manifesting bias – for how can one be safe from a charge of bias against a characteristic one cannot objectively observe or that may change from one moment to the next? In addition, certain of these groups have not been recognized as protected classes under Arizona law. Therefore, the Bar, in including these classes, has taken sides in an ongoing and contentious debate – with both political and moral ramifications – extending protections to groups that neither the State of Arizona, nor a good many members of this Bar, have determined ought to be granted special acknowledgement and protection. Removing the list of specially protected groups cures this defect while still preserving the idea that attorneys should not invidiously discriminate against, threaten, harass, intimidate, or defame anyone if such actually undermines the impartiality of the judicial system.

Finally, the proposed amendment's provision that the Rule shall not limit or impair the right of a lawyer to accept, decline, or withdraw from the representation of a client is an extremely important improvement over the current Comment. Attorneys have the right to professional and ethical autonomy. The Rules of Professional Conduct themselves recognize the rights and obligations of attorneys to exercise their personal ethical judgments in the practice of law. For example, paragraph [7] of the Rules' Preamble provides: "*Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct,*

as well as substantive and procedural law. However, a lawyer is also guided by personal conscience . . ." (our emphasis). Paragraph [9] of the Preamble states: "*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person* . . . [s]*uch issues must be resolved through the exercise of sensitive professional and moral judgment*" (our emphasis). And paragraph [16] of the Preamble provides: "*The Rules* [of Professional Conduct] *do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be competently defined by legal rules*" (our emphasis). Rule 2.1 provides that "*In rendering advice, a lawyer may refer not only to law but to other considerations such as moral* . . . *factors*" (our emphasis). Comment [2] to Rule 2.1 provides that "*It is proper for a lawyer to refer to relevant moral and ethical considerations in giving* [legal] *advice. . . moral and ethical considerations impinge upon most legal questions* . . ." (our emphasis). "Sexual orientation" and "gender identity" are by their very nature inextricably and deeply rooted in sexual behavior and, therefore, implicate sexual ethics. By adopting both "sexual orientation" and "gender identity" as protected classes, the current Comment [3] creates a conflict between the Bar's expectations of attorney "ethics" and many lawyers' sincerely held moral beliefs.

In doing so, the Bar is taking sides in a profound moral debate and may find itself in the position of forcing certain Arizona attorneys in certain circumstances to either violate their conscience or face the possibility of professional discipline. The Bar should never find itself in such a position. One of the most important decision-points for an attorney and perhaps the greatest expression of a lawyer's professional and moral autonomy is the decision whether to take a case, whether to decline a case, or whether to withdraw from representation. And a necessary

corollary of the Rules' directives that a lawyer be an ethical person - guided by the lawyer's personal conscience and practicing law in the context of moral and ethical considerations - is that lawyers must not be forced to violate their moral and ethical principles in order to practice law. Lawyers must, therefore, retain their right to decline or withdraw from representation when to do otherwise would violate their sincerely held moral values. The proposed amendment clearly recognizes and supports this important principle. The proposed amendment will also align the Comment with the newly enacted Arizona law which provides that making client selection decisions based on a professional's sincerely held religious beliefs does not constitute unprofessional conduct (see Section 41-1493.04, Arizona Revised Statutes).

CONCLUSION

The proposed Amendment provides objective standards in determining what actions are proscribed, rather than the vague and subjective standards currently in place. It protects the rights of all – not just certain individuals – to seek recourse for behavior that is actually prejudicial to the administration of justice. And it expressly respects, protects and preserves the autonomy of attorneys to exercise their conscience in deciding which cases to take, which to decline, and whether to withdraw. For all these reasons, we support Ms. Herrod's Petition to Amend Comment [3] to ER 8.4, Rule 42, of the Arizona Rules of the Supreme Court.

Respectfully submitted this 21st day of May, 2012.

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