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**IN THE SUPREME COURT
STATE OF ARIZONA**

IN THE MATTER OF:

PETITION TO AMEND ETHICAL
RULE 8.4, RULE 42, ARIZONA
RULES OF THE SUPREME COURT

Supreme Court No. R-13-0019

**Comment in Opposition to the State
Bar of Arizona’s Petition to Amend
ER 8.4, Rule 42, Ariz. R. Sup. Ct. and
in Support of Cathi W. Herrod’s
Petition to Amend Comment [3] to
Ethical Rule 8.4**

The 73 undersigned Arizona attorneys hereby submit this Comment in opposition to the State Bar of Arizona’s Petition to Amend ER 8.4, Rule 42, Ariz. R. Sup. Ct. and in support of Attorney Cathi W. Herrod’s Petition to Amend Comment [3] to Ethical Rule 8.4.

**History of the Ethical Rule 8.4, Comment [3] Leading Up to the State
Bar of Arizona’s Current Petition to Amend ER 8.4**

Ethical Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The current Comment [3] to Ethical Rule 8.4(d) prohibits attorney conduct manifesting bias or prejudice toward certain protected classes.

In 2010 the State Bar of Arizona (hereinafter referred to as “State Bar” or “Bar”) proposed to add “gender expression” to Comment [3]’s list of protected classes and to elevate the Comment to a Rule. The State Bar withdrew that petition in December of 2011 after a significant number of Arizona attorneys objected to it.

On January 10, 2012, Arizona attorney Cathi W. Herrod filed a Petition to Amend Comment [3] to Ethical Rule 8.4 (hereinafter referred to as “Attorney Herrod’s Petition”). Attorney Herrod’s Petition seeks to amend Comment [3] to remedy the current Comment [3]’s many defects while still addressing invidious discrimination that adversely impacts the administration of justice.

The State Bar of Arizona has now filed another Petition to amend Comment [3] to ER 8.4 (hereinafter referred to as “Bar’s Petition” or “Bar’s proposed Comment”).

The undersigned Arizona attorneys object to the Bar’s Petition and support Attorney Herrod’s Petition for the reasons set forth herein.

A. The Bar’s Petition Fails to Resolve Any of the Defects that Attorney Herrod’s Petition Addresses.

Attorney Herrod’s Petition – and the comments filed by other Arizona attorneys supporting that Petition as well as the many comments filed by Arizona attorneys opposing the Bar’s previous petition – pointed out many serious defects

in the current Comment [3]. The Bar's Petition fails to address these defects and, in many respects, exacerbates the defects of the current Comment.

1. The Bar's Petition Contains Unconstitutionally Vague Language

The language of the Bar's Petition is so vague as to fail to provide Arizona attorneys with fair notice of what is and what is not prohibited conduct.

A rule 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).

In particular, the terms "bias," "prejudice," and "manifest" leave attorneys having to speculate about the meaning and application of the Bar's proposed Comment. Such terms fail to provide attorneys with sufficient notice of what behavior is prohibited, and vest in the Bar a virtually unfettered discretion to define the key terms in a manner it desires rather than in a manner that is objectively and fairly applicable.

Further, as set forth in more detail below, some of the protected classes cannot even be objectively defined or identified and, to that extent, are also unconstitutionally vague.

The vagueness of the Bar’s proposed language chills attorneys’ valid speech 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).

Attorney Herrod’s proposed amendment cures these constitutional defects by clarifying the standard to which attorneys will be held. Attorney Herrod’s proposed amendment does this by making clear that the only acts that may violate the Rule are **acts of “invidious” discrimination** (which removes the danger that attorneys may face discipline for acts that are merely rude or “politically incorrect” or that are based not on some malicious prejudice but rather on an attorney’s religious or moral principles) **or 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 ties the Comment to the Rule and insures that – in order to be actionable – the complained of

conduct must have some actual adverse affect on the administration of justice – which is the only expressed purpose of Rule 8.4(d)).

Although the Bar’s proposed Comment adds Attorney Herrod’s language prohibiting an act that “*discriminates against, threatens, harasses, intimidates, or defames*” someone, it then undermines the clarity of Attorney Herrod’s language by also retaining the Comment’s currently vague language prohibiting an act that “*manifests bias or prejudice.*”

One would be hard pressed to articulate the difference between conduct “*manifesting bias or prejudice*” and conduct “*discriminating against*” someone – but the fact that the Bar’s proposed Comment separates the two phrases with the word “or” clearly implies that manifesting bias or prejudice is conduct distinctly different from discriminating against someone. Because the Bar’s proposed Comment creates this incomprehensible distinction, attorneys are required to speculate – at their peril – as to what, in fact, is being prohibited. As a consequence, the Bar’s Petition actually exacerbates the current Comment’s defects rather than curing them.

2. The Bar’s Petition Continues to Compel Speech.

“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.” Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573

(1995)(quotations omitted). This bedrock constitutional principle undergirds the well-established rule that the government may not compel a private actor to express or affirm a message contrary to the actor’s beliefs. See Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 557 (2005)(identifying compelled-speech cases as those where “an individual is obliged personally to express a message he disagrees with, imposed by the government.”); United States v. United Foods, Inc., 533 U.S. 405, 410 (2001)(recognizing that the First Amendment “prevent[s] the government from compelling individuals to express certain views”).

The Bar’s proposed Comment violates this constitutional guarantee against compelled speech because it compels an attorney to represent or continue representing a client even if advocating that client’s position or interest would conflict with the attorney’s sincerely held religious or moral convictions. Because lawyers exercise many expressive rights when representing their clients – indeed, the advocacy process is rife with expression (speaking, writing, and arguing, to name a few, see Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071-73 (1991)) – the Bar’s proposed Comment forces attorneys to advocate positions contrary to their sincerely held religious and moral convictions, which is something the federal Constitution clearly prohibits.

3. The Bar’s Petition Prohibits Protected Speech

The Bar’s proposed Comment also threatens to prohibit attorneys from

advocating politically controversial views on behalf of their clients. These issues include, among others, that the law should continue to define marriage only as the union of one man and one woman (which some might argue “manifest[s] bias or prejudice” or “discriminates against” sexual orientation). The Constitution does not permit the Government to confine clients and their attorneys by excluding ostracized yet vital theories and ideas. Cf. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001)(dealing with the litigation context). That, however, is precisely what the Bar’s proposed Comment does.

This silencing of attorney advocacy for publicly marginalized views runs directly counter to the purpose of the First Amendment. By branding these views as “discriminatory” (and, under the Bar’s proposal, “professional misconduct”) the provision encourages public and private contempt of, along with official punishment against, attorneys and clients who express such views and beliefs.

4. The Bar’s Petition Discriminates On The Basis Of Viewpoint

A legal provision proscribing expression must not exhibit, either explicitly or implicitly, viewpoint discrimination. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992). The Bar’s proposed Comment suffers from this constitutional defect.

For example, suppose an attorney writes a letter for his client arguing that the State should give marriage licenses to same-sex couples and that failing to do so constitutes discrimination on the basis of sexual orientation. That attorney most assuredly would not be accused of manifesting bias or prejudice based on sexual orientation. But consider the attorney who conveys the position that the State should continue defining marriage only as the union of one man and one woman. Recent history illustrates that some people would conclude that the latter expression manifests bias or prejudice based on sexual orientation.

Some may argue that this concern is without merit because the Bar's proposed Comment specifically allows for "legitimate advocacy." But if there is "legitimate advocacy" there must also be, by definition, "illegitimate advocacy." Which is which and who will decide the meaning of that objectively undefinable distinction? Could an attorney, representing a heterosexual party in a custody dispute between that parent and a homosexual parent, introduce sociological studies showing that children do better when raised by an opposite-sex couple than when raised by a same-sex couple? Or would such an argument and such evidence be considered other than legitimate advocacy because, by its very nature, such demonstrates "bias or prejudice" based on sexual orientation? If "bias or prejudice" against those who engage in homosexual behavior constitutes a disciplinary offense, who can say the Board of Professional Responsibility

would not contend that *any* advocacy against such behavior is not “legitimate advocacy”?

Under the Bar’s proposal, lawyers will only be allowed to advocate in ways the powers-that-be determine are “legitimate” and may face punishment if they engage in advocacy the powers-that-be determine are not “legitimate.” That constitutes viewpoint discrimination. As the Supreme Court has recognized, the government “has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.’ R.A.V., supra at 392.

5. The Bar’s Petition Violates Free Exercise Of Religion Rights

The Rules of Professional Conduct themselves recognize the rights and obligations of attorneys to exercise their personal ethical judgments in the practice of law. 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). And 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).

The Bar’s proposed Comment undermines these ideals by prohibiting the attorney’s exercise of moral judgment regarding sexual behavior.

Since most major religions in Arizona hold certain precepts and convictions concerning sexual behavior, the Bar’s proposed Comment threatens to force attorneys holding these beliefs to violate their conscience by advocating for clients on issues contrary to their religious tenets.

Indeed, the Bar’s rejection of Attorney Herrod’s language limiting the proscribed conduct to “invidious” discrimination is telling. It evidences an intent to interpret the proscription broadly so as to apply to *any* behavior that draws a perceived negative distinction on the basis of one of the protected class characteristics – and includes no recognition of distinctions based on religious or

moral principles. This creates a direct collision between a lawyer’s professional obligations and a lawyer’s religious convictions. Indeed, many legal scholars have noted the conflict between religious liberty and the mandatory acceptance of certain sexual behaviors. See, for example, Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 43-44 (2000); see generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Douglas Laycock et al., eds., 2008).

The “*Free Exercise Clause* [of the First Amendment] *pertain[s] if the law at issue discriminates against some or all religious beliefs.*” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993). The Bar’s proposed Comment discriminates against those attorneys who hold sincerely held religious beliefs about the morality of certain sexual behaviors.

In addition, the Arizona Religious Freedom Amendment, A.R.S. § 41-1493, (hereinafter “Arizona RFRA”) offers broader religious liberties than those protected by the First Amendment to the United States Constitution. The Arizona RFRA declares that “*Free exercise of religion is a fundamental right that applies in the State even if laws, rules, or other government actions are facially neutral,*” A.R.S. § 41-1493.01(A) and that “*government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general*

applicability.” A.R.S. § 41-1493.01(B). For purposes of the Arizona RFRA, “*Exercise of religion means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.*” A.R.S. § 41-1493(2). And to “*substantially burden*” religious exercise means any burden on that exercise that is not “*trivial, technical or de minimis.*” A.R.S. § 41-1493.01(E).

The Bar’s proposed Comment infringes on the free-exercise rights of religiously motivated attorneys by requiring them to advocate views and legal positions that conflict with their sincerely held religious beliefs. Therefore, the Bar’s proposed Comment violates the Arizona RFRA because it substantially burdens the attorneys’ religious exercise.

And the State of Arizona would be unable to show, as required by the Arizona RFRA, that the Rule is both “*in furtherance of a compelling governmental interest; and [t]he least restrictive means of furthering that compelling governmental interest.*” A.R.S. § 41-1493.01(C).

It is unclear exactly what interest the Bar intends to further through its proposed Comment, but whatever it is it does not appear to be a compelling one because there does not appear to be any significant evidence of bias, prejudice, or discrimination manifested by Arizona attorneys that the Rule or Comment [3]

would actually address. Indeed, it appears that no complaint has ever been filed invoking Comment [3] to Rule 8.4. The Bar references the 1999 *Gay and Lesbian Task Force's Final Report to the State Bar Board of Governors* in support of its proposed Comment, but a perusal of that *Report* reveals not one actual incident of sexual orientation or gender identity discrimination by attorneys in the course of representing a client. Therefore, the Bar's proposed Comment doesn't even address any actually existing problem. Addressing a non-existent problem cannot constitute a compelling governmental interest.

Moreover, regardless of whether the Bar's proposed Comment furthers a compelling governmental interest, the State will not have used the least restrictive means to achieve its end. Other less-restrictive means – such as incorporating a religious exemption or removing controversial behavioral choices from the list – exist in these circumstances, and the State's failure to use those alternatives dooms its actions under the Arizona Religious Freedom Amendment analysis.

6. The Bar's Petition Fails to Remedy the Evils Caused by the Current Comment's Ever Growing List of Specially Protected Classes

Attorney Herrod's 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 proposed amendment serves several salutary purposes.

By removing the list of specially protected groups, the Comment is rendered inclusive rather than exclusive. If we, as a profession, believe that improper discrimination is prejudicial to the administration of justice, then we should be concerned about improper discrimination against *any person*, regardless of whether or not that person is a member of a certain group.

Also, including a list of specially 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 real 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, the committee could not even discern what that classification referred to or who it protected. And yet the Bar’s Petition seeks not only to retain a classification it cannot even define; it also seeks to retain similarly indefinable classifications.

For example, 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.”).

Likewise, “gender identity” is objectively indeterminable. “Gender identity” is, by definition, completely subjective, depending entirely upon a person’s self-perception, which may have nothing to do with how they objectively appear to others. The concept is completely malleable and subject to change. There is absolutely no requirement that someone have a temporally consistent “gender identity.” In fact, proponents of gender identity protection admit that “gender identity” is not only changeable over time but also that different “gender identities” may exist simultaneously and in different contexts. See, for example, *Self-Determination In A Gender Fundamental State: Toward Legal Liberation Of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101 (2006)(“[I]ndividuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities”). Consequently, under the Bar’s proposed Comment, attorneys are being directed not to discriminate against something they can neither objectively perceive nor even rely upon as having any objectively consistent existence.

Indeed, the very concept of a class to which one can subjectively choose to belong is troublesome. Can a Caucasian person choose to self-identify as African-American? Can a European-American choose to self-identify as Native American? If one can claim a sexual identity contrary to one's objectively verifiable chromosomes, anatomy, and phenotype – simply because that is how they “feel” – what reasoned basis would there be to prevent someone from claiming a racial identity contrary to that person's objectively identifiable race?

In addition, providing a list of specially protected groups has now pushed the Bar into the improper role of taking positions on contentious political and social issues, including issues of personal morality. 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 wide disagreement among members of the Arizona Bar as to the agendas of the groups seeking Bar support.

Using the Bar in this inappropriate manner results in frequent petitions to change the Rules to include recognition and protection to new groups who seek support for their particular interests. Indeed, this has already occurred repeatedly in Arizona. In particular, those seeking recognition of and protection based upon certain sexual 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. 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.

Allowing itself to be used in this manner damages the credibility and effectiveness of the Bar. Attorney Herrod’s proposed amendment – by removing the list of specially protected groups altogether – will prevent 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 as a whole.

7. The Bar’s Petition Fails to Protect Every Attorney’s Right to Moral and Professional Autonomy in Accepting, Rejecting, and Withdrawing from Representation.

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.

Attorney Herrod's proposed amendment clearly recognizes and supports this important principle by explicitly providing that the Rule shall not limit or impair the right of a lawyer to accept, decline, or withdraw from the representation of a client. The Bar's proposed Comment rejects this language.

The Bar might argue that it's proposed Comment would not interfere with a lawyer's right to decline representation at the outset, because the Comment is limited to acts performed "*in the course of representing a client,*" which implies that the proscription would only attach once an attorney-client relationship is established. But it is not always clear when an attorney-client relationship begins. Indeed, many informal acts on an attorney's part have been held to create

an attorney-client relationship. Therefore, if the Bar’s proposed Comment is adopted, attorneys will harbor a reasonable apprehension that they will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept or reject cases.

And in any event it is very clear that, under the Bar’s proposed Comment, once an attorney-client relationship *is* established an attorney cannot withdraw from representation if to do so would “manifest bias or prejudice” or would “discriminate” against an individual or group – even if facts that come to light after representation has commenced places the attorney in the position of having to violate his or her religious or moral principles.

B. The Bar’s Petition Divorces the Comment from the Ethical Rule the Comment is Intended to Address.

The sole purpose of Comment [3] is to elaborate on Ethical Rule 8.4(d), which provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The current Comment [3] maintains the essential link between the Rule and the Comment by providing that “*A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d)[of Ethical Rule 8.4] when such*

actions are prejudicial to the administration of justice (our emphasis). Attorney Herrod's Petition also retains this crucial link between Comment [3] and the Rule it supports.

The Bar's proposed Comment, however, completely disconnects Comment [3] from Rule 8.4(d) by removing the current Comment's ". . . when such actions are prejudicial to the administration of justice" language.

We may all agree that invidious discrimination is undesirable. But when the sole purpose of Comment [3] is to elaborate on Ethical Rule 8.4(d)'s prohibition of conduct that prejudices the administration of justice, a distinction must be made between undesirable conduct that prejudices the administration of justice and that which does not. Otherwise, the Comment does not support the Rule to which it owes its existence, but instead creates nothing less than a new and free-standing disciplinary policy divorced from any legitimate professional interest. Such action contravenes the very purpose of a Comment to an Ethical Rule and, for that reason alone, the Bar's proposed Comment should be rejected.

CONCLUSION

For all the reasons set forth herein, we the undersigned support Attorney Herrod's Petition to Amend Comment [3] to ER 8.4, Rule 42, of the Arizona Rules of the Supreme Court and object to the State Bar of Arizona's Petition to Amend ER 8.4, Rule 42, Ariz.R.Sup.Ct.

Respectfully submitted this 20th day of May, 2013.

/s/ Andre E. Carmen

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CERTIFICATE OF FILING AND SERVICE

I, the undersigned, do hereby certify that the foregoing **Comment in Opposition to the State Bar of Arizona's Petition to Amend ER 8.4, Rule 42, Ariz. R. Sup. Ct. and in Support of Cathi W. Herrod's Petition to Amend Comment [3] to Ethical Rule 8.4** was filed electronically with the Clerk of the Supreme Court of Arizona this 20th day of May, 2013 and that copies of the same were mailed this 20th day of May, 2013 to the following via United States Mail, postage prepaid:

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