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Central Arizona National Lawyers Guild

IN THE SUPREME COURT
STATE OF ARIZONA

In the matter of RULES 31 AND 41, RULES OF THE SUPREME COURT	Supreme Court No. R-16-0029 **Proposed Amendments to the Oath of Admission and A Lawyer's Creed of Professionalism of the State Bar of Arizona**

Introduction

The interest in justice and nondiscrimination by the State Bar is a compelling one. It is the bedrock of The Rule of Law and a principle that all lawyers must adhere to. However, the suggested changes in the oath and the creed appear to strip the legal profession of all that it stands for and turn it into a trade rather than a profession with a duty to justice, our clients and the public. The suggested changes seem to indicate that the Supreme Court has turned its back on the Rule of Law that is the cornerstone of our society and the role that lawyers play in maintaining law, democracy and a just society.

Oath of Admission

One of the first changes in both the Oath and the Creed (41 (b)) is adding and subtracting the word "laws." One of the reasons given for the changes was to conform to the

Arizona Loyalty Oath of Office and Rule 32(c)(3) of Arizona Supreme Court. The only conforming done is adding the word "laws" in the Oath and removing the word "laws" in the Creed so that the lawyer would only say s/he supported the Constitution of the United States, not the laws. That is how it reads in both the Oath and Rule 32. However, both come from the Arizona Constitution, Article 6, Section 26, Oath of Office that reads as follows:

> Section 26. Each justice, judge and justice of the peace shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability. The oath of all judges of courts inferior to the superior court and the oath of justices of the peace shall be filed in the office of the county recorder, and the oath of all other justices and judges shall be filed in the office of the secretary of state.

The oath states that the judge must support the Constitution of the United States and of Arizona but does not mention laws at all. One could argue that this is because judges sometimes overturn laws and therefore ought not be so proscribed by an Oath of Office.

But because lawyers also challenge certain laws as facially unconstitutional or unconstitutional as applied and should therefore not be obeyed, lawyers, too, should not be required to swear an oath to laws they believe are unconstitutional.

On the other hand, removing the word "laws" from in front of the U.S. Constitution but leaving it in regarding the State Constitution seems to smack of a political agenda. For several years now, bills have been introduced into the state legislature to exempt Arizona from following federal laws that certain members of the legislature don't like – those concerning the environment, non-discrimination, regulation of public resources etc. To avoid this political bias, the word "laws" should be included for both federal and state or deleted for both.

The second change of concern is in the third paragraph that starts with "I will not counsel or maintain…" It would seem to hamstring the defense bar from presenting defenses that may be novel or in line with the newest science but not yet accepted under *Frye* or *Daubert*. Under our current system, defense attorneys can maintain a not guilty plea even when the facts show otherwise because it is the job of the state to prove the crime, not the defendant to admit it. The current language discussing merit and justice and allowing defenses that are debatable under law is far preferable to the suggested changes to keep the burden where it properly should be.

The next paragraph starting with, "I will be honest in my dealings …" is now far too broad as it would include the entirety of the lawyer's life. Are we to be monitored in our private lives lest we ever tell a white lie? The existing language that limits it to the cause of action, judge and jury should be maintained or the language could be construed as void for vagueness.

The next paragraph that begins, "I will fulfill my duty …" eviscerates one of the most important rules of a lawyer – that of confidentiality. We must maintain confidence and preserve the secrets of our client. Why else would they trust us? The level of trust of lawyers today is extremely low. A Princeton University study in 2014 found that lawyers ranked below nearly every other profession and job in trustworthiness. We may be respected and envied – but we are not trusted. This rule change would diminish further that rule of confidentiality and harm attempts to build trust in the public.

The second unacceptable change in that paragraph is that attorneys accept compensation from someone other than their client with only the client's knowledge and

approval. Most clients are not sophisticated in the law and unless it is explained to them, and even sometimes when it is, they do not understand the ramifications of certain actions in the system. Therefore, any acceptance of outside compensation should be with knowledge and consent by the client but only after full disclosure and explanation by the lawyer.

The next paragraph that begins with, "I will avoid engaging in …" is unacceptable for two reasons. First, it exchanges "unprofessional" conduct for "offensive" conduct. Unprofessional conduct is defined in Rule 42, Rules of the Supreme Court as:

> **ER 8.4. Misconduct**
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Code of Judicial Conduct or other law.
>
> (g) file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b).

Only in the comments does it prohibit abusive conduct that is unprofessional in terms of disadvantaged minorities:

> [3] 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) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin,

> disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

In August 2016, the American Bar Association (ABA) amended a model ethics rule, prohibiting offensive language or conduct by lawyers in various settings. The amendment prohibits conduct "the lawyer knows or reasonably should know" is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, and marital or socioeconomic status. This would apply in court, at the office, or during "business or social activities in connection with the practice of law." Rather than talking about offensive conduct, we should follow the lead of the new model ethics rule and define such discriminatory behaviors as nonprofessional in our Rule 42 and not just in the commentary.

The second problem with this provision is that it eliminates the duty to the profession and the greater public for the constant and necessary search for justice. The new language adds in duties to client or tribunal, but not to the profession, the public or justice. Yet justice is what lawyers are to seek – even prosecutors must seek justice not convictions. Defense attorneys must seek justice by forcing the government to live by the Rule of Law to take away someone's liberty. Family lawyers must seek justice for the best interest of the child. Civil lawyers must seek justice by not deliberately misleading the court or jury. The Supreme Court and the Bar should not minimize the lawyers' role in seeking justice but maximize it.

The next paragraph, "I will never reject…" is another example of completely abandoning the duty, professionalism and public trust that lawyers should instead emulate. The existing duty not to reject the cause of the defenseless and oppressed and not to abandon

a client for greed or malice is precisely what should remain in our oath. Our country has marched toward a Hobbesian future in the last thirty years with trickledown economics, a dramatic shift of income from the poor to the wealthy, and abandonment by the government of public education, welfare programs and even infrastructure such as roads and bridges. We have more than a duty to support justice; we have a duty to ensure it. That duty extends not just to our immediate clients but also to the entire society. By eliminating that language, you cut out the heart and soul of what a lawyer is.

Creed of Professionalism

In B(3), by changing "legitimate" to "substantive" lawyers will be deprived of a strategic tool. We all know that cases involve both strategy and tactics and that the substantive provisions are not the only important ones. Especially in cases of unpopular causes or people, political issues or those involving public figures, perception is often as important as the law (OJ Simpson for example). Especially for unpopular causes, a "legitimate" interest may be an editorial in the New York Times or a march down Washington Avenue. Lawyers should not be hamstrung in these important, difficult but socially important cases because of "substantive" concerns only but need the full panoply of strategies within the Rule of Law.

In C (11), the addition of "and respectful to" is duplicative of C (1) but also could be seen to place respect to the tribunal over duty to the client or justice to the cause. We have all heard of stories where the tribunal has been disrespectful to the attorneys, often women and those who represent unpopular people or causes. Most recently we have heard of judges who think nothing of allowing a lawyer to wear a flag lapel or a cross necklace or Jewish Star

of David, but they are not allowed to wear a Black Lives Matter pin because somehow it is disrespectful to say that Black Lives Matter.

In history there have been many instances where tribunals were sorely wrong from *Buck v. Bell, Dred Scott, Plessy v. Ferguson, Korematsu v. U.S., Bush v. Gore, Citizens United v. FEC, Shelby v. Holder* to *Hobby Lobby v. Burwell*. We have the show trials of the 1960s where activists, especially Black Panthers, were jailed on no or manufactured evidence and their lawyers were dragged out of court by police. The success of the current Innocence Project in freeing hundreds of factually innocent prisoners who had served from 3 to 45 years, (43 in solitary for Albert Woodfox) for crimes they did not commit provides ample evidence that our criminal justice system, including our prosecutors and judges, do not always uphold the law. Lawyers do not owe respect to those who would destroy our democracy and decapitate our Constitution. Respect is earned not anointed. Such courts should receive the opprobrium they deserve. It would be a serious mistake to elevate respect for the tribunal over respect for justice and the Rule of Law. In Nazi Germany, lawyers and judges sat too quietly as the country descended into destruction and the people, especially Jews, Roma and homosexuals, descended into hell. Lawyers must not be afraid to criticize the government, judges and prosecutors when they are abusing their powers. We cannot fear discipline by the Bar because we spoke truth to power.

Absent a prejudicial effect on the administration of justice, lawyers retain free speech rights even when engaging in professional activities and especially in their social and daily life activities outside the practice of law. Therefore, efforts to broaden and censure lawyer's speech and conduct when the prohibited speech and conduct do not have a prejudicial affect

on the administration of justice not only raise serious First Amendment issues but are also subject to constitutional challenge.

Additionally, the words "and respectful to" are void for vagueness since they are undefined. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Moreover, the words would operate to inhibit the exercise of First Amendment freedoms by preempting and even muzzling speech and conduct lest boundaries not clearly marked are crossed.

And more worrisome still is the probability that arbitrary and discriminatory enforcement will follow absent explicit standards for those who apply them. Some lawyers already believe the State Bar enforces its ethical rules on an ad hoc and subjective basis. Vague terms only serve to further compound this opinion and the apprehension of arbitrary and discriminatory application.

The issues in Rule 41 (a)(e)(f) and (h) have all been addressed above and the same corrections are necessary. In Rule 41 (h) simply saying lawyers support fair administration is too vague with no teeth and will have no meaning and no impact on those who actually need fair and just representation.

Conclusion

Unfortunately of late our government has too often abandoned the Rule of Law as evidenced by Guantanamo and Abu Ghirab where people are tortured and imprisoned indefinitely without proof, charges or any hint of due process; execution of American citizens by drone strike without benefit of judge or jury; violent attacks on peaceful protesters from Ferguson, Missouri to Standing Rock, South Dakota; and mass surveillance without cause or warrant to name a few instances.

Those who protest these actions and come forward with proof themselves jailed e.g. Manning, Snowden, Kiriakou, Kane, and Sterling. Those who aid and abet these violations of law wind up as law professors at prestigious law schools e.g. John Yoo. While some will shout – this is political – we know in reality everything the law does is political. Mass incarceration that has anchored our criminal "justice" system for 40 years is political; the finding that pregnancy discrimination is not sex discrimination is political; the destruction of the Voting Rights Act in *Shelby v. Holder* is political. Only a fool thinks the law can escape the politics of power and privilege. The recent Supreme Court Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies is a realization coming to birth around the country that the law is unfair to the poor and powerless, something the National Lawyers Guild has known and fought against since 1937.

Those who suggested the proposed change argue that it would better reflect what the profession is today. Rather, the oath and the creed should reflect what the profession should aspire to be. The Central Arizona National Lawyers Guild asks that the Supreme Court reject the proposed amendments to the oath and the creed.

Respectfully submitted this date: 5 October 2016

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