

1 Mauricio R. Hernandez, Bar No. 020181
2 P.O. Box 7347
3 Goodyear, AZ 85338
4 (623)363-2649
5 mo@lawmrh.com

6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

8 In the matter of

Supreme Court No. R-16-0029

9 RULES 31 AND 41, RULES OF THE
10 SUPREME COURT

**Comments Re. Proposed Amendments to
the Oath of Admission and A Lawyer's
Creed of Professionalism of the State Bar
of Arizona**

11
12
13
14 There is generally much to recommend in the additional concision and clarity offered
15 by the Court's September 2, 2016 revision to the subject January 8, 2016 State Bar of
16 Arizona petition to amend the Lawyer's Oath and Creed. That said, the petition nonetheless
17 begs the question "Why?"

18
19 Not all U.S. jurisdictions have deemed fit to enact Creeds in a vain attempt to
20 legislate virtue and conduct in their professional ranks. Even fewer have embraced a
21 compulsion to make further amendments. The instant matter represents the third amendment
22 since Arizona's original lawyer creed was first promulgated on May 19, 1989. Prior
23 amendments were made September 19, 2003 and then just two years later on May 20, 2005.

24
25 More useful than future amendments might be metrics to objectively measure
26 retrospectively and prospectively the lawyer culture, conduct and the outcomes, including

1 and beyond lawyer disciplinary incidents.

2 All the same, it's noteworthy to state here for the record that as of the date of this
3 writing the Court's above-mentioned revision circulated and extended for comment by
4 October 28, 2016 has not been made available for review and comment on the Court's Rules
5 Forum website. But for the State Bar having circulated the Court's September 2nd Order as
6 an incidental part of a general member blast email newsletter, lawyers would not have
7 received notice of the *latest* proposed amendments. More lamentably, the general public
8 bereft of access to State Bar blast emails is left uninformed about changes that speak directly
9 to the State Bar's public protection mission and their purportedly safeguarded interests.
10

11 **Oath of Admission**

12 As stated in the October 6, 2016 Comment filed by the Central Arizona National
13 Lawyers Guild, the Oath of Office in Article 6, Section 26 of the Arizona Constitution states
14 judges must support the Constitution of the United States and of Arizona — but the section
15 does not mention “laws.” I agree with the Guild's Comment that because judges sometimes
16 overturn laws, judges ought not to be so proscribed by an Oath of Office.
17

18 Moreover, as the Guild further explains, since lawyers sometimes challenge certain
19 laws as facially unconstitutional or unconstitutional as-applied, lawyers in those
20 circumstances -- like judges -- should not be similarly required to swear an oath to "laws"
21 they don't in good faith believe are constitutional. Consequently, I further agree with the rest
22 of the Guild's related remarks, including the concession that regarding the duties and
23 obligations of members under Rule 41, the word “laws” should either be included for both
24 federal and state constitutions or deleted for both.
25

26 //

Creed of Professionalism

I am also of like mind with the Guild's concerns about the addition in C (11) of "and respectful to" the tribunal which are words, as they maintain, void for vagueness since they are undefined. And they are correct in asserting that the addition of "and respectful to" will "inhibit the exercise of First Amendment freedoms by preempting and even circumscribing speech and conduct "lest boundaries not clearly marked are crossed."

By the same token, I concur that 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."

But beyond the foregoing is the weightier related concern adroitly argued by Professor Margaret Tarkington in, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*,¹ to wit, that "a free speech right to impugn judicial integrity must be recognized for attorneys when acting as officers of the court and making statements in court proceedings."

Professor Tarkington believes, "Such a right is necessary to protect the constitutional and legal rights of litigants to an unbiased and competent judiciary. Further, the recognition of such a right for the attorney preserves litigants' access to courts and due process rights." She also further distinguishes past academic viewpoints "based on analogies to other areas of limited First Amendment protection" because they "fail to account for the protection of

¹ Margaret Tarkington, "A Free Speech Right to Impugn Judicial Integrity in Court Proceedings," 51 B.C.L.Rev. 363 (2010), <http://lawdigitalcommons.bc.edu/bclr/vol51/iss2/2>

1 litigant rights, the role of attorneys in our adversary system, and the constitutionally required
2 role of our judicial system."

3 Additionally, she contends that "by curbing speech in the presentation of claims, the
4 judiciary undermines the adversarial system and the role of attorneys therein, as well as
5 undermining the judiciary's own role and responsibility in remedying constitutional
6 violations and providing fair proceedings."

7 Perhaps the greatest paradox among the so-called learned professions is the one
8 confronted by the legal profession. The State Bar pronounces that among a lawyer's "core
9 values" is "our commitment to advocate the causes of others with all of our strength, as we
10 would advocate for ourselves in the most important of personal concerns."²

11 And yet, when it comes to advocating their own causes with all of their strength,
12 lawyers are paradoxically often found wanting. Thanks to the shibboleth turned article of
13 faith that "Membership in the bar is a privilege burdened with conditions," *In re Rouss*, 221
14 N.Y. 81, 84 (1917), it appears almost any manner³ of obligation and any number of
15 proscriptions⁴ and constrictions⁵ can be imposed under the pretextual rubric of "privilege"
16
17
18

19 _____
20 ² "Mission, Vision, and Core Values," State Bar of Arizona, <http://www.azbar.org/aboutus/mission-vision-andcorevalues/> (last visited October 27, 2016)

21 ³ Ilya Somin, "Justice Sotomayor's misguided advocacy of "forced labor" for lawyers," *The Washington Post*, May
22 20, 2016 at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/20/justice-sotomayors-misguided-advocacy-of-forced-labor-for-lawyers/?utm_term=.6dbb741894a1 (last visited October 27, 2016)

23 ⁴ *Scheehle v. Justices of the Supreme Court*, 120 P.3d 1092 (Ariz. 2005) rejecting plaintiff's objection that forced
24 employment on a court-appointed arbitration panel at nominal rates was an unconstitutional "taking" of property by the
25 government without just compensation.

26 ⁵ *Cohen v. Hurley*, 366 U.S. 117 (1961) where the Court sustained the disbarment of an attorney who refused on
grounds of self-incrimination to answer questions in an investigation of professional misconduct taking the form of
"ambulance-chasing." Overruled by *Spevack v. Klein*, 385 U.S. 511, 514 (1967) concluding that "*Cohen v. Hurley* should be
overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its
protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of
disbarment and the deprivation of a livelihood as a price for asserting it."

1 inasmuch as lawyers are resigned to submit to virtually any liberty and property interest
2 burden⁶ and financial and practice strain to protect an oligopolistic livelihood.

3 Indeed, as far back as *Sara Baird v. State Bar of Arizona* 401 U.S. 1 (1971) followed
4 by *Bates v. State Bar of Arizona* 433 U.S. 350 (1977), lawyer First Amendment rights have
5 been threatened and often impinged.⁷ Will a newly-amended Creed obligating lawyers "at all
6 times" to be "respectful to the tribunal" now presumably enmesh lawyer free speech rights in
7 their personal lives as private citizens?⁸

8 So given this, will the change to C (11) expand even further the justifications "for the
9 notion that membership in the bar is a mere privilege conferred by the State and is therefore
10 subject to withdrawal for the 'breach' of whatever vague and indefinite 'duties' the courts and
11 other lawyers may see fit to impose on a case-by-case basis"?⁹

12
13
14
15
16 ⁶ See a recent Federal Southern District Court opinion granting summary judgment against The Florida Bar and
17 enjoining it from enforcing guidelines concerning past results in attorney advertising in indoor and outdoor display,
television and radio media as a violation of the First Amendment. *Robert Rubenstein v. The Florida Bar*, Case No. 14-CIV-
20786-BLOOM/Valle (SD Fla. 12/8/14)

18 ⁷ *Lathrop v. Donohue*, 367 U.S. 820, *Keller v. State Bar of California*, 496 U.S. 1 (1990); Also see the "2016:
19 52nd Legislature - 2nd Regular Session Annual Report of the State Bar of Arizona Public Policy Positions disclosing State
Bar lobbying efforts made with mandatory member funds spent to thwart the strong interests of members advocating for bar
reform legislation. State Bar of Arizona website, "Government Relations," at
20 <http://www.azbar.org/media/1179934/2016legislativeannualreport.pdf> (last visited October 27, 2016);

21 ⁸ Just this past August, the ABA adopted an amended Model Rule 8.4 imposing a new speech code whose reach
exceeds the grasp of a courtroom and whose violation can trigger lawyer discipline for "verbal . . . conduct" broadly defined
22 as "conduct related to the practice of law," including "representing clients; interacting with witnesses, coworkers, court
personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and
23 participating in bar association, business or social activities in connection with the practice of law." The new rule means to
eradicate "bias" by prohibiting "harmful verbal or physical conduct that manifests bias or prejudice toward others."
Violations would subject lawyers to disciplinary sanctions. See Peter Geraghty, "*ABA adopts new anti-discrimination rule*
24 *8.4(g)*" September 2016 at [http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-](http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html)
[discrimination-rule-8-4-g--at-annual-meeting-in-.html](http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html) but also see David French, "*A Speech Code for Lawyers*," August 11,
25 2016 at *National Review* at [http://www.nationalreview.com/article/438906/american-bar-association-lawyers-follow-these-](http://www.nationalreview.com/article/438906/american-bar-association-lawyers-follow-these-speech-rules-or-else)
[speech-rules-or-else](http://www.nationalreview.com/article/438906/american-bar-association-lawyers-follow-these-speech-rules-or-else) (last visited October 28, 2016)

26 ⁹ *Cohen*, 366 U.S. 117, at 147 (Black, dissenting)

1 Fifty-five years ago, Associate U.S. Supreme Court Justice Hugo Black had an
2 opposing view in dissent in *Lathrop v. Donohue*.¹⁰ It still resonates today:

3 I do not believe that the practice of law is a 'privilege' which empowers Government
4 to deny lawyers their constitutional rights. The mere fact that a lawyer has important
5 responsibilities in society does not require or even permit the State to deprive him of
6 those protections of freedom set out in the Bill of Rights for the precise purpose of
7 insuring the independence of the individual against the Government and those acting
8 for the Government. What I said in the Cohen case is, in my judgment, equally
9 applicable here:

10 '* * * (O)ne of the great purposes underlying the grant of those freedoms was to give
11 independence to those who must discharge important public responsibilities. The
12 legal profession, with responsibilities as great as those placed upon any group in our
13 society, must have that independence. If it is denied them, they are likely to become
14 nothing more than parrots of the views of whatever group wields governmental power
15 at the moment. Wherever that has happened in the world, the lawyer, as properly so
16 called and respected, has ceased to perform the highest duty of his calling and has lost
17 the affection and even the respect of the people.'

18 Respectfully submitted this 28th day of October 2016

19 By /s/ Mauricio R. Hernandez
20 Mauricio R. Hernandez (#020181)

21
22
23
24
25
26

¹⁰ *Lathrop*, 367 U.S. 820, at 876 (Black, dissenting)