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**IN THE SUPREME COURT**

**STATE OF ARIZONA**

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| In the Matter of:<br><br>PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT | No. R-17-0032<br><br>**COMMENT OPPOSING AMENDMENT TO ER 8.4** |

Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, we comment in opposition to the Petition to Amend Ethical Rule (ER) 8.4 of the Arizona Rules of Professional Conduct (the "Petition").

The proposed rule change is based on American Bar Association Model Rule 8.4(g) (the "Model Rule"). Adopting the Model Rule is a bad idea, for many reasons. *See generally* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal Prof. 201 (2017) (hereinafter *History*). We here comment upon just two: that the proposed change to ER 8.4 would violate Arizona state constitutional separation-of-powers principles, and that to adopt the proposed change would be to adopt a rule of professional conduct lacking a corresponding

disciplinary sanction.

As to the former, the Arizona Supreme Court has the power to regulate the ***practice of law*** in this state. We do not read the Arizona Constitution as conferring on this Court the power to broadly regulate all attorney conduct which is merely ***related to*** the practice of law in some way. As to the latter, to adopt a rule governing lawyers' conduct, without also telling lawyers what fate might befall them for a violation, would amount to adopting a half-rule—and one fundamentally unfair to the practicing bar.

## I. THE PROPOSED RULE CHANGE WOULD VIOLATE THE SEPARATION OF POWERS REQUIRED BY THE ARIZONA CONSTITUTION.

### A. The Arizona Judiciary Is Constitutionally Authorized to Regulate the Practice of Law.

The Constitution divides the powers of the state's government into three departments: the legislative, executive, and judicial. The three departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. The judicial power is vested in the judicial department. Ariz. Const. art. VI § 1. The power to make laws is, with limited exceptions reserved to the people,[1] vested in the legislature, Ariz. Const. art. IV § 1, together with the executive. Ariz. Const. art. V § 7; *see also McDonald v. Frohmiller*, 63 Ariz. 479, 489, 163 P.2d 671, 675 (1945).

Among its other functions, the judicial department is constitutionally permitted to regulate the practice of law. As this Court has observed, "This court

[1] *See* Ariz. Const. art. IV, Pt. 1 § 1; *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 347, 295 P.3d 440, 445 (Ct. App.) ("Through the Arizona Constitution, the people have delegated general lawmaking authority for the state to the legislature . . . However, the people have reserved to themselves the power to propose amendments to the constitution and laws through the rights of initiative and referendum."), *aff'd,* 233 Ariz. 1, 308 P.3d 1152 (2013).

has long recognized that under article III of the Constitution 'the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court.'" *In re Creasy*, 198 Ariz. 539, 541, 12 P.3d 214, 215 (2000) (quoting *Hunt v. Maricopa County Employees Merit Sys. Comm'n*, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980)).[2]

### B. The Proposed Rule Would Exceed the Judicial Department's Constitutional Authority.

#### 1. The Proposed Rule Would Regulate Lawyer Conduct Far Beyond the Practice of Law.

Petitioner aims to add a new ER 8.4(h), adopting the language of Model Rule 8.4(g). Doing so would exceed this Court's constitutional authority by legislating permissible conduct not only *in* the practice of law, but also attorneys' private conduct which is merely *"related to"* the practice of law.

Proposed ER 8.4(h), and ABA Model Rule 8.4(g), provide,

> It is professional misconduct for a lawyer to:
>
> engage in conduct that 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, marital status or socioeconomic status in conduct *related to the practice of law***.** This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

(Emphasis added.)

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[2] Arizona Supreme Court Rule 31(a)(1) echoes this statement of authority: "*Jurisdiction*. Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction."

Regulating lawyer conduct that adversely affects the administration of justice is, undisputedly, within the judicial department's province. But unlike current ER 8.4 Comment [3],[3] the proposed rule—like the Model Rule—untethers the concept of lawyer bias from any impact on the administration of justice. *See History*, *supra*, at 203, 214.

Moreover, Comment 4 to the Model Rule confirms that the scope of conduct "related to the practice of law" within the proposed rule's[4] meaning is, indeed, vast. It includes not only "representing clients [and] interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law," but also "operating or managing a law firm or law practice" and even "***participating in bar association, business or social activities*** in connection with the practice of law." *Id.* cmt. [4] (emphasis added).

Serving clients, and maintaining preparedness to serve them, can be all-consuming—for many lawyers, occupying most if not all waking hours. It is no surprise, then, that many lawyers' entire lives are "related to" the practice of law in some way. Much or all of their activity—making friends, getting together for meals, meeting future spouses, collaborating in charitable endeavors, hosting and attending social events, spending time with their own and others' families, going and inviting people to church, playing sports, and so on—can be traced back to the

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[3] Comment [3] provides, "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*." (Emphasis added.)

[4] The Petition does not explicitly advocate adopting the revisions to the Model Rule's comments that accompanied adoption of the Model Rule itself. But leaving the expression "conduct related to the practice of law" undefined would only exacerbate the vagueness and corresponding due process problems afflicting the Model Rule. *See History*, *supra*, at 248-49. Our separation-of-powers analysis here presumes that, as used in the Petition, that expression means what the ABA in Comment 4 says it means.

lawyer's work in some way.

**2. The Judicial Department Regulates the Practice of Law, Not All Conduct that Is "Related to" the Practice.**

Though "related," these activities are too attenuated from the practice of law legitimately to be regulated as part of the practice of law. They are not "the kind of core service that is and has 'been customarily given and performed from day to day [only] in the ordinary practice of members of the legal profession.'" *In re Creasy*, 198 Ariz. at 542, 12 P.3d at 217 (quoting *Arizona Land Title*, 90 Ariz. at 95). Indeed, doctors, clergy, accountants, and other learned professionals do all these things, similarly deriving directly or indirectly from their practices, as well.

This Court's own Rules make clear that the "practice of law" is limited. Arizona Supreme Court Rule 31(a)(2)(A) provides,

> "Practice of law" means providing legal advice or services to or for another by:
>
> (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
>
> (2) preparing or expressing legal opinions;
>
> (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
>
> (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
>
> (5) negotiating legal rights or responsibilities for a specific person or entity.

Ariz. R. Sup. Ct. 31(a)(2)(A).

In *In re Creasy*, the Arizona Supreme Court endorsed a definition of the "practice of law" first formulated in 1961:

> We long ago defined the practice of law as "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts . . . include rendering to another *any other advice or services* which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession . . . ."

*In re Creasy*, 198 Ariz. at 541-42, 12 P.3d at 216-217 (quoting (and adding emphasis to) *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961)).

Things like "operating or managing a law firm," not to mention "business or social activities," extend beyond this Court's definition of the "practice of law."

**3. Current Attorney Regulation Beyond the Practice of Law Evinces Appropriate Respect for Other Branches' Lawmaking Functions. The Proposed Rule Would Not.**

We acknowledge that this Court has, in certain limited contexts, asserted regulatory authority over lawyer conduct beyond the practice of law itself. These regulations evince respect for the judicial department's coequal branches of government in a way that the proposed rule does not.

First, Arizona attorneys are subject to professional discipline for committing certain crimes. *See* ER 8.4(b) ("It is professional misconduct for a lawyer to: commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."); Ariz. R. Sup. Ct. 54(g) (permitting discipline upon conviction of misdemeanor "involving a serious crime" or felony). Those circumstances feature a (constitutionally enacted) underlying

law—indeed, a criminal law—coupled with a determination by the judicial department that a violation of that law is sufficiently related to the practice of law to justify professional consequences. *Cf. Matter of Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990) ("Without doubt, respondent's [felony] conviction places in question his ability to respect and uphold the law. Obedience to the law by an attorney is crucially important." (internal citations omitted)). These rules thus demonstrate respect for the co-equal branches of government that passed the underlying laws. But the proposed rule makes no reference to substantive law; the ABA eschewed any such reference. *See, e.g.*, *History*, *supra*, at 226-27. It thus is subject to criticism, particularly as it relates to conduct merely "related to" the practice of law, for usurping lawmaking functions.

Second, this Court may discipline attorneys for "unprofessional conduct as defined in Rule 31(a)(2)(E)." Ariz. R. Sup. Ct. 54(i). "'Unprofessional conduct' means substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona." Ariz. R. Sup. Ct. 31(a)(2)(E).

The Oath is brief, and carefully circumscribed. The overwhelming majority of its requirements fall within the practice of law, such as "treat[ing] the courts of justice and judicial officers with due respect." Beyond those, the Oath's only requirements consist of a commitment to support the constitution and laws of the United States and this state, which (as noted above) distinguishes the proposed rule, as well as commitments to "be honest in my dealings with others," to "avoid engaging in unprofessional conduct," and to "support . . . professionalism among lawyers." Honesty is uncontroversial; it has long been viewed a central character requirement for practicing lawyers. *See* 7 Am. Jur. 2d Attorneys at Law § 139 ("Honesty is basic to the practice of the law; clients must be able to rely unquestioningly on the truthfulness of their counsel."); *see also* Restatement (Third) of the Law Governing Lawyers § 98 (2000) ("The law governing

misrepresentation by a lawyer includes the criminal law (theft by deception), the law of misrepresentation in tort law and of mistake and fraud in contract law, and procedural law governing statements by an advocate. Compliance with those obligations meets social expectations of honesty and fair dealing and facilitates negotiation and adjudication, which are important professional functions of lawyers." (internal citation omitted)). As for professionalism, the Court's decision effective January 1, 2017, to excise the language, "I will abstain from all offensive conduct," signaled fitting restraint, avoiding social legislation by judicial decree. *See* Order Amending the Oath of Admission to the Bar and a Lawyer's Creed of Professionalism of the State Bar of Arizona, Rule 31, Rules of the Arizona Supreme Court, and Rule 41, Rules of the Arizona Supreme Court (Dec. 14, 2006).

The Creed too focuses on the practice of law, excepting only admonitions to "remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good"; to "be mindful of the need to protect the integrity of the legal profession"; and to "be mindful that the law is a learned profession and that among its desirable goals are devotion to public service" and contributions of time and influence on behalf of the poor. Nothing in these admonitions requires (or bars) any particular conduct, let alone expressive or associative conduct, *let alone* purports to do so independently of the lawmaking functions of the legislature and executive.

### C. Arizona's Constitutional Right to Privacy Further Counsels Restraint in Asserting Regulatory Authority Beyond the Practice of Law.

Under Arizona Constitution article 2, section 8, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." To "'disturb' is '[t]o interfere with in the lawful enjoyment of a right.'" *State v. Jean*, 243 Ariz. 331, 407 P.3d 524, 547 (2018) (Bolick, J., concurring in part and dissenting in part) (quoting Webster's New Int'l Dictionary 757 (2d ed. 1944)).

This guarantee of "fundamental liberty"[5] in and for one's "private affairs" and "home"[6] may be impinged only where the lawmaking power properly has conferred authority to do so.

The separation-of-powers concerns described above gain still more force when considered in light of article 2, section 8, since questions regarding the judicial department's power to regulate conduct merely "related to" the practice of law implicate the individual liberty interests protected by this provision of the Arizona Constitution. Lawyers do much of what they do, including entertaining co-workers, clients, prospective clients, and other friends, privately and at home. Article 2, section 8, counsels great caution in extending the judicial department's regulatory reach to any and all such conduct just because it happens to be "related to" the practice of law.

## II. TO ADOPT A HALF-RULE OF PROFESSIONAL CONDUCT—ONE LACKING A KNOWN DISCIPLINARY SANCTION—WOULD BE FUNDAMENTALLY UNFAIR TO ARIZONA'S LAWYERS, AND FURTHER STRAIN CONSTITUTIONAL SEPARATION OF POWERS.

This Court has adopted the ABA's *Standards for Imposing Lawyer Sanctions* for determining sanctions for a violation of the Ethics Rules. See Ariz. R. Sup. Ct. 58(k). But the *Standards* include no sanction that would apply to a violation of the proposed rule. *See History*, *supra*, at 246-47. To adopt the

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[5] *State v. Martin*, 139 Ariz. 466, 474, 679 P.2d 489, 497 (1984); *cf. Jean*, 243 Ariz. 331, 407 P.3d at 546 (Bolick, J.) ("[W]e frequently may find that our constitution provides greater protections of individual liberty and constraints on government power because of provisions that do not exist in its national counterpart . . . .").

[6] Ariz. Const. art. 2 § 8; *see also State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) ("[W]e are . . . aware of our people's fundamental belief in the sanctity and privacy of the home . . . . While Arizona's constitutional provisions generally were intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy." (citation omitted)).

proposed rule change would thus be inappropriate, for at least three reasons.

First, to impose an ethical obligation on Arizona's lawyers, without fair notice of what might happen to them in the event of a violation, raises fundamental fairness, and even due process, concerns. One may not fairly be disciplined for a wrong without advance notice of the discipline that might be imposed as a result. *See id.* at 249 nn. 252-53 and accompanying text; *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring) (observing, regarding invalidated Nevada rule of professional misconduct, that "a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement").

Second, adopting an ethics rule governing lawyer conduct, without also adopting a corresponding sanction or set of sanctions, amounts in effect to incomplete rulemaking. It is all well and good for the ABA to adopt Model Rule 8.4(g) for symbolic reasons, *see History* at 245-46 & nn. 65, 225, but symbolism is inadequate to sustain the proposed rule change in a real world setting with real world consequences for real world lawyers. And, though this Court need not consider what sanction or sanctions might be applied for a violation of the proposed rule, since none have been proposed,[7] the substantial First Amendment

[7] We honor the ABA's historical role in setting lawyer ethics standards, *see generally* American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005 (2006), and lament its more recent drift toward one-sided political activism—activism evidenced by, among other things, that the ABA adopted Model Rule 8.4(g) notwithstanding individual commenters' overwhelming opposition to the one and only version of the then-proposed model rule offered for public comment, *see History*, *supra*, at 221-23, and without taking any public comment on the final version. *See id.* at 235-36. This drift may well explain the ABA's membership challenges of late. *See* Aebra Coe, *ABA to Cut Staff and Restructure Amid Membership Slump*, Law360, April 6, 2018, *available at* law360.com/articles/1030411/aba-to-cut-staff-and-restructure-amid-membership-slump; Richard Cassidy, *What Does the Future Hold for the American Bar Association?*, LinkedIn, Sept. 25, 2015, *available at* linkedin.com/pulse/what-does-future-hold-american-bar-association-richard-

and other challenges that would confront determining how to sanction a violation—including violations consisting of private speech and private association—are, as best we can tell, intractable.[8] We respectfully submit that it would be inappropriate, given the absence of any extant or proposed disciplinary sanction for violating the proposed rule, for this Court to adopt it.

Finally, this defect in the proposed rule supplies an additional reason why it is a poor candidate on which to test the boundary between the powers of the judicial department, on the one hand, and those of its coequal branches of government, on the other. While the proposed rule provides no direct cause for this Court to determine whether its extant lawyer regulations beyond the practice of law, *see supra* Section I.B.3, let alone legislative attempts to regulate professional licensure,[9] are consistent with constitutional separation of powers, one

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cassidy/. Rejecting the proposal thus carries the potential additional benefit of helping the ABA see that its turn away from politically neutral advancement of the profession and the rule of law threatens its authority as an objective voice on these and related issues, including professional responsibility.

[8] *See, e.g.*, *History* at 249-55; Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Oct. 6, 2016, *available at* heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought; Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Washington Post, Aug. 10, 2016, *available at* washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.0ee45f00e1a8; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law,"* 30 Georgetown J. Legal Ethics 241 (2017); George W. Dent Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, __ N.D. J. Law, Ethics & Pub. Pol'y __ (2018) (forthcoming); *available at* https://scholarlycommons.law.case.edu/faculty_publications/2012/.

[9] *See* A.R.S. § 41-1493.04(A) ("Government shall not deny, revoke or suspend a person's professional or occupational license, certificate or registration for any of the following and the following are not unprofessional conduct: [d]eclining to provide or participate in providing any service that violates the person's sincerely held religious beliefs… [or r]efusing to affirm a statement or

suspects that the assertion of expanded judicial power inherent in adopting the proposed rule would, in short order, lead those questions to be asked as well.

## III. CONCLUSION.

This Court should reject the Petition.

DATED this 14th day of May, 2018.

SNELL & WILMER L.L.P.

By */s/ Lindsay L. Short*
John J. Bouma
Andrew F. Halaby
Lindsay L. Short

Electronic copy served this date upon Petitioner.

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oath that is contrary to the person's sincerely held religious beliefs . . . [or e]xpressing sincerely held religious beliefs in any context, including a professional context as long as the services provided otherwise meet the current standard of care or practice for the profession.").