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

9 IN THE MATTER OF:

Supreme Court No. R-10-0031

10 PETITION TO AMEND ER 8.4,
11 RULE 42, ARIZONA RULES OF
12 THE SUPREME COURT

**Concerned Attorneys' Comment to
Petition to Amend ER 8.4, Rule 42,
Arizona Rules of the Supreme Court**

13
14 Fifty-two concerned attorneys hereby comment regarding the Petition to
15 Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court. The State Bar of
16 Arizona has petitioned this Court to amend ER 8.4, Rule 42, Arizona Rules of the
17 Supreme Court, by adding the following language: "It is professional misconduct
18 for a lawyer to knowingly manifest bias or prejudice based upon race, gender,
19 religion, national origin, disability, age, sexual orientation, gender identity or
20 expression, or socioeconomic status in the course of representing a client when
21 such actions are prejudicial to the administration of justice; provided, however,
22 this does not preclude legitimate advocacy when such classification is an issue in
23 the proceeding."

24
25 _____
26 ¹ Firm information is provided for identity only; the concerned attorneys assert their
position on their own behalf and not on behalf of any organization with which they may
be affiliated.

1 For the reasons set forth below, the concerned attorneys oppose this
2 proposed revision, particularly the inclusion of sexual orientation and gender
3 identity or expression. We believe, as explained herein, that the proposed
4 provision is unnecessary, ambiguous, and unconstitutional. Our concern, most
5 particularly, is that the proposed provision violates due-process, free-speech, and
6 free-exercise guarantees.

7 In 2008, the State Bar considered a similar change to the Arizona Bar Oath
8 of Admission, which would have required all attorneys to affirm that they would
9 not permit considerations of “gender, race, religion, age, nationality, sexual
10 orientation, disability, or social standing” to influence their work. Many of the
11 undersigned attorneys submitted a letter to the State Bar objecting to that
12 proposal. After the State Bar considered our and others’ objections, it decided not
13 to submit the prior proposal to this Court, thereby demonstrating that the State Bar
14 found that proposal unacceptable.

15 We first learned of the now-pending petition, which mimics the effect of
16 the prior, unacceptable effort to amend the oath, through media coverage on July
17 11, 2011. It does not appear that the proposed change was widely publicized prior
18 to that date. While the State Bar briefly referenced this proposal in a few of its
19 earlier publications, those materials provided only abstract and incomplete
20 descriptions of its plans. This is not to say that the Bar intentionally obscured the
21 petition’s content, but instead we seek to explain why we have not commented
22 earlier. We respectfully request the Court consider this comment in its
23 deliberation regarding the proposed rule change.

24 Before discussing the legal and policy concerns associated with the
25 proposed provision, we begin by determining the contours of its application.
26 Then, having considered the provision’s scope, we highlight our legal and policy

1 concerns. Notably, many of our concerns extend not only to the pending petition,
2 but also call into question the validity of the existing Comment 3 to ER 8.4, Rule
3 42, which appears to regulate discrimination on the basis of sexual orientation and
4 gender identity. At best, the petition is therefore superfluous—and further, some
5 of the concerned attorneys are now considering whether to propose an amendment
6 to resolve extant concerns with Comment 3.

7 **The Proposed Provision Applies to Attorney Expression and Attorney**
8 **Autonomy over Client Choices.**

9 The proposed provision applies with particular force to attorney expression,
10 for it prohibits what an attorney “manifest[s],” and its application to protected
11 speech is rather broad because it reaches attorney manifestations “in the course of
12 representing a client.” This, of course, encompasses most of an attorney’s
13 professional expression since lawyers are in the business of representing clients.

14 Other features of the provision fail to narrow its scope sufficiently to
15 protect attorneys’ free-speech rights. The terms “bias” and “prejudice” and the
16 phrase “prejudicial to the administration of justice” do not confine its reach in a
17 constitutionally appropriate manner. When targeting an attorney’s manifestations
18 and expression, such terms are hopelessly vague. Lawyers, after all, are paid to
19 manifest bias and prejudice in favor of their clients, their clients’ causes, and their
20 clients’ rights; what one person might call “bias” and contrary to the
21 “administration of justice,” another observer might just as well consider good
22 advocacy. Nor does the “legitimate advocacy” exemption provide adequate
23 protection for attorney expression because it is confined only to instances
24 involving a particular “proceeding.” Attorneys often advocate for clients outside
25 the context of proceedings: corporate counsel and transactional attorneys, for
26 instance, devote nearly all their time to representing their clients in tasks
unconnected with any proceeding; and even litigating or public-interest attorneys

1 perform countless non-proceeding-related tasks for their clients, such as
2 expressing their clients' interests to legislatures, governmental agencies, the
3 media, or the public.

4 The proposed provision also impacts attorney autonomy over client
5 choices. While it targets manifestations that occur "in the course of representing a
6 client," that phraseology does not explicitly exempt an attorney's client-selection
7 decisions (for the provision does not specify when exactly in the "course" of
8 representation the prohibited manifestation must occur); nor does it exempt a
9 lawyer's decision to discontinue client representation (for such decisions
10 necessarily occur in the course of representing a client). A few examples sharpen
11 this point.

12 Suppose that an attorney agrees to represent a client in his bankruptcy
13 proceedings, and that later, after the attorney-client relationship commences, the
14 client receives a marriage license from the State of Massachusetts for him and his
15 same-sex partner, and that the client wants to argue that the bankruptcy court
16 should strike down the federal Defense of Marriage Act and recognize that union.
17 If the attorney, due to his sincerely held religious beliefs, decided that he could no
18 longer represent the client in light of this new development, the proposed
19 provision would seemingly prevent him from discontinuing the representation
20 because his decision might be deemed to "manifest bias . . . based upon . . . sexual
21 orientation."

22 Similarly, consider a criminal-defense attorney who agrees to defend a
23 client, who the attorney believes to be a woman, charged with lewd conduct in the
24 women's restroom, but later the client informs the attorney that he is in fact a man
25 who dresses as a woman and uses women's restrooms. The attorney,
26 notwithstanding his sincerely held religious or moral objections to the client's

1 behavior, could not discontinue his representation under the proposed provision
2 because one might conclude that the attorney’s decision “manifest[ed] bias . . .
3 based upon . . . gender identity or expression.” Thus, the provision significantly
4 jeopardizes attorney autonomy over client selection and retention decisions.

5 **The Proposed Provision Is Unconstitutionally Vague.**

6 An ethical requirement that “either forbids or requires the doing of an act in
7 terms so vague that [persons] of common intelligence must necessarily guess at its
8 meaning and differ as to its application violates the first essential of due process
9 of law.” *Cramp v. Bd. of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278,
10 287 (1961). As discussed above, the proposed provision is full of vague terms
11 (“bias” and “prejudice”)² that target attorney expression (“manifest[at]ions”). For
12 this reason, trained attorneys are left to speculate about its meaning and
13 application. Adopting such a vague provision—one which exposes attorneys to
14 discipline—violates due-process principles of the federal constitution.

15 These vagueness concerns also infringe upon the free-speech rights of
16 attorneys. “First Amendment freedoms need breathing space to survive.”
17 *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967).
18 The “vice of vagueness” is that an attorney cannot know what conduct is
19 proscribed. *See Elfbrandt v. Russell*, 384 U.S. 11, 15 (1966). Uncertain meanings
20 require the attorney “to steer far wider of the unlawful zone than if the boundaries
21 of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372
22 (1964) (quotation and citations omitted); *see also Keyishian*, 385 U.S. at 604.
23 Such ambiguity creates a chilling effect on the exercise of First Amendment
24

25 ² Vagueness also exists in the phrases “gender identity or expression” and
26 “sexual orientation.” We discuss below the novel and unsettled nature of these
concepts and terms.

1 freedoms. *See id.* Thus, adopting the vague proposed provision violates free-
2 expression principles of the federal constitution.

3 **The Proposed Provision Unconstitutionally Compels Speech.**

4 “[O]ne important manifestation of the principle of free speech is that one
5 who chooses to speak may also decide what not to say.” *Hurley v. Irish-American*
6 *Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)
7 (quotations omitted). This bedrock constitutional principle undergirds the well-
8 established rule against compelled expression, which prohibits the government
9 from compelling a private actor, including an attorney, to express or affirm a
10 message contrary to his beliefs. *See Johanns v. Livestock Mktg. Ass’n*, 544 U.S.
11 550, 557 (2005) (identifying compelled-speech cases as those where “an
12 individual is obliged personally to express a message he disagrees with, imposed
13 by the government”); *United States v. United Foods, Inc.*, 533 U.S. 405, 410
14 (2001) (recognizing that the First Amendment “prevent[s] the government from
15 compelling individuals to express certain views”). The “choice of a speaker not
16 to propound a particular point of view . . . is presumed to lie beyond the
17 government’s power to control,” *Hurley*, 515 U.S. at 575, and the government
18 may not “compromise” or otherwise invade “the speaker’s right to autonomy over
19 the message,” *id.* at 576.

20 The proposed provision violates this constitutional guarantee against
21 compelled speech. It may be read to compel an attorney to represent or continue
22 representing a client even if advocating that client’s position or interests would
23 conflict with the attorney’s sincerely held religious or moral convictions. Because
24 lawyers exercise many expressive rights when representing their clients—indeed,
25 the advocacy process is rife with expression (speaking, writing, and arguing, to
26 name a few, *see Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-73

1 (1991))—the proposed provision essentially forces attorneys to advocate
2 unwanted positions or causes, and the federal constitution flatly prohibits that
3 result.

4 **The Proposed Provision Unconstitutionally Prohibits Protected Speech.**

5 The proposed provision threatens to prohibit attorneys from advocating
6 politically controversial views on behalf of their clients in all contexts unrelated to
7 a proceeding. These hot-button views include, among others, that the law should
8 continue to define marriage only as the union of one man and one woman (which
9 might be said to “manifest bias . . . based upon . . . sexual orientation”), and that
10 the law should continue to embrace its understanding of male and female as
11 determined by biology and anatomy rather than the subjective internal feelings
12 associated with the “gender identity or expression” construct (which might be said
13 to “manifest bias . . . based upon . . . gender identity or expression”). “The
14 Constitution does not permit the Government to confine [clients] and their
15 attorneys” by excluding ostracized yet vital “theories and ideas.” *Cf. Legal Servs.*
16 *Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (dealing only with the litigation
17 context). That, however, is precisely what the proposed provision threatens to do.

18 This silencing of attorney advocacy for publicly marginalized views runs
19 directly counter to the purpose of the First Amendment. By branding these views
20 as “discriminatory” and a form of “professional misconduct,” the proposed
21 provision encourages public and private contempt, along with official
22 punishment, against attorneys and clients who express such views and beliefs.
23 Undoubtedly, many of those attorneys and their clients will stop communicating
24 such opinions for fear that they might be punished by the Bar or viewed with
25 scorn by their colleagues. This government-induced ostracizing of unpopular
26 views is deeply unsettling.

1 **The Proposed Provision Unconstitutionally Discriminates on the Basis**
2 **of Viewpoint.**

3 A legal provision proscribing expression must not exhibit, either explicitly
4 or implicitly, viewpoint discrimination. *R.A.V. v. City of St. Paul, Minn.*, 505
5 U.S. 377, 391 (1992). The proposed provision suffers from this constitutional
6 flaw, and a few examples illustrate this defect.

7 First, suppose that an attorney writes a letter for his client (in a context
8 unrelated to a specific proceeding) arguing that the State should give marriage
9 licenses to same-sex couples and that failing to do so is discrimination on the
10 basis of sexual orientation. That attorney most assuredly would not be accused of
11 manifesting prejudice based on sexual orientation. But consider the attorney who,
12 on his client’s behalf, conveys the exact opposite position—that the State should
13 continue defining marriage only as the union of one man and one woman. It is no
14 stretch to think that many people would conclude that such expressions manifest
15 prejudice based on sexual orientation.

16 Second, contemplate that a group begins to lobby the Arizona Legislature
17 to add “gender identity or expression” to the State’s nondiscrimination law. The
18 attorneys who, while representing their clients, publicly advocate in favor of that
19 proposed law certainly would not be charged with violating the proposed
20 provision. But in contrast, the attorneys whose clients want them to oppose that
21 legal change risk punishment under that provision for manifesting prejudice
22 against “gender identity or expression.”

23 In short, then, under the proposed provision, attorney advocacy that is
24 artificially “*in favor* of . . . [so-called] tolerance and equality” concerning the
25 enumerated categories would be unfettered, but expression by “those speakers’
26 opponents” would be stifled. *See R.A.V.*, 505 U.S. at 391. That amounts to

1 viewpoint discrimination, and as the Supreme Court has recognized, the
2 government “has no such authority to license one side of a debate to fight
3 freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.*
4 at 392.

5 **The Proposed Provision Violates the Free Exercise of Religion.**

6 The direct conflict between religious liberty and the proposed provision’s
7 inclusion of sexual orientation is plain to see. *See* Michael W. McConnell, *The*
8 *Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 43-44 (2000); *see*
9 *generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts*
10 (Douglas Laycock et al., eds., 2008). Indeed, we have already referenced it in
11 passing. On the one hand, most of the major religions in our State—such as
12 Christianity, Judaism, Mormonism, and Islam—hold certain precepts and
13 convictions about sexual behavior. On the other hand, the proposed provision
14 threatens to force attorneys holding these beliefs to advocate for clients in a
15 manner contrary to their religious tenets. This creates a direct clash between
16 professional obligations and religious convictions.

17 The “Free Exercise Clause [of the First Amendment] pertain[s] if the law at
18 issue discriminates against some or all religious beliefs.” *Church of the Lukumi*
19 *Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). And following its
20 enactment of the Free Exercise of Religion Act (“FERA”), Ariz. Rev. Stat. § 41-
21 1493 *et seq*, Arizona offers broader religious liberties than those protected by the
22 First Amendment. FERA declares that the “government shall not substantially
23 burden a person’s exercise of religion even if the burden results from a rule of
24 general applicability.” Ariz. Rev. Stat. § 41-1493.01(B). The requirement of a
25 “substantial burden” is not rigorous; it is “intended solely to ensure that [FERA]
26 is not triggered by trivial . . . infractions.” Ariz. Rev. Stat. § 41-1493.01(E). The

1 infringement on the free-exercise rights of religiously motivated attorneys at issue
2 here—by requiring them to advocate views and legal positions that conflict with
3 their sincerely held religious beliefs—is far from trivial and thus violates FERA.

4 The State would be unable to show, as is required under FERA, that the
5 proposed provision is “both in furtherance of a compelling governmental interest
6 [and] the least restrictive means of furthering that compelling governmental
7 interest.” Ariz. Rev. Stat. § 41-1493.01(C). It is unclear what interest the State
8 intends to further through the proposed provision, but it certainly does not appear
9 to be a compelling one.

10 Moreover, regardless of whether the proposed provision furthers a
11 compelling interest, the State has not used the least restrictive means to achieve its
12 end. Other less-restrictive means (such as a religious opt-out procedure) exist in
13 these circumstances, and the State’s failure to use those alternatives dooms their
14 actions under FERA analysis. Thus, the free-exercise rights of Arizona attorneys
15 weigh heavily in favor of denying the State Bar’s petition.

16 **Ethical Mandates Like the Proposed Provision Have Become a Threat**
17 **to People of Faith in Other Professions.**

18 Other professions have unwisely implemented ethical obligations like the
19 proposed provision, but experience has shown the harm such enactments inflict on
20 professionals who hold religious convictions about sexual morality. An existing
21 legal case demonstrates the concern: In *Ward v. Wilbanks*, Case No. 09-CV-
22 11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), a Michigan public
23 university dismissed a counseling student because, according to the university, her
24 religious need to refer prospective clients seeking counseling to affirm
25 homosexual behavior violated the counseling profession’s ethical obligation
26 against discriminating based on sexual orientation.

 That case (and others like it) tangibly shows how ethical measures like the

1 proposed provision drive people of faith from a profession, essentially creating a
2 religious litmus test excluding individuals who want to adhere to their religious
3 convictions while carrying out their professional obligations. Ironically, then, the
4 proposed provision will not promote tolerance and diversity in the law, but will
5 senselessly force people of faith from the profession. In this way, this misguided
6 effort to prevent “discrimination” will actually engender pernicious discrimination
7 against professionals who hold religious convictions.

8 **The Proposed Provision Attempts to Enshrine in the Ethical Rules**
9 **Protected Classifications and Concepts Not Adopted by the**
10 **Legislature.**

11 The proposed provision, by including “sexual orientation” and “gender
12 identity or expression,” embraces controversial protected classifications and
13 concepts that have never been approved by the Legislature and are relatively
14 foreign to Arizona law. *See, e.g.,* Ariz. Rev. Stat. § 41-1402(A)(8) (discussing
15 “the elimination of discrimination between persons” only “because of race, color,
16 religion, sex, age, disability, familial status or national origin”).

17 To begin with, sexual orientation is a controversial, vaguely defined, and
18 unsettled concept. Even scholars who regularly study sexual orientation cannot
19 agree on a definition for or understanding of it. *See* Todd A. Salzman & Michael
20 G. Lawler, *The Sexual Person* 150 (2008) (“The meaning of the phrase ‘sexual
21 orientation’ is complex and not universally agreed upon.”). Not only is it a
22 difficult-to-define phenomenon, but as mentioned above, creating a protected-
23 class status based on sexual orientation produces significant conflicts with
24 religious liberty. *See* McConnell, *The Problem of Singling Out Religion*, 50
25 DePaul L. Rev. at 43-44; *Same-Sex Marriage and Religious Liberty: Emerging*
26 *Conflicts* (Laycock et al., eds.). For these reasons, more than half the States have

1 joined Arizona in refusing to codify sexual orientation as a protected
2 classification.

3 Similarly, gender identity and expression is also a fiercely debated notion.
4 Gender identity is generally defined as “a personal conception of oneself as male
5 or female” or “intersex.” Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine
6 (May 19, 2009), <http://emedicine.medscape.com/article/917990-overview>. The
7 notion of a person’s gender identity sharply contrasts with the well-established
8 and long-recognized legal classification of a person’s sex. Sex, on the one hand,
9 is determined by a person’s biology and anatomy, *id.*; it is thus clearly defined
10 and objectively determined. Gender identity, in contrast, is determined by “one’s
11 own identification as male, female, or intersex,” *id.*; it is therefore an ambiguous
12 classification, determined by a person’s subjective self-identification, and subject
13 to unstable shifts at the whim of each person’s internal feelings and perceptions.
14 This novel concept would undoubtedly bring a sea change to our State’s legal
15 understanding of maleness and femaleness. Indeed, this concept is so foreign to
16 our legal traditions that the vast majority of the States have joined Arizona in
17 declining to enshrine gender identity or expression in the law.

18 While the Court certainly may regulate the practices of its officers, this
19 social controversy over sexual orientation and gender identity or expression
20 implicates broader public policy considerations best addressed by the Legislature.
21 If these recently conceived and ever-contentious concepts are to find a place in
22 our State’s legal regime, that change should come through the Legislature rather
23 than an amendment to the attorney ethical rules.

24 **The Proposed Provision Reaches Beyond Any Ethical Rules Enacted in**
25 **Any State.**

26 The State Bar attempts to characterize its proposal as a lockstep measure
with the ethical rules of other States. But that is not an accurate depiction of the

1 legal landscape. To begin with, in Appendix “C” of its Petition, the State Bar
2 cites the ethical codes of 23 other States (plus the District of Columbia), so even if
3 all those jurisdictions had enacted the proposed provision (which, as discussed
4 below, is inaccurate), the fact remains that even by the State Bar’s calculations,
5 the majority of States have not embraced anything like the current proposal.

6 Digging a bit deeper, we determined that the ethical codes in eight of the 24
7 other jurisdictions cited by the State Bar—Connecticut, Delaware, the District of
8 Columbia, Idaho, South Carolina, South Dakota, Tennessee, and Utah—have a
9 somewhat similar set-up to that which currently exists in our State, in the sense
10 that those jurisdiction’s rules contain “sexual orientation” as an enumerated
11 suspect classification in the *comments* rather than the rule itself, which is precisely
12 what our rules already do.

13 Delving further still, we found that *none* of the 24 other jurisdictions cited
14 in Appendix “C” contains “gender identity” or “gender expression” in either the
15 rules or the comments. In this sense, Arizona’s rules, which contain “gender
16 identity” (but not expression) in Comment 3 to ER 8.4, Rule 42, are already an
17 aberration, and the State Bar’s petition seeks to widen the chasm between our
18 State and others. Again, for the reasons expressed above, some of us are troubled
19 by this and other aspects of Comment 3 to ER 8.4, Rule 42, and we are thus
20 considering whether to propose a different amendment to that comment.

21 **The State Bar Admits that No Need Exists for the Proposed Provision.**

22 In light of all the concerns we have discussed herein, one might suppose
23 that a great countervailing need exists for this troublesome proposal. But that is
24 not the situation here. The State Bar has not even alleged, much less
25 demonstrated, a need for the proposed measure. Indeed, it does not appear that a
26 complaint has ever been filed invoking Comment 3 to ER 8.4, Rule 42, (or any

1 similar comment or rule in any other State). In essence, the petition is best
2 characterized as a problematic “solution” to a non-problem.

3 In sum, a simple balance of the relevant interests readily shows the proper
4 course for resolving the State Bar’s pending petition. On the one side, we have
5 highlighted hosts of constitutional and policy concerns with the proposed
6 provision, and on the other side, the State Bar has not shown any need for that
7 measure. Hence, the scale weighs decidedly against the State Bar’s petition.

8
9 **CONCLUSION**

10 For the foregoing reasons, the undersigned concerned attorneys oppose the
11 State Bar’s proposed amendments to the Arizona Rules of the Supreme Court. I
12 have been authorized by the attorneys listed below to assert their support, in their
13 individual capacity as Arizona licensed attorneys for this petition; the exigent
14 circumstances precluded obtaining physical signatures.

15 Respectfully submitted this 15th day of July, 2011.

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17 

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Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 15th day of July, 2011,



By:

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