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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	**No. R-17-0032**
PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	**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"). Below, we address two of the many reasons that this Court should reject the proposed rule change. First, the proposed rule change violates the right to free speech enjoyed by Arizona attorneys under both the U.S.

Constitution and the Arizona Constitution. Second, the proposed rule change will weaken the bar of this state by chilling the constitutionally-protected speech of its members.

I. The proposed rule change violates the free-speech rights of Arizona attorneys.

The bar's ability to limit lawyer speech is not limitless, and its power declines sharply the further it strays from its core function, which is regulating the practice of law—*i.e.*, actually representing clients. For example, no one disputes this Court's authority to punish attorneys who lie to their clients, make false representations in court, or attempt to communicate with a represented party without that party's attorney being present. But once the Court attempts to regulate other kinds of attorney speech, its constitutional authority decreases dramatically—and appropriately so. The Petition, which aims to add a new ER 8.4(h) by adopting the language of Model Rule 8.4, would give this Court the power to monitor and punish speech that is not related to the practice of law at all—the point at which this Court's regulatory authority is virtually non-existent.

In *Holder v. Humanitarian Law Project*, the U.S. Supreme Court made it clear that *any* restriction on attorney speech must be analyzed using strict scrutiny. 561 U.S. 1 (2010). *Holder* involved a federal statute that was being applied to prohibit attorneys from providing "material support" to terrorist organizations. While the Court did uphold the restrictions in that case, it did so using the highest

level of constitutional scrutiny. "[A]s applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message … and we must apply a more demanding standard" of review. *Id*. at 28 (cleaned up). Namely, strict scrutiny.

Holder demonstrates why this Court should reject the proposed rule. There, the U.S. Supreme Court applied strict scrutiny to uphold the statute because combatting terrorism is "an urgent objective of the highest order," and the material-support statute directly advanced that interest. *Id*. at 28. But despite the fact that it upheld the application of the law in *Holder*, the Court went out of its way to observe that:

> [T]his is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, *we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations*.

Id. at 39 (emphasis added) —which is to say that rules directly regulating the practice of law will often survive First Amendment scrutiny, but rules that regulate the "independent speech" of attorneys usually will not.

Under the Model Rule, which the Petition would have this Court adopt, "[i]t 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."[1] Comment 3 explains that a lawyer may be engaging in intimidation and harassment if she engages in "harmful verbal or physical conduct that manifests bias or prejudice towards others."[2] Comment 4 then explains that the proposed rule applies to a vast array of speech, including "participating in bar association, business or social activities in connection with the practice of law."[3] Thus, under this rule, an attorney who "manifest[ed] bias" toward a particular group at a bar function or social activity could be found guilty of *professional* misconduct.[4]

The rule being proposed by the Petition could not be any more distant from the rule at issue in *Holder*. That rule prohibited attorneys from giving advice that might ultimately benefit terrorist organizations. This rule applies to attorneys speaking at bar functions, meetings of the Federalist or American Constitution Societies, law schools, social clubs, or any other setting where they are speaking in their roles as attorneys. And it prohibits them from saying anything that might be perceived as harassing or discriminating against members of the listed protected

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1 goo.gl/CTdrpF
2 goo.gl/GvD2hR
3 *Id.*
4 *Id.*

classes. The speech at issue in *Holder* is precisely the kind of speech that the government is constitutionally permitted to regulate. The kind of speech at issue here is the kind of speech that the government has never been permitted to regulate.

If the First Amendment protects anything, it protects the right of Americans to come together and speak their minds about important issues of the day. And that protection is not diminished merely because the speaker happens to be an attorney. An attorney might wish to speak about laws affecting the classes listed in the proposed rule. Should employers be allowed to discriminate based on age? Should public-accommodation laws be extended to bakers who do not wish to make a cake for a gay wedding? How should a city combat the problem of homelessness (socio-economic status)? Attorneys will have opinions about these things, and people will sometimes want to listen to those opinions precisely because the speaker is an attorney. But the proposed rule chills speech about these topics because any attorney speaking about such things runs at least the possibility of being sanctioned for doing so.

The proposed rule unconstitutionally restricts the independent speech of Arizona attorneys. The government does not have a compelling interest in preventing attorneys from speaking about controversial topics—even if a listener might be offended. And even if the government could demonstrate such an

interest—which it cannot—this rule is far too broad and covers far too much constitutionally protected speech to survive any level of scrutiny, much less the strict scrutiny that *Holder* demands. *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050–53 (1991) (rejecting a balancing test for cases involving independent, public speech of attorneys in favor of strict scrutiny); *Bates v. State Bar of Arizona*, 433 U.S. 350, 381–82 (1977) (First Amendment protects truthful, non-misleading attorney advertising); *In re Sawyer*, 360 U.S. 622, 631 (1959) ("lawyers are free to criticize the state of the law"); *but see Bridges v. California*, 314 U.S. 252, 271 (1941) (states can regulate attorney speech where, for example, "the substantive evil of unfair administration of justice [is] a likely consequence").

There is no doubt that "it is the responsibility, even the obligation, of diverse communities to confront [bigoted] notions in whatever form," but there is equally no doubt that "the manner of that confrontation cannot consist of selective limitations upon speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (cleaned up). Nor can this Court forget that freedom of speech applies to racist and sexist speech no less than to speech about inclusion and diversity. *See National Socialist Party of America v. Village of Skokie*, 434 U.S. 1327 (1977). A rule that deems it improper for an attorney even to associate at social functions with persons holding disapproved beliefs risks damaging our profession's bedrock principle that the law "protects all minorities, no matter how despised they are." *Communist*

Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 190 (1961) (Douglas, J., dissenting).

II. The proposed rule change will weaken the bar of this state by making its members afraid to speak about important topics.

Beyond the constitutional infirmities discussed above, the proposed rule is a bad idea because it will weaken the bar of this state, for at least two reasons. First, it will make Arizona attorneys afraid to speak about topics of the day, thus silencing these important voices. Second, the proposed rule will inevitably be used to silence ideological opponents, thus increasing the amount of discord and acrimony within the bar.

To the first point, the proposed rule will make Arizona attorneys less willing to speak at pubic functions, even if they possess expertise in a particular area. The risk of censure under the rule—while potentially remote—will nevertheless be ever-present. Bar activities, public discussions, and debates are important to attorneys, but not central to the practice of law. One can effectively practice law without doing any of these things, and more attorneys will choose to do so if the model rule is adopted. Why risk it? Why risk a blemish on one's record—particularly for discrimination or harassment—when one can simply choose to remain silent? Why risk offending one's attorney malpractice insurer simply to speak at a political debate or a controversial town-hall meeting?

The smart, self-interested choice will simply be for attorneys to remain silent. And when this happens, the Arizona bar will be poorer for it. The resulting information void will deprive listeners of attorney insight, allowing some voices to be amplified while others wisely choose silence. This will result in worse decision-making on important public issues, and it will result in a bar with less influence and respect as an important public voice.

The proposed rule is also bad public policy because it increases the likelihood of acrimony and "score settling" among members of the bar. The rules allow anyone to file a grievance on the basis that they found an attorney's *independent* speech to be intimidating or discriminatory. This could include anything from a debate about the best way to combat homelessness (socioeconomic discrimination) at a bar event to a speech about a pending Supreme Court ruling on gay marriage (harassment based on sexual orientation) at a political event.

Such grievances will certainly be filed. Sometimes it will happen because someone has honestly been offended by something an attorney has said. And sometimes it will be done by someone looking to settle a score or stir up trouble. In either case, the rule introduces a substantial likelihood of greater acrimony among members of the bar. This would be bad for Arizona. Honorable conduct and collegiality are hallmarks of a well-functioning legal system, and Arizona puts

a special emphasis on professionalism. Acrimony, intimidation, and score-settling will result in a worse state of affairs for both attorneys and their clients. The rules of professional conduct should ensure that attorneys behave honorably, but they should also allow for honest debate and disagreement, consistent with the First Amendment freedoms that all attorneys enjoy.

III. Conclusion

This Court should reject the Petition.

DATED this 21st day of May, 2018.

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PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 28(D), Rules of the Supreme Court, the Comment Opposing Amendment to ER 8.4 does not exceed 20 pages, and complies with the formatting requirements for filings in the Arizona Supreme Court because it contains text formatted in a proportionally spaced Times New Roman 14-point font, as required by Rule 14, Ariz. R. Civ. App. P.

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