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Arizona Supreme Court

Re: R-17-0032, In the Matter of: Petition to Amend ER 8.4, Rule 42

Dear Justices:

I am writing this to urge you to reject the proposed amendments to Rule of Professional Conduct 8.4. The proposed rule would (1) violate the First Amendment, (2) unnecessarily turn ordinary employment law disputes into bar discipline matters, and (3) unnecessarily limit lawyers’ freedom to engage in perfectly proper discrimination based on socioeconomic status.

1. The proposal would violate the First Amendment

a. The proposal would punish and chill a wide range of speech on important topics

The proposal says (emphasis added),

It is professional misconduct for a lawyer to . . . [e]ngage 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 . . .

This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

The ABA comments, which the petition expressly endorses, Petition at 11, go on to elaborate:

Discrimination and harassment . . . includes *harmful verbal* or physical *conduct that manifests bias or prejudice* towards others. Harassment includes sexual harassment and *derogatory or demeaning verbal* or physical *conduct*. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

Conduct related to the practice of law includes 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 *participating in bar association, business or social activities in connection with the practice of law*. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for

example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Say, then, that some lawyers put on a Continuing Legal Education event that includes a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side says something critical of gays, Muslims or transgender people. Under the Rule, the debater could well be disciplined by the state bar:

1. He has engaged in “verbal . . . conduct” that “manifests bias or prejudice” toward gays, Muslims, or transgender people.

2. Some people view such statements as “harmful”; those people may well include bar authorities.

3. This was done in an activity “in connection with the practice of law,” a Continuing Legal Education event. (The event could also be a bar activity, if it’s organized through a local bar association, or a business activity.)

4. The statement is not about one person in particular (though it could be—say the debater says something critical about a specific political activist or religious figure based on that person’s sexual orientation, religion or gender identity). But “anti-harassment . . . case law” has read “harassment” as potentially covering statements that are offensive to a group generally, even when they are not said to or about a particular offended person. *See, e.g., Sherman K. v. Brennan*, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (coworkers’ wearing Confederate flag T-shirts on occasion constituted racial harassment); *Shelton D. v. Brennan*, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for fact-finding on whether coworker’s repeatedly wearing cap with “Do not Tread On Me” flag constituted racial harassment); *Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); *Pakizegi v. First Nat’l Bank*, 831 F. Supp. 901, 908 (D. Mass. 1993) (describing an employee’s posting a photograph of the Ayatollah Khomeini and another “of an American flag burning in Iran” in his own cubicle as potentially “national-origin harassment” of coworkers who see the photographs). And the rule is broad enough to cover statements about “others” as groups and not just as individuals.

Indeed, one of the comments to the ABA rule originally read “Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct *towards a person who is, or is perceived to be, a member of one of the groups.*”¹ But the italicized text was

¹ *See* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/draft_redline_04_12_2016.authcheckdam.pdf.

deleted, further reaffirming that the statement does not have to be focused on any particular person.

Or say that you are at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters—Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you’ve engaged in “verbal . . . conduct” that the bar may see as “manifest[ing] bias or prejudice” and thus as “harmful.” This was at a “social activit[y] in connection with the practice of law.” The State Bar, if this Rule is adopted, might thus discipline you for your “harassment.” And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you are fine; if you express the contrary viewpoints, you are risking disciplinary action.

b. There is no First Amendment exception for “hate speech” or advocacy that some may deem “harassing”

Yet such speech is constitutionally protected, when said by lawyers (again, outside the courtroom and similar contexts) or by others. Recent opinions from several state Attorneys General have expressly concluded that the ABA Model Rule is likely unconstitutionally overbroad, see Op. to Warren L. Montgomery, La. A.G. Op. No. 17-0114 (Sept. 8, 2017); Op. to John R. McCravy III, S.C. A.G. Op. (May 1, 2017); Tenn. A.G. Op. No 18-11 (Mar. 16, 2018); Op. to Charles Perry, Tex. A.G. Op. No. KP-0123 (Dec. 20, 2016). And the Supreme Court has repeatedly made clear that even much more offensive speech than the above is constitutionally protected.

As four Justices of the Supreme Court noted in *Matal v. Tam*, 137 S. Ct. 1744 (2017), “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Id.* at 1764 (Alito, J., lead opinion). four other Justices in the same case agreed, stressing that “A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence.” *Id.* at 1769 (Kennedy, J., concurring in part and concurring in the judgment). Similarly, in *Christian Legal Society v. Martinez*, 561 U.S. 661, 696 n.26 (2010), the Supreme Court stressed the First Amendment’s tradition of “protect[ing] the freedom to express ‘the thought that we hate’” includes the right to express even “discriminatory” viewpoints. Nor can any proposed “hate speech” exception, rejected by the Supreme Court, be rescued by labeling it a ban on “harassment.” As then-Judge Alito noted, “There is no categorical ‘harassment exception’ to the First

Amendment’s free speech clause.” *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 204 (3d Cir 2001).

And the Court said all this in reaffirming speakers’ viewpoint-neutral right of access even to relatively modest benefits (certain programs available to university student groups, and certain forms of trademark enforcement available to registered trademark owners). The First Amendment protection should be even clearer when it comes to freedom to be speak without jeopardy to one’s license to practice a profession.

c. The proposed rule goes far beyond most existing professional conduct rules

The proposed rule goes well beyond the current Arizona Rule of Professional Conduct 8.4(d), which generally bars “conduct” “that is prejudicial to the administration of justice,” including certain kinds of speech “in the course of representing a client” (comment to Ariz. R. Prof. Cond. 8.4). Courts can legitimately protect the administration of justice from interference, even by, for instance, restricting the speech of lawyers in the courtroom or in depositions. But the proposal deliberately goes vastly beyond such narrow restrictions, to apply even to “social activities.”

Indeed, I have found only two states, Indiana and New Jersey, that forbid lawyer speech that “manifests bias or prejudice” or speech that is “derogatory or demeaning” outside the special context of speech in courtrooms, depositions, negotiations, and the like—interactions that are indeed likely to directly interfere with the administration of justice. *See* Ind. Rule Prof. Conduct 8.4(g); N.J. Rule Prof. Conduct 8.4 official comment. (Compare, e.g., Mass. R. Sup. Jud. Ct. 3.4(i) and Wash. R. Prof. Conduct 8.4(h), which forbid such speech only within such litigation or negotiation processes.) And even the Indiana and New Jersey rules do not go so far as to cover “social activities related to the practice of law.”

The petition states that “Twenty-four U.S. jurisdictions have some type of antidiscrimination rule in their rules of professional conduct for lawyers,” Petition at 7. But none of these jurisdictions’ rules contains the specific speech-restrictive language offered in its proposal, and almost none includes anything that is even close.

The proposal also goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes. That law itself poses potential First Amendment problems if applied too broadly. *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591 (5th Cir. 1995) (“Where pure expression is involved, Title VII steers into the territory of the First Amendment.”) (dictum); *Rodriguez v. Maricopa County Comm. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (“There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”). And in any event, it is substantially narrower than the proposed rule: For instance, harassment law generally does not cover social activities at which coworkers are not present—yet under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm.

Hostile-work-environment harassment law is also often defended (though in my view that defense is inadequate) on the grounds that it's limited to speech that is so "severe or pervasive" that it creates an "offensive work environment." This proposed rule conspicuously omits any such limitation. Though the statement in the ABA comments that "anti-harassment . . . case law may guide application of paragraph (g)" might be seen as implicitly incorporating a "severe or pervasive" requirement, that's not at all clear: That provision says only that the anti-harassment case law "may guide" the interpretation of the rule, and in any event the language of the comments (which, again the Arizona State Bar petition expressly adopts and endorses) seems to cover any "harmful verbal . . . conduct," including isolated statements.

Many people pointed out possible problems with this proposed rule, which is based on the ABA's new Model Rule, when the ABA was considering it—yet the ABA adopted it with only minor changes that do nothing to limit the rule's effect on speech. It seems that the ABA and the petitioners want to do exactly what the text calls for: limit lawyers' expression of viewpoints that the ABA and the Bar dislikes.

2. The proposal would turn ordinary employment disputes into disciplinary matters

Lawyers are rightly subjected to many special rules that have to do with the special power that they are granted, and the special relationships they enter into, with courts, with clients, with witnesses, and the like.

But lawyers can also wear many other hats: they can be drivers, they can be homeowners, they can be businesspeople, and they can be employers (including employers of nonlawyer staff). Of course, like all citizens, they ought to behave properly in those capacities: They should, for instance, be careful drivers; they should not play their music too loudly; they should comply with their contractual obligations. But we recognize that these matters should be left to the normal tort and contract law rules that apply to all people, lawyers or not (at least unless they involve outright criminality or fraud).

The same should apply to ordinary employment law disputes. If an accountant or an administrative assistant—or for that matter an associate—believes that he or she has been improperly fired or demoted, that person can sue, or file a charge with an administrative agency that deals with such matters, just as someone who works for a contractor or a dentist can do the same. There is no reason to also turn this into a matter of bar discipline.

Yet the proposal would likely do precisely this: After all, the employment of the employees of a law practice is "conduct related to the practice of law." Employees who feel themselves aggrieved by a lawyer-employer's decision could then retaliate by filing a bar complaint and not just a lawsuit, and indeed use the express or implied threat of a bar complaint as leverage to favorably settle even a meritless lawsuit. Many employers have comprehensive liability insurance policies that could be used to settle such a suit—but you ca

not insure yourself against the possible loss of a license, or the public opprobrium that would accompany even a lesser sanction, such as a public reprimand.

Indeed, even some of the broadest professional conduct rules, which do cover employment discrimination by lawyers, try to mitigate this danger by limiting themselves to “employment discrimination . . . resulting in a final agency or judicial determination,” *e.g.*, N.J. R. Prof. Conduct 8.4(g). But the Arizona State Bar’s proposal lacks such a limitation.

3. The proposal’s ban on socioeconomic status discrimination is unjustifiable

Even apart from the above problems, consider how the discrimination ban would work as to “socioeconomic status.” That term is not defined in the proposed rule or in Arizona law, but the definition that the legal system likely most often uses—one developed in dealing with a similar ban on socioeconomic-status discrimination in the federal Sentencing Guidelines—is “an individual’s status in society as determined by objective criteria such as education, income, and employment.” *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *see also United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

All of the following, then, might well lead to discipline if the ABA adopts this rule as part of its influential Model Rules of Professional Conduct, and then states adopt it in turn:

- A law firm preferring more-educated employees—both as lawyers and as staffers—over less-educated ones.
- A law firm preferring employees who went to high-“status” institutions, such as Ivy League schools.
- A law firm contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.
- A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a wealthier would-be partner over a poorer one. (The solo might, for instance, want a partner who would have the resources to weather economic hard times and to help the firm do the same.)
- A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a poorer would-be partner over a wealthier one. (The solo might, for instance, want a partner who would be hungry for success, rather than one whose past income or family wealth might make him too comfortable.)

If the rule were limited to actions that were “prejudicial to the administration of justice,” and did not cover ordinary employment decisions, including socioeconomic status as one of the forbidden bases for discrimination may have made sense. For instance, insulting

a witness because of his poverty, where the poverty is not relevant to the case, might reasonably be condemned.

But the proposed rule goes far beyond this. And though people pointed out the breadth of the rule when the ABA was first considering it, the ABA did nothing to materially limit the scope of the rule—apparently, it and the State Bar of Arizona do indeed want to bar lawyers from discriminating based on socioeconomic status in choosing partners, employees and experts.

Nor is it enough to say that Bar authorities will act “reasonably” by not enforcing this rule as written. If the Supreme Court adopts the rule, then Bar authorities would have an obligation to implement it according to its terms.

And even if the rule is notoriously underenforced, ethical lawyers should be expected to abide by it even if they know of such underenforcement. Certainly that is how lawyers should be encouraged to behave. To promote such behavior, rules should be written carefully at the outset, rather than being framed in unjustifiably overbroad ways, with the expectation that their breadth will be ignored by Bar officials and Bar members.

Sincerely Yours,



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