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Via Electronic Mail

Edward F. Novak
Arizona State Bar President
SHUGHART THOMSON & KILROY, P.C.
Security Title Plaza
3636 North Central Avenue, Suite 1200
Phoenix, AZ 85012

Re: Proposed Changes to Arizona Bar Oath of Admission

Dear Mr. Novak:

We are writing to express our concerns regarding the proposed changes to the Arizona Bar Oath of Admission. The troublesome proposed provision states as follows: "I will not permit considerations of gender, race, religion, age, nationality, sexual orientation, disability, or social standing to influence my duty of care," (referred to as the "proposed provision"). For the reasons expressed herein, we believe that the proposed provision is unnecessary, exceedingly ambiguous, and unconstitutional. We are concerned most particularly that the proposed provision's vagueness violates due-process and free-speech guarantees and that its application infringes First Amendment rights by compelling conduct and expression in conflict with an attorney's philosophical or religious beliefs as well as his other professional responsibilities.

Difficulty Deciphering the Meaning and Application of the Proposed Provision

We begin by noting that, as compared to other state-bar oaths, the proposed provision appears to be an oddity. Of the many state-bar oaths we found (which admittedly did not include all states), none contains a provision addressing disfavored "considerations." Most state-bar oaths consist of general, nonspecific proclamations such as (1) promises to uphold the state and federal constitutions, (2) promises to maintain respect for the judicial system, and (3) promises to conduct oneself with "fairness, courtesy, respect, and honesty." *See* Colorado Attorney Oath of Admission; *see also* Texas Oath of Attorney. Even the states using similarly structured, more-detailed oaths—such as Washington and South Carolina—have not included provisions identifying disfavored "considerations." *See* Washington Oath of Attorney; South Carolina Lawyer's Oath. Yet, for some unknown reason, the proposed Arizona Bar Oath departs from this apparently uniform standard.

Furthermore, the proposed provision is nearly impossible to understand. It purports to regulate the attorney's duty of care, which is an objective concept. An attorney's subjective opinions, desires, or "considerations" simply do not influence the duty of care; thus, a rule that precludes that duty from being "influenced" by certain "considerations" is nonsensical and ultimately without effect.

Setting aside its inexact wording, we assume the proposed provision intends to prohibit the attorney from allowing the enumerated "considerations" to influence his *discharge* of the duty of care. But even adopting this intended meaning, the proposed provision is still peculiar: for example, suppose an attorney represents a client in a race-discrimination case under Title VII; according to a literal reading of the proposed provision, the attorney's sworn oath would preclude him from being "influenced" by "considerations" of race in the exercise of his duties and thus prevent him from effectively representing his client.[1] While it is doubtful that this is the intended purpose of the proposed provision, one cannot help but glean such sentiments from a literal reading of its text.

The application of the proposed provision, as currently written, is veiled in ambiguity. It is uncertain whether the proposed provision applies only after the attorney has undertaken representation of a client and agreed to advocate his interests, or whether it applies to an attorney's preliminary decision to represent a client. Generally, the duty of care extends only to clients, and not to prospective clients. Given this understanding, it appears that the proposed provision applies only to already-existing attorney-client relationships, and thus does not impact the attorney's representation decision.

Yet, the Third Restatement of the Law Governing Lawyers indicates that the duty of care has limited application to prospective clients. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 15(1)(c) (2000). Similarly, the Arizona Ethics Rules indicate that an attorney owes some duties to prospective clients. *See* Ariz. ER 1.18. To the extent the duty of care applies in that context, the proposed provision might affect an attorney's decision to represent a client. That real possibility raises grave new concerns for Arizona attorneys.

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[1] Many other situations exists where these forbidden "considerations" are highly relevant to the legal task before the lawyer and the exercise of his duties to clients. For instance, an attorney employed by a state university might be asked to draft an affirmative action policy, and in doing so, he must consider the extent to which the Supreme Court allows state universities to consider race in admissions decisions. Similarly, an attorney employed by a local synagogue might be asked to draft articles of incorporation and bylaws for the organization, and in doing so, he must carefully consider and evaluate the religious tenants of the organization. These examples are just a few of many illustrating the practical difficulties created by this ambiguously phrased proposed provision.

Given this understanding, the proposed provision, unlike any other part of the Arizona Bar Oath or Ethics Rules, may be interpreted to force an attorney to undertake particular representation. For example, suppose an attorney is approached by a prospective client who is involved in a same-sex relationship and wishes to argue that defining marriage in Arizona as the union of one man and one woman violates her rights under the federal constitution; further suppose the attorney does not want to represent the client because (1) the attorney believes, based on well-supported social science and his sincerely held religious beliefs, that marriage is confined to the union of one man and one woman and (2) the tenets of the attorney's religion teach that sexual behavior between persons of the same sex is immoral. In this situation, the proposed provision prevents the attorney from refusing to represent the client because his decision might be deemed to have been "influenced" by "considerations" of "sexual orientation."[2]

This pernicious result grates against an attorney's autonomy to select the cases in which he will be involved and the clients he will represent. It also conflicts with portions of the Ethics Rules permitting lawyers to decline appointments or withdraw from representation where the client's cause is "repugnant" to the attorney. *See* Ariz. ER 1.16(b)(4), 6.2(c). More importantly, compelling that attorney to represent the client conflicts with federal and state constitutional concerns of due process, free expression, freedom of conscience, and free exercise of religion.

Constitutional Violation – Vagueness

Adopting an ambiguously expressed oath violates due-process and free-expression principles. The comment from Arizona Supreme Court Rule 41 states that "[u]nprofessional conduct, as defined by Rule 31(a)(2)(E), . . . may result in discipline." Ariz. Sup. Ct. Rule 41 cmt. Rule 31(a)(2)(E), in turn, states that "unprofessional conduct" includes, among other things, "violations of the Oath of Admission to the Bar." Ariz. Sup. Ct. Rule 31(a)(2)(E). Thus, failure to comply with the requirements of the proposed provision, whatever those might be, subjects attorneys to penalties and discipline. Our speculation as to the meaning of the proposed provision is no mere exercise in semantics; this question involves the potential discipline against Arizona attorneys.

An oath that "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cramp v. Bd. of Pub. Instruction of Orange County, Florida*, 368 U.S. 278, 287 (1961). As discussed, the proposed provision to the Arizona Bar Oath is unclear and vague

[2] Consider also the closely related scenario where that same attorney is approached by a same-sex couple seeking to jointly adopt a child. There are many other examples, in addition to these, that could further illustrate real-world situations raising these concerns.

such that trained attorneys, much less persons of "common intelligence," are unable to decipher its meaning or application. Adopting a vague provision that subjects attorneys to discipline, *see* Ariz. Sup. Ct. Rule 31(a)(2)(E), violates due-process principles of the federal constitution.

These vagueness problems also create a free-expression violation. The Arizona Bar Oath requires newly admitted attorneys to repeat and affirm the sentiments expressed therein. Such declarations and affirmations implicate constitutional principles of free expression. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). It is well settled, however, that "First Amendment freedoms need breathing space to survive." *Keyishian v. Board of Regents of Univ. of State of New York*, 385 U.S. 589, 604 (1967). The "vice of vagueness" is that an attorney cannot know what conduct is proscribed. *See Elfbrandt v. Russell*, 384 U.S. 11, 15 (1966). "The uncertain meanings of the oath[] require the oath-taker . . . to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quotation and citations omitted); *see also Keyishian*, 385 U.S. at 604. Such "extraordinary ambiguity" creates a chilling effect on the exercise of First Amendment freedoms. *See id.* Thus, adopting the vague proposed provision violates free-expression principles of the federal constitution. *See Baggett*, 377 U.S. at 374 ("The State may not require one to choose between subscribing to an unduly vague and broad oath . . . , and conscientiously refusing to take the oath with the consequent loss of . . . profession").

Constitutional Violation – Compelled Speech

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

The proposed provision causes a compelled-speech violation in two ways. First, lawyers exercise many expressive rights while representing their clients; the

advocacy process is rife with expression—speaking, writing, and arguing, to name a few. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-73 (1991). Application of the proposed provision infringes on these rights by forcing attorneys to advocate positions that conflict with their sincerely held religious beliefs. This violates the constitutional prohibition against compelled speech.

Second, adoption of the proposed provision as part of the Arizona Bar Oath would require all incoming Arizona attorneys to state and affirm the messages contained therein. The proposed provision communicates that all matters of "sexual orientation" are beyond the attorney's legitimate consideration when deciding to represent clients and discharging other professional duties. By agreeing that those issues are beyond his legitimate consideration, the attorney implicitly affirms that all so-called "sexual orientations" are morally equal and thus irrelevant to his decision-making. Requiring such an affirmation conflicts with the speaker's constitutional autonomy to refrain from a message he deems "morally objectionable." *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

Including this proposed provision undermines one of the fundamental purposes of the Arizona Bar Oath. The oath is intended, among other things, to unite the legal profession under a common set of principles forged by consensus. Far from a common, well-settled principle, "sexual orientation" is a divisive political issue. The very concept of "sexual orientation" is hotly debated in the social-science literature. *See, e.g.*, Rosemary C. Veniegas and Terri D. Conley, *Biological Research on Women's Sexual Orientations: Evaluating the Scientific Evidence*, 56 JOURNAL OF SOCIAL ISSUES 267, 277 (2000). Moreover, the State of Arizona has yet to legislate on that issue, *see, e.g.*, Ariz. Rev. Stat. § 41-1402(8) (discussing "the elimination of discrimination between persons because of race, color, religion, sex, age, disability, familial status or national origin"), further demonstrating its incompatibility with the traditional generality and unifying purpose of the Bar Oath.

Constitutional Violation – Freedom of Conscience and Freedom of Religion

The "Free Exercise Clause pertains if the law at issue discriminates against some or all religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The proposed provision infringes on the rights of attorneys who hold religious beliefs about the immorality of sexual conduct between persons of the same sex. If adopted, it would force those attorneys both to affirm their willingness to represent persons advocating for the rights of same-sex couples and to use their expressive rights to advocate for those issues. This creates a direct clash between professional obligations and religious convictions.

Following its enactment of the Free Exercise of Religion Act ("FERA"), Ariz. Rev. Stat. § 41-1493 *et seq*, Arizona offers broader religious liberties than those protected

by the First Amendment.[3] FERA declares that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." Ariz. Rev. Stat. § 41-1493.01(B). The requirement of a "substantial burden" is not rigorous; it is "intended solely to ensure that [FERA] is not triggered by trivial . . . infractions." Ariz. Rev. Stat. § 41-1493.01(E). As already discussed, the infringement on the free-exercise rights of religiously motivated attorneys is far from trivial and thus violates FERA.

The State would be unable to show, as is required under FERA, that the proposed provision is "both in furtherance of a compelling governmental interest [and] the least restrictive means of furthering that compelling governmental interest." Ariz. Rev. Stat. § 41-1493.01(C). It is unclear what interest the State intends to further through the imprecisely drafted proposed provision, but it certainly does not appear to be a compelling one. We contend that the proposed change accomplishes no governmental purpose, let alone a compelling one. The Arizona Bar Oath already requires attorneys to profess their adherence to the Ethics Rules generally; that broad affirmation encompasses all requirements inherent in the proposed provision, thus demonstrating that the proposed provision accomplishes no governmental purpose.

Moreover, regardless of whether the proposed provision furthers a compelling interest, the State has not used the least restrictive means to achieve its end. Other less-restrictive means exist (such as a religious opt-out procedure), and the State's failure to use those alternatives dooms their actions under FERA analysis. Thus, the freedom-of-conscience and free-exercise rights of Arizona attorneys should compel the drafters to remove the proposed provision from the Bar Oath.

Solutions to the Problems of the Proposed Provision

The best solution to the problems created by the proposed provision is to refrain from inserting it into the Arizona Bar Oath. As previously mentioned, the proposed provision is unique among the state bars. As best we can tell, the other states have not included similar provisions in their bar oaths. Following its sister organizations, the Arizona Bar should conclude that the proposed provision is best omitted.

Instead of enumerating a short list of invalid "considerations" in the Oath, the drafters could generically state: "I will conduct my affairs with fairness and treat

[3] In any event, the state constitutional provisions regarding freedom of conscience and free exercise of religion appear broader than their federal counterpart. *See* Ariz. Const. art. 2, § 12 (discussing the "liberty of conscience secured by the provisions of this Constitution"); Ariz. Const. art. 20, ¶ 1 ("Perfect toleration of religious sentiment shall be secured to every inhabitant of this State, and no inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same").

all clients with the utmost dignity and respect." This suggested provision enshrines the same general principle expressed in the proposed provision, but without raising confusion and constitutional concerns.

It is unlikely that all the constitutional problems created by the proposed provision could be eliminated by redrafting. Nevertheless, more clearly elucidating the meaning and application of the proposed provision might alleviate some of the concerns discussed herein. To the extent the Bar insists on keeping this proposed provision in the Oath, the drafters should include an opt-out procedure for attorneys whose compliance would violate their free-expression rights or sincerely held religious beliefs. *See* Ariz. Const. art. 2, § 7 ("The mode of administering an oath, or affirmation, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.")

Yet, an opt-out procedure will not correct the problems created by the vagueness of the oath; the Arizona Bar Oath would still be susceptible to legal challenge from those who might not be eligible for an opt-out yet still trapped by the oath's ambiguity. In short, only the withdrawal of this proposed provision will solve all constitutional problems.

Respectfully submitted,

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