

January 16, 2009

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

VIA EMAIL TO ED.NOVAK@AZBAR.ORG

Re: Comments on Behalf of Arizona Attorneys Supporting Addition of Non-Discrimination Language to Arizona State Bar Oath of Admission

Dear Members of the State Bar of Arizona Board of Governors:

Lambda Legal respectfully submits these comments in support of the addition of non-discrimination language to the Arizona State Bar Oath of Admission. We submit these comments on behalf of our over 200 Arizona members, together with the undersigned attorneys admitted to the State Bar of Arizona (hereafter, "State Bar of Arizona" or "State Bar").¹ We believe that the addition of a non-discrimination pledge to

¹ Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Its Western Regional Office, based in Los Angeles, California, serves 11 western states and has a long history of involvement in Arizona, representing clients and amicus curiae in such cases as Kastl v. Maricopa County Community College District, Ninth Circuit Case No. 06-16097 (representing amicus curiae in pending appeal from the U.S. District Court for the District of Arizona, arguing for the proper application of sex discrimination law to employment discrimination based on gender identity); Gwin v, Mercy Care West, Case No. 06F-44516-AHC (Office of Administrative Hearings 2005) (obtaining administrative law ruling for client that Arizona's Medicaid program cannot refuse payment for HIV positive patient's liver transplant); Biggs v. Napolitano, Arizona Supreme Court Case No. CV-03-0257-SA (2003) (representing *amicus curiae* urging that Governor's executive order prohibiting discrimination against state employees based on sexual orientation be upheld); and LaWall v. Pima County, Pima County Superior Court Case No. 320550 (1998) (representing intervenors in successful defense of county provision of health insurance benefits covering domestic partners of employees). Lambda Legal has long recognized the critical importance of a

the oath will help further a fair and independent judicial system, and also will serve the important policy reasons that non-discrimination requirements have become mainstream in the regulation of legal professionals, consistent with the strong legal authority supporting such requirements.

I. Incorporating Non-Discrimination Language into the Oath of Admission is Consistent with the Mainstream Standards of Professionalism Already Adopted by Arizona, the American Bar Association, and Many Other States Across the Country.

We commend the State Bar of Arizona's efforts to further the State Bar's professionalism by affirming an important principle: discrimination should have no place in the important trust an attorney assumes as a fiduciary and officer of the court. Incorporating non-discrimination language into the Oath of Admission is consonant with the professional standards that are a familiar feature in the regulation of law practice nationally. The American Bar Association (hereafter, the "ABA"), which has developed models of regulatory law for the legal profession for over eighty years, has proscribed sexual orientation discrimination for over 10 years. *See* ABA, Center for Professional Responsibility, Model Rules of Professional Conduct, Rule 8.4, Comment ¶ 3 (hereafter, "Model Rule 8.4, Comment ¶ 3") (providing that it is misconduct prejudicial to the administration of justice to for an attorney to "knowingly manifest[] by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status"), available at <htp://www.abanet.org/cpr/mrpc/rule_8_4_comm. html>.

This ethical obligation is already embedded in multiple rules regulating the conduct of Arizona lawyers and judicial officers. Like many other states, Arizona has adopted a more protective version of Model Rule 8.4 and its explanatory Comment ¶ 3, which make explicit Arizona attorneys' non-discrimination obligations.² See Arizona Ethics Rule 8.4, Comment ¶ 3, available at http://www.myazbar.org/Ethics/ruleview. cfm?id=61> (incorporating the anti-discrimination provisions of Model Rule 8.4 and its

nondiscriminatory legal system, including a fair and independent judiciary, and works through its Fair Courts Project on such issues across the country.

² Arizona Ethics Rule 8.4, Comment \P 3, in relevant part, 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) [of Arizona Ethics Rule 8.4] when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding.

Comment ¶ 3). Arizona's non-discrimination requirements for lawyers are mirrored in several corresponding canons of judicial conduct³ and local court rules.⁴

- ³ For example, the Arizona Code of Judicial Conduct, in relevant part, provides:
 - Canon 3(B)(5) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.");
 - Canon 3(B)(6) ("A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.").
 - Canon 4 ("A judge shall conduct all of the judge's extra-judicial activities so that they do not: ¶ (1) cast reasonable doubt on the judge's capacity to act impartially as a judge"); *see also*, Canon 4, Commentary ("Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.").

Id., available at <http://www.supreme.state.az.us/ethics/Code_of_Judicial_Conduct_June_2004.pdf>.

⁴ For example, the Rules of Practice of the United States District Court for the District of Arizona, in relevant part, provide:

The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.

Local Rule 83.5, available at http://www.azd.uscourts.gov/azd/courtinfo.nsf/40047025CF342 B460725750F005BB5EA/\$file/2008+Local+Rules.pdf?openelement>. Similarly, the Local Rules for the United States Bankruptcy Court for the District of Arizona provide:

> The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as gender, race, ethnicity, religion, disability, age, or sexual orientation.

Rule 1000-1, available at http://www.azb.uscourts.gov/default.aspx?PID=16>.

The harms of discrimination in the practice of law are widely recognized and condemned, with numerous states (and the District of Columbia) now having adopted Model Rule 8.4 and its explanatory Comment ¶ 3, or similar prohibitions on discrimination by licensed attorneys. Attached as Appendix A to this letter is a representative overview of many of those states' ethical rules, including rules adopted by California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Utah, Vermont and Washington.

As other states have emphasized, anti-discrimination protections "reflect[] the premise that a commitment to equal justice under the law lies at the very heart of the legal system." *See* Maryland Lawyers' Rules of Professional Conduct, Rule 8.4(e), Comment ¶ 4, available at <http://www.courts.state.md.us/rules/rodocs/153ro.pdf>. Impressing this important obligation upon new members of the profession serves a core professional policy goal – reinforcing the solemn trust they assume as "public citizen[s] having special responsibility for the quality of justice." *See* Arizona Ethics Rules, Preamble ¶ 1, available at <http://www.myazbar.org/Ethics/preamble.cfm>.

II. A Nondiscrimination Commitment in the Attorney Oath Will Not Improperly Restrict Constitutional Rights.

We understand the State Bar has received comments opposing the addition of anti-discrimination language from the Alliance Defense Fund (hereafter, "ADF"), which we have reviewed.⁵ By submitting these comments, the undersigned wish to correct several misstatements of the law in the ADF submission (hereafter, the "Opposing Comments"). We are all too familiar with ADF's view that anti-discrimination protections purportedly are vague and violate constitutional rights. Indeed, ADF and their co-counsel have made these arguments routinely and unsuccessfully in a number of other states. *See, e.g., Butler v. Adoption Media, LLC,* 486 F. Supp. 2d 1022 (N.D. Cal. 2007) (rejecting claim that California's public accommodations law violated free speech rights); *Morrison v. Bd. of Educ.,* 521 F.3d 602 (6th Cir. 2008) (rejecting student's free speech, due process and free exercise of religion challenge to school policy prohibiting discrimination and harassment based on sexual orientation); *Nuxoll v. India Prairie Sch. Dist. #204,* 523 F.3d 668 (7th Cir. 2008) (rejecting student's attack on school rule prohibiting derogatory comments referring to race, ethnicity, religion, gender, sexual orientation, or disability); *North Coast Women's Care Medical Group, Inc. v. Superior*

⁵ See "State Bar of AZ to censor First Amendment rights of attorneys on gay issues," Free Republic, December 15, 2008 (blog post by Rachel Alexander, Esq., reporting that, "The Alliance Defense Fund (ADF), a Christian constitutional rights organization, has expressed its opposition [to the proposed addition to the Oath of Admission] in a letter signed by several attorneys including myself"), available at <http://www.freerepublic.com/focus/f-news/2148950/posts>.

Court, 44 Cal. 4th 1145 (2008) (rejecting physicians' free speech and free exercise of religion challenge to sexual orientation discrimination ban in California's public accommodations law).⁶ The arguments in the Opposing Comments are equally unsound here.

A. Anti-Discrimination Requirements Generally Do Not Raise Vagueness Concerns.

While the Opposing Comments purport to raise concerns about the wording of the proposed addition to the Oath, they make clear that their real concern is with requiring attorneys to state an obligation to not discriminate. The Opposing Comments suggest that re-drafting the proposed addition might alleviate some concerns, but stress that any revised language should include an opt-out procedure for attorneys. We hope the State Bar will not entertain even for a moment the troubling notion that, unlike other licensed professionals subject to ethical duties, individual attorneys should be allowed to regulate themselves and retain the freedom unilaterally to opt out of ethical obligations at will. Under such a system, ethical "obligations" become mere suggestions and cannot provide meaningful insistence upon ethical conduct. Indeed, the Opposing Comments make clear their signatories' view that no amount of re-drafting ultimately would suffice and "only withdrawal" of the proposed addition could satisfy the alleged constitutional concerns. This position is revealing: the real objection is to the non-discrimination obligation itself.

As a general proposition, legal obligations to not discriminate are not unconstitutionally vague. "[W]hile there is little doubt that imagination can conjure up hypothetical cases in which the meaning of . . . terms will be [a] nice question," as some may believe the Opposing Comments have done, "we are condemned to the use of words, [and] we can never expect mathematical certainty from our language." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks omitted). When it is clear what the law as a whole prohibits, "speculation about possible vagueness in hypothetical situations" does not raise a valid constitutional claim. *Id*. An obligation to refrain from impermissible discrimination is not so vague *per se* that people of ordinary intelligence

⁶ Recently, ADF and their co-counsel have launched three similar lawsuits in California seeking to overturn hate crimes prohibitions and anti-discrimination protections for students in public schools, arguing that the terms "sexual orientation" and "gender" are unconstitutionally vague and restrict free speech. California's Attorney General and Lambda Legal, with additional co-counsel, have explained that the claims are baseless because it is well-established that anti-hate violence and anti-discrimination protections are *not* impermissibly vague and do *not* restrict protected speech. ADF voluntarily dismissed the first two cases and the Attorney General's motion to strike the third complaint is pending. *See California Education Committee, LLC, et al. v. Schwarzenegger et al.*, U.S. District Court for the Southern District of California, Case No. 07-CV-02246-BTM-WMC (voluntarily dismissed); *California Education Committee, LLC, et al. v. Schwarzenegger et al.*, San Diego Superior Court Case No. 37-2008-00077546-CU-CR-CTL (voluntarily dismissed); *California Education Committee, et al.*, Sacramento County Case No. 34-2008-00026507.

must guess at its meaning, let alone the "trained attorneys" the Opposing Comments reference.

B. Anti-Discrimination Protections Do Not Improperly Restrict Protected Speech Because They Prohibit Harmful Acts of Discrimination.

It has long been established that laws and regulations prohibiting discrimination do not infringe on protected speech. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (noting that the United States Supreme Court has repeatedly rejected attempts to invalidate anti-discrimination laws based on free speech arguments, *citing Roberts v. United States Jaycees*, 468 U.S. 609, 628-629 (1984), which held that Minnesota's antidiscrimination law does "not seriously implicate[]" vagueness concerns); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (application of Title VII to law firm's rejection of woman for partnership does not violate constitutional rights of expression or association); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (rejecting argument that freedom of association justifies exclusion of African American students because "the Constitution ... places no value on discrimination") (internal quotation marks omitted)).⁷ Contrary to the Opposing Comments' suggestion, "acts of invidious discrimination ... like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts*, 468 U.S. at 628.

C. Statutory Protections For Private Religions Beliefs Do Not Overcome the Arizona Supreme Court's Constitutional Authority to Regulate the Legal Profession.

In state-licensed professions, religious liberty ends where harm to another would begin. This principle must apply with particular force to protect clients who repose trust in their attorneys as fiduciaries. Under federal constitutional principles, neutral non-discrimination provisions of general applicability that do not target religious belief or practice must simply satisfy the applicable rational basis test of constitutional review. *See Employment Division v. Smith*, 494 U.S. 872, 885-886 (1990) (rational basis test applies to federal free exercise of religion challenges to state laws). Because nondiscrimination rules that govern commercial activity "plainly serv[e] compelling state interests," *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537,

⁷ See also, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston et al., 515 U.S. 557, 572 (1995) (anti-discrimination laws "do not, as a general matter, violate the First or Fourteenth Amendments"); Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc., 968 F.2d 286, 295 (2d Cir. 1992) (federal and state anti-discrimination statutes "are plainly aimed at conduct, *i.e.*, discrimination, not speech"); Butler, 486 F. Supp. 2d at 1059-1060 (adoptionrelated website that refused to post profiles for same-sex couples in violation of California's public accommodations law was not engaged in "expressive speech"); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (1994) (housing anti-discrimination law does not violate constitutional rights to free exercise of religion or due process).

549 (1987), this test is easily satisfied. The lone federal case the Opposing Comments cite, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), confirms this result. Unlike the ordinance challenged in *Lukumi*, which was found to target a particular religion's practice, the proposed change to the oath targets no one and applies to all equally.

Nor does Arizona's Free Exercise of Religion Act (Ariz. Rev. Stat. § 41-1493 *et seq.*, hereafter, "FERA") require a different result. The Opposing Comments, which suggest that the proposed change to the Attorney Oath could not satisfy the test established by FERA, disregard the Arizona Supreme Court's superior constitutional authority to regulate the practice of law. But, the Arizona Supreme Court has recognized its authority in this area "since the early days of statehood." *Scheehle v. Justices of the Supreme Court of Ariz.*, 120 P.3d 1092, 1099 n. 8 (2005).⁸ The Court regulates by "promulgating rules" that "further the administration of justice," and it exercises that function "pursuant to its own constitutional authority over the bench, the bar, and the procedures pertaining to them." *Id.* at 1099, 1100. As long as these rules are an "appropriate exercise of the court's constitutional authority" they are "valid even if they are not completely cohesive with related legislation." *Id.* at 1099. "Although the legislature may, by statute, regulate the practice of law, *such regulation cannot be inconsistent with the mandates of this Court.*" *Id.* (emphasis added).⁹

Where individuals enter, as a matter of choice, into a licensed commercial activity they must accept the same professional limits that serve the public welfare as every other practitioner. *Id.* at 1101 ("A state may engage in reasonable regulation of licensed professionals"; "An attorney's right to pursue a profession is subject to the paramount right of the state . . . to regulate . . . professions . . . to protect the public . . . welfare.") (internal quotation marks omitted). There is nothing new or novel about the proposition that members of the public depend upon such protection.¹⁰

⁸ See also, Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 261-262 (1980) ("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.").

⁹ Moreover, the Opposing Comments' free exercise arguments would not succeed even were the test established by FERA to apply. Non-discrimination obligations rarely impose substantial burdens on religious exercise (*see, e.g., Smith v. Fair Employment & Hous. Com,* 12 Cal. 4th 1143, 1170-1176 (1996)), and even when they might be construed to do so, such rules are valid because they serve compelling interests in a tailored manner (*see, e.g., Duarte,* 481 U.S. at 549; *North Coast Women's Care Medical Group,* 44 Cal. 4th at 1158.

¹⁰ Indeed, it has been settled law for decades that non-discrimination regulations serve "interests of the highest order" (*Roberts*, 468 U.S. at 624) and reduce the "moral and social wrong" of discrimination (*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)).

III. The State Bar's Board of Governors Should Approve Non-Discrimination.

Lambda Legal, on behalf of its Arizona resident members, and the undersigned Arizona attorneys strongly recommend that the State Bar's Board of Governors adopt an express non-discrimination obligation as part of the Oath of Admission. We additionally suggest that any language approved include not only "sexual orientation" but also "gender identity or expression" to make this obligation consistent with the existing Rule 8.4 of the Arizona Ethics Rules, Comment ¶ 3 (prohibiting discrimination based on gender identity). In so doing, the State Bar will have taken an important step to increase fairness throughout the judicial system and to elevate professionalism in the bar.

Respectfully submitted,

Tara L. Borelli^{*} Jennifer C. Pizer^{**} Western Regional Office LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

* Admitted to the State Bar Associations of Washington and California ** Admitted to the State Bar Associations of California and New York

Joined by:

Dina Afek AZ Bar No. 022798 Tucson, AZ

Wendy Ascher AZ Bar No. 024652 Tucson, AZ

Barbara A. Atwood AZ Bar No. 004733 Tucson, AZ

Leigh H. Bernstein AZ Bar No. 016123 Tucson, AZ

Lisa S. Bibbens AZ Bar No. 014961 Tucson, AZ Brad Bransky AZ Bar No. 007350 Flagstaff, AZ

Ron Bogard

Tucson, AZ

Juliet Speisman Burgess AZ Bar No. 023475 Phoenix, AZ

Michael Cafiso AZ Bar No. 013175 Phoenix, AZ

Dean C. Christoffel AZ Bar No. 003928 Tucson, AZ Jose Antonio Colon AZ Bar No. 018290 Phoenix, AZ

Robert A. Colosi AZ Bar No. 004181 Phoenix, AZ

Suzanne Crawford AZ Bar No. 016441 Tucson, AZ

Angela DeMarse AZ Bar No. 024088 Flagstaff, AZ

John Alan Doran AZ Bar No. 012112 Phoenix, AZ Comments Supporting Non-Discrimination Addition to Arizona Attorney Oath January 16, 2009 Page 9

Annette Everlove AZ Bar No. 006123 Tucson, AZ

Helen Gaebler AZ Bar No. 021085 Tucson, AZ

Paul Gattone AZ Bar No. 012482 Tucson, AZ

Patrice A. Gillotti AZ Bar No. 165581 Phoenix, AZ

Beverly A. Ginn AZ Bar No. 005211 Tucson, AZ

Elliot Glicksman AZ Bar No. 006010 Tucson, AZ

Kenneth K. Graham AZ Bar No. 007069 Tucson, AZ

Kolby William Granville AZ Bar No. 025504 Phoenix, AZ

Brigitte Finley Green AZ Bar No. 012706 Phoenix, AZ

Howard Grodman AZ Bar No. 014794 Flagstaff, AZ

Kathie J. Gummere AZ Bar No. 016199 Phoenix, AZ William M. Hardin AZ Bar No. 009111 Phoenix, AZ

Sally Hart AZ Bar No. 013453 Tucson, AZ

Steven Harvey AZ Bar No. 013553 Flagstaff, AZ

Brad Holland AZ Bar No. 019646 Tucson, AZ

Co Horgan AZ Bar No. 022899 Payson, AZ

Kami M. Hoskins AZ Bar No. 026271 Phoenix, AZ

Hon. Margaret M. Houghton, Retired AZ Bar No. 001706 Tucson, AZ

Abigail Jensen AZ Bar No. 018810 Prescott, AZ

Mikkel Jordahl AZ Bar No. 012211 Flagstaff, AZ

Thomas Klinkel AZ Bar No. 010955 Tucson, AZ

Pima County Attorney Barbara LaWall AZ Bar No. 004906 Tucson, AZ Pamela A. Liberty AZ Bar No. 009753 Tucson, AZ

Carol L. Lohmann AZ Bar No. 013307 Tucson, AZ

John Lotardo AZ Bar No. 012796 Phoenix, AZ

Kate McMillan AZ Bar No. 003965 Tucson, AZ

Craig R. McPike AZ Bar No. 020576 Phoenix, AZ

Brendan N. Mahoney AZ Bar No. 017350 Phoenix, AZ

Lynn Marcus AZ Bar No. 013051 Tucson, AZ

Diane M. Meyers AZ Bar No. 022599 Seattle, WA

Michelle S. Michelson AZ Bar No. 021234 Tucson, AZ

Jennifer L. Nye AZ Bar No. 019230 Tucson, AZ

Timothy A. Olcott AZ Bar No. 013633 Green Valley, AZ Comments Supporting Non-Discrimination Addition to Arizona Attorney Oath January 16, 2009 Page 10

Anthony Payson AZ Bar No. 013660 Tucson, AZ

Bryan B. Perry AZ Bar No. 009240 Phoenix, AZ

Melissa Noshay Petro AZ Bar No. 022644 Tucson, AZ

Lee Phillips AZ Bar No. 009540 Flagstaff, AZ

Mayor Sara Presler-Hoefle AZ Bar No. 023980 Flagstaff, AZ

Nina Rabin AZ Bar No. 025246 Tucson, AZ

John C. Richardson AZ Bar No. 005606 Tucson, AZ

J.J. Rico AZ Bar No. 021292 Tucson, AZ

Susan M. Robbins AZ Bar No. 012331 Sun City, AZ

Nancy Robinett AZ Bar No. 018587 Tucson, AZ Lawrence J. Rosenfeld AZ Bar No. 004426 Phoenix, AZ

Anne M. Ryan AZ Bar No. 009825 Tucson, AZ

Michael Ryan AZ Bar No. 018139 Phoenix, AZ

Laura G. Schoenfeld AZ Bar No. 017479 Tucson, AZ

F. William Sheppard AZ Bar No. 003466 (Inactive) Phoenix, AZ

Andrew Silverman AZ Bar No. 002440 Tucson, AZ

State Representative Kyrsten Sinema AZ Bar No. 023827 Phoenix, AZ

Laura E. Sixkiller AZ Bar No. 022014 Phoenix, AZ

Susan Slasor AZ Bar No. 006642 Flagstaff, AZ

Lisa Anne Smith AZ Bar No. 016762 Tucson, AZ Fanny G. Steinlage AZ Bar No. 023480 Flagstaff, AZ

Joshua Steinlage AZ Bar No. 023481 Flagstaff, AZ

James L. Stroud AZ Bar No. 004120 Tucson, AZ

Pamela K. Sutherland AZ Bar No. 019606 Tucson, AZ

Michael J. Tucker AZ Bar No. 012387 Phoenix, AZ

Merle Joy Turchik AZ Bar No. 011130 Tucson, AZ

Scott K. Weiss AZ Bar No. 019364 Phoenix, AZ

Kim E. Williamson AZ Bar No. 010526 Tucson, AZ

Claudia D. Work AZ Bar No. 018701 Phoenix, AZ

Wayne E. Yehling AZ Bar No. 010532 Tucson, AZ

APPENDIX A

Arizona

- Adopted a version of Model Rule 8.4, Comment ¶ 3 providing that "[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) [of Arizona Ethical Rule 8.4] when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule."
- Codified as Arizona Ethical Rules, Rule 8.4, Comment ¶ 3
- *See* http://www.myazbar.org/Ethics/ruleview.cfm?id=61

California

- Adopted a rule governing "Prohibited Discriminatory Conduct in a Law Practice," which provides, in part, that "[i] n the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability . . ."
- Codified as California Rules of Professional Conduct, Rule 2-400(B)
- See http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf

Colorado

- Adopted a rule providing that it is misconduct for a lawyer to "engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process."
- Codified as Colorado Rules of Professional Conduct, Rule 8.4(g)
- Comment ¶ 3 to Colorado's Rule 8.4 further provides that "[a] lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d)." Paragraph (d) is identical to Model Rule 8.4(d), which provides that it is misconduct to "engage in conduct that is prejudicial to the administration of justice."
- See http://www.cobar.org/index.cfm/ID/20519/subID/22571/CETH//

Connecticut

- Adopted a version of Model Rule 8.4, Comment ¶ 3 providing that "[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 or socioeconomic status, violates" the rule "when such actions are prejudicial to the administration of justice."
- Codified as Connecticut Rules of Professional Conduct, Rule 8.4(4), Commentary
- See http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf

Delaware

- Adopted Model Rule 8.4, Comment ¶ 3 providing, "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 or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."
- Codified as Delaware Lawyers' Rules of Professional Conduct, Rule 8.4(d), Comment ¶ 3
- See http://courts.delaware.gov/odc/DLRPCwithCommentsDec2008.pdf

District of Columbia

- Adopted a version of Model Rule 8.4, Comment ¶ 3 that provides a lawyer violates the rule against engaging "in conduct that serious interferes with the administration of justice" when that lawyer uses "words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."
- Codified as District of Columbia Rules of Professional Conduct, Rule 8.4(d), Comment ¶ 3
- *See* http://www.dcbar.org/new_rules/rules.cfm

Florida

- Adopted a rule providing that a lawyer shall not "engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic."
- Codified as Florida Rules of Professional Conduct, Rule 4-8.4(d)
- *See* http://www.floridabar.org/divexe/rrtfb.nsf/FV/0B6C8E5CDCA464D685 257172004B0FBD

Idaho

• Adopted Model Rule 8.4, Comment ¶ 3 providing that "[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 or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."

- Codified as Idaho Rules of Professional Conduct, Rule 8.4(d), Comment ¶ 3
- See http://www2.state.id.us/ISB/rules/irpc.htm

Illinois

- Adopted a rule providing that a lawyer shall not engage in conduct that is prejudicial to the administration of justice and "[i]n relation thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin, disability, age, sexual orientation or socioeconomic status. This subsection does not preclude legitimate advocacy when these or similar factors are issues in the proceeding."
- Codified as Illinois Rules of Professional Conduct, Rule 8.4(a)(5)
- Adopted an additional rule providing that a lawyer shall not "violate a Federal, State or local statute or ordinances that prohibits [*sic*] discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer."
- Codified as Illinois Rules of Professional Conduct, Rule 8.4(a)(9)(A)
- See http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/ArtVIII.htm#8.4

Indiana

- Adopted a rule providing that it is misconduct for a lawyer to "engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors."
- Codified as Indiana Rules of Court, Rules of Professional Conduct, Rule 8.4(g)
- See http://www.in.gov/judiciary/rules/prof_conduct/

Iowa

- Adopted Model Rule 8.4, Comment ¶ 3 providing that 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 or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."
- Codified as Iowa Rules of Professional Conduct, Rule 32:8.4, Comment ¶ 3
- Adopted an additional rule that it is professional misconduct for a lawyer to "engage in . . . other unlawful discrimination . . ."
- Codified as Iowa Rules of Professional Conduct, Rule 32:8.4(g)
- See http://www.judicial.state.ia.us/wfdata/frame2395-1066/File1.pdf

Maryland

• Adopted a rule providing that it is professional misconduct for a lawyer to "knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph."

- Codified as Maryland Lawyers' Rules of Professional Conduct, Rule 8.4(e)
- Maryland also adopted a related comment that provides, "Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in paragraph (e). See Md. Rule 16-813, Maryland Code of Judicial Conduct, Canon 3 B (11)."
- Codified as Maryland Lawyers' Rules of Professional Conduct, Rule 8.4(e), Comment ¶ 4
- See http://www.courts.state.md.us/rules/rodocs/153ro.pdf

Massachusetts

- Adopted a rule providing that a lawyer shall not "in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding."
- Codified as Massachusetts Rules of Professional Conduct, Rule 3.4(i)
- *See* http://www.mass.gov/obcbbo/RPC.pdf

Minnesota

- Adopted a rule providing that it is professional misconduct for a lawyer to "harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with a lawyer's professional activities."
- Codified as Minnesota Rules of Professional Conduct, Rule 8.4(g)
- Adopted an additional rule providing that it is professional misconduct for a lawyer to "commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer."
- Codified as Minnesota Rules of Professional Conduct, Rule 8.4(h)
- Also adopted a comment providing, "Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act

prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities."

- Codified as Minnesota Rules of Professional Conduct, Rule 8.4, Comment ¶ 6
- See http://www.mncourts.gov/lprb/05mrpc.html#r84

Missouri

- Adopted a rule providing that it is professional misconduct for an attorney to "manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues."
- Codified as Missouri Rules of Professional Conduct, Rule 4-8.4(g)
- Additionally adopted a comment to Rule 4-8.4(g) providing that "Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice against others based upon race, sex, religion, national origin, disability, age, or sexual orientation. Rule 4-8.4(g) excludes those instances in which a lawyer engages in legitimate advocacy with respect to these factors. A lawyer acts as an officer of the court and is licensed to practice by the state. The manifestation of bias or prejudice by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice."
- Codified as Missouri Rules of Professional Conduct, Rule 4-8.4, Comment ¶ 3
- See http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/ c0c6ffa99df4993f86256ba50057dcb8/a51eedab3cdc362b86256ca6005211ec?Ope nDocument

New Jersey

- Adopted a rule providing that it is professional misconduct for an attorney to "engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm."
- Codified as New Jersey Rules of Professional Conduct, Rule 8.4(g)
- See http://www.judiciary.state.nj.us/rpc97.htm#8.4

New York

• Adopted a rule providing that it is misconduct to "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."

- Codified as New York Rules of Professional Conduct, Rule 8.4(g) (to take effect on April 1, 2009)
- *See* http://www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf

North Dakota

- Adopted a rule providing that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding."
- Codified as North Dakota Rules of Professional Conduct, Rule 8.4(f)
- *See* http://www.court.state.nd.us/rules/conduct/frameset.htm

Ohio

- Adopted a rule providing that it is professional misconduct for a lawyer to "engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability."
- Codified as Ohio Rules of Professional Conduct, Rule 8.4(g)
- *See* http://www.sconet.state.oh.us/AttySvcs/ProfConduct/rules/default.asp# Rule8_4

South Carolina

- Adopted Model Rule 8.4, Comment ¶ 3 providing that 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 or socioeconomic status, violates paragraph [(e)] when such actions are prejudicial to the administration of justice."
- Codified as South Carolina Rules of Professional Conduct, Rule 8.4(e), Comment ¶ 3
- *See* http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&subRule ID=RULE%208.4&ruleType=APP

South Dakota

- Adopted Model Rule 8.4, Comment ¶ 3 providing that 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 or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."
- Codified as South Dakota Rules of Professional Conduct, Rule 8.4, Comment ¶ 3
- *See* http://www.sdbar.org/Rules/rules.shtm

Tennessee

- Adopted a version of Model Rule 8.4, Comment ¶ 3 providing that a "lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status, may violate paragraph (d) if such actions are prejudicial to the administration of justice."
- Codified as Tennessee Rules of Professional Conduct, Rule 8.4(d), Comment $\P 2$
- See http://www.tba.org/ethics/rules_book/index.php?page=rule8.4

Utah

- Adopted Model Rule 8.4, Comment ¶ 3 providing that 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 or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice."
- Codified as Utah Rules of Professional Conduct, Rule 8.4(d), Comment ¶ 3
- *See* http://www.utcourts.gov/resources/rules/ucja/ch13/8_4.htm

Vermont

- Adopted a rule providing that it is professional misconduct for a lawyer to "discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual."
- Codified as Vermont Rules of Professional Conduct, Rule 8.4(g)
- *See* http://www.vermontjudiciary.org/PRB1.htm

Washington

- Adopted a rule providing that it is professional misconduct for a lawyer to, "in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments."
- Codified as Washington Rules of Professional Conduct, Rule 8.4(h)
- *See* http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&group Name=ga&setName=RPC