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The Honorable Scott Bales, Chief Justice
The Honorable Robert M. Brutinel, Vice Chief Justice
The Honorable John Pelander, Justice
The Honorable Ann A. Scott Timmer, Justice
The Honorable Clint Bolick, Justice
The Honorable John R. Lopez, Justice
The Honorable Andrew Gould, Justice
The Arizona Supreme Court
1501 W. Washington St., Room 402 Phoenix, Arizona 85007

Attn: Clerk of the Supreme Court

May 17, 2018

Dear Chief Justice Bales, Vice Chief Justice Brutinel, Justice Pelander, Justice Timmer, Justice Bolick, Justice Lopez, and Justice Gould:

This comment letter is filed pursuant to this Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032. In its petition, the National Lawyers Guild, Central Arizona Chapter, urges this Court to amend Rule 42, ER 8.4, by adopting ABA Model Rule 8.4(g).

This proposed rule raises significant First Amendment issues. Rule 8.4(g) has an unprecedented scope. It disfavors the expression of certain viewpoints in forums completely disconnected with the servicing of clients or provision of legal services. I explain these arguments at length in my recently-published article in Volume 30 of the GEORGETOWN JOURNAL OF LEGAL ETHICS, titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law*." For your convenience, I have enclosed a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204.

This article has been useful to deliberations in other states. For example, the Tennessee Bar Association adopted several of my proposals to address the First Amendment problems raised by a modified version of Rule 8.4(g).[1] Ultimately, the Tennessee Supreme Court rejected the rule altogether.[2] I recommend the same course of conduct for Arizona.

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[1] Mindy Rattan, Tennessee Again Rejects Anti-Discrimination Ethics Rule, Bloomberg BNA (May 1, 2018), https://www.bna.com/tennessee-again-rejects-n57982091727/ ("In response to the comments, particularly those from Blackman, the board and Tennessee bar proposed modifications to the revised Rule 8.4(g) on the day the public comment period closed. Those revisions focused on trying to avoid confusion and clarify the legitimate advocacy exception and that the rule does not apply to conduct protected by the First Amendment.").
[2] *Id.*

Over the past two decades, nearly three dozen jurisdictions have amended their local version of Rule 8.4 to prohibit discrimination, harassment, or other forms of bias against specifically defined groups. With few exceptions, these rules *only* govern conduct within the three heads of conduct reached by Rule 8.4(a)–(f). First, the narrowest category regulated bias *during the representation of a client* or *in the practice of law*. This standard is set by fifteen states in their rules, and ten states in their comments. Second, a far broader standard regulates bias that implicates a *lawyer's fitness to practice law*, whether or not it occurs in the practice of law. Only two states impose this standard in their rules. Third, the broadest, most nebulous standard at issue prohibits bias that would *prejudice the administration of justice*. This standard, which can reach conduct entirely outside the client-lawyer relationship or the practice of law, is imposed by seven states. None of these jurisdictions provide a precedent for the Rule 8.4(g).

Three jurisdictions have adopted far broader scopes to their anti-bias provisions. First, Indiana regulates such misconduct when "engage[d] . . . in a professional capacity." Second and third, Washington state and Wisconsin both regulate such misconduct that is committed "in connection with the lawyer's professional activities." None of these rules define "professional capacity" or "professional activities." Yet, these three provisions still have a concrete nexus to delivering legal services, and do not purport to reach "social activities," such as bar-sponsored dinners that are merely "connected with the practice of law." Rule 8.4(g) is unprecedented in its scope. Efforts to cite precedents from these states as evidence that Rule 8.4(g) would not censor protected speech are unavailing. Because they are far more circumscribed, it is unsurprising that they have not given rise to litigation.

To avoid the chilling, and potential infringement, of protected free speech, the Arizona Supreme Court should deny the petition. It would be my pleasure to provide any further insights to inform your deliberations.

Sincerely,

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