

Proposed Arizona Amendment Compromises Attorneys' Free Speech Rights

Attorneys are asking the Arizona Supreme Court to reject a proposed amendment to attorney ethical rules that would create significant threats to the constitutionally protected rights of many Arizona lawyers.

Dozens of individual attorneys—including some affiliated with the Alliance Defense Fund, a legal alliance of Christian attorneys and like-minded organizations defending the right of people to freely live out their faith—filed a letter Friday with their request. An addendum was filed Wednesday, as opposition to the amendment gained the support of a total of 72 Arizona attorneys from diverse law practices.

The proposed amendment would prohibit attorneys in many instances from expressing views that others might perceive as biased, based on sexual orientation and gender identity or expression. Lawyers who advocate for certain legal positions, including the view that the law should protect and preserve marriage as the unique union of a man and a woman, could be punished if the amendment passes.

“No one should have their free speech rights threatened just because they advocate a position that some consider politically incorrect. Stifling the advocacy of attorneys is simply unconstitutional,” says Gary McCaleb, ADF senior counsel. “Our legal system promises all of its citizens the freedom to fully and fairly debate the important questions of our day. This proposed amendment needlessly undermines that constitutional guarantee within the very profession that protects constitutional rights.”

“It is professional misconduct for a lawyer to knowingly

manifest bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, gender identity or expression, or socioeconomic status in the course of representing a client...” stated the letter, signed by 72 attorneys, asking the Arizona Supreme Court not to grant the State Bar of Arizona’s request to amend ER 8.4, Rule 42.

The attorneys supporting the letter argue that the proposed amendment is unnecessary, ambiguous and unconstitutional—violating attorneys’ free speech and religious liberty rights. They note that such a rule could compel speech, constitute viewpoint discrimination, prohibit protected speech, violate the free exercise of religion, marginalize people of faith in the legal profession and adopt an ethical rule not enacted in any other state.

The Arizona State Bar considered a similar change—which would have required all attorneys to affirm that they would not permit considerations of “gender, race, religion, age, nationality, sexual orientation, disability, or social standing” to influence their work—to the Arizona Bar Oath of Admission in 2008. Many of the attorneys opposing the newly proposed amendment also challenged that change, which the bar chose not to pursue after receiving a significant amount of public criticism.