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IN THE ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND RULES 2.3)
AND 3.6, ARIZONA CODE OF) Supreme Court No. R-
JUDICIAL CONDUCT, RULE 81,)
RULES OF THE SUPREME COURT)
OF ARIZONA)
_____)

¶1 Pursuant to Rule 28 of the Rules of the Supreme Court of Arizona, the undersigned members of the State Bar of Arizona¹ petition the Court to amend Rules 2.3 and 3.6 of the Arizona Code of Judicial Conduct, Rule 81, Ariz. R. Sup. Ct. *See* Appendix A attached.

I. SUMMARY

¶1 The undersigned request that subsections (B) and (C) of Rule 2.3 prohibiting improper bias and prejudice by judges be conformed to the corresponding attorney ethics rule² by adding the phrase “gender identity”.³ For similar reasons, we also

¹ The undersigned attorneys are acting in their individual capacities and not as representatives of the offices in which they practice.

² Comment 3, Ethics Rule (ER) 8.4, Ariz. R. Sup. Ct. 42.

request that subsection (A) of Rule 3.6, which prohibits judicial membership in organizations that practice certain types of “invidious discrimination,” be amended to include that phrase.

¶2 Judges⁴ should be held to at least the same ethical standards as attorneys. Yet, unlike attorneys, Rule 2.3 fails to prohibit judges from demonstrating bias based on gender identity. In addition, judicial membership in organizations that discriminate based on gender identity is just as detrimental to the integrity and fairness of our judicial system as is membership in organizations that discriminate based on race, religion or sexual orientation.⁵ Such memberships, thus, should also be prohibited.

³ “Gender identity” refers to a person’s internal sense of being a man, a woman, both or neither, regardless of the sex they were assigned at birth. *See GLAAD Media Reference Guide.-Transgender Issues*, <http://www.glaad.org/reference/transgender> (last visited January 4, 2015).

⁴ In addition to prohibiting judges from engaging in bias and prejudice, Rule 2.3 requires that they prevent “court staff, court officials, or others subject to the judge's direction and control,” and lawyers appearing before them, from engaging in such conduct. In the interest of brevity, when discussing Rule 2.3, “judges” includes all other parties subject to the judges’ control.

⁵ The Preamble to the Arizona Code of Judicial Conduct states:

An independent, fair, and impartial judiciary is indispensable to our system of justice. . . . Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

II. **RULE 2.3 SHOULD BE AMENDED TO CONFORM TO THE CORRESPONDING ATTORNEY ETHICS RULE.**

¶2 Rule 2.3 states:

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

¶3 ER 8.4(d) prohibits attorneys from engaging in “conduct that is prejudicial to the administration of justice.” Comment 3 to that rule explains that an attorney violates that provision when they

“knowingly manifest[] by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual

Preamble, Rule 81, Ariz. R. S. Ct. *See also* “Canon 1. A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety.” *Id.*

orientation, *gender identity* or socioeconomic status ... when such actions are prejudicial to the administration of justice.”

(Emphasis added.)

¶4 There is no logical reason why judges should be subject to a less restrictive standard of conduct than the attorneys who practice before them. Moreover, the omission of “gender identity” from Rule 2.3(C) means that a judge is not specifically empowered to require attorneys in their court to refrain from conduct that is prohibited by ER 8.4(d). In light of the fact that bias against transgender⁶ people, including bias by judges and other court officials, is endemic in Arizona, as well as the rest of the country,⁷ Rule 2.3 should be amended to include “gender identity”.

III. RULE 3.6(A) SHOULD ALSO BE AMENDED TO INCLUDE “GENDER IDENTITY”.

¶5 Rule 3.6(A) bars judges from “hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.” Given the critical role that the values of integrity, impartiality and fairness play in the success of our judicial

⁶ “Transgender” is “[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” *GLAAD Media Reference Guide.-Transgender Issues, supra.*

⁷ See Section IV below.

system,⁸ and the growing consensus that discrimination based on gender identity should be prohibited,⁹ allowing judges to hold membership in organizations that discriminate based on gender identity is just as damaging to the public's perception of our judicial system, as membership in organizations that discriminate based on race, religion or any of the other factors already included in Rule 3.6(A).

IV. DISCRIMINATION BASED ON GENDER IDENTITY, INCLUDING DISCRIMINATION BY JUDGES AND OTHER COURT OFFICIALS, IS A CRITICAL PROBLEM.

¶6 The largest survey of transgender people in the U.S. ever conducted¹⁰ shows that discrimination based on gender identity, i.e., discrimination against transgender people, is endemic in all areas of public and private life, including the judicial system.¹¹ For example, ninety percent of the respondents experienced harassment or other discrimination in employment; as a consequence, the unemployment rate for transgender people is double the national average, and four times the national average for transgender people of color.¹² In addition,

⁸ See footnote 5 above.

⁹ See Section V below.

¹⁰ Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011 (hereafter "*Injustice*") (available at <http://endtransdiscrimination.org/>, last visited January 4, 2015).

¹¹ *Id.*, p. 2.

¹² *Id.*, p. 3.

transgender people are nearly four times more likely to live on less than \$10,000 per year; those who lost jobs through bias were six times more likely to live below this level.¹³ Those who lost jobs due to bias were also much more likely than others to engage in the underground economy, such as sex work or drug sales, for survival.¹⁴ One-fifth of the respondents reported being homeless at some point because of their gender identity or expression.¹⁵ In addition, the rate of home ownership was less than one half the national average.¹⁶ Homelessness, in turn, exposed transgender people to mistreatment in a variety of settings, including police abuse.¹⁷ Transgender people are also much more likely to be victims of violent crime¹⁸ and are incarcerated at much higher rates than the general

¹³ *Id.*, pp. 2, 51.

¹⁴ Sixteen percent of respondents reported engaging in underground employment for income. *Id.*, p. 51.

¹⁵ “Gender expression” is the outward manifestations of gender through names, pronouns, clothing, voice, makeup and body characteristics. *See GLAAD Media Reference Guide.-Transgender Issues, supra.*

¹⁶ *Injustice*, p. 4.

¹⁷ *Id.*

¹⁸ Almost three-quarters of the victims of anti-LGBT murders in 2013 were transgender women and more than two-thirds were transgender women of color. National Coalition of Anti-Violence Programs, Media Release dated May 29, 2014, p. 2. Available at <http://avp.org/resources/avp-resources/315> (last visited January 4, 2015).

population.¹⁹ Comparable numbers in all these areas were reported by respondents from Arizona.²⁰

¶7 These conditions expose transgender people to contact with the judicial system at much higher rates than the general population. In addition, transgender people must engage with the judicial system for reasons unique to them, e.g., to obtain court-ordered name changes and, in some states, to obtain court orders allowing them to change the gender marker on their birth certificates.²¹

¶8 Unfortunately, our judicial system is not free of the bias against transgender people that exists in the rest of society. Twelve percent of the respondents to the *Injustice* survey reported being harassed or otherwise denied equal treatment by judges and other court officials.²² And one percent reported being *physically*

¹⁹ *Injustice*, p. 163.

²⁰ *Findings of the National Transgender Discrimination Survey-Arizona Results* (hereafter “*Injustice-Arizona*”) (available at <http://endtransdiscrimination.org/>, last visited January 4, 2015).

²¹ Obtaining identity documents that are congruent with their gender identity and expression is critical to the lives of transgender people. Forty percent of survey respondents who presented identity documents that did not match their gender identity or expression reported being harassed, three percent reported being assaulted, and fifteen percent reported being asked to leave. *Injustice*, pp. 5, 138-39, 143, 153.

²² *Injustice*, pp. 5, 129, 133.

assaulted by judges and court officials.²³ Arizona respondents reported harassment and other unequal treatment by judges and court officials at a similar rate (13%).²⁴

V. GOVERNMENTS AT ALL LEVELS ARE RESPONDING TO THE ENDEMIC DISCRIMINATION AGAINST TRANSGENDER PEOPLE BY BANNING DISCRIMINATION BASED ON GENDER IDENTITY.

¶9 Eighteen states and the District of Columbia have statutes explicitly prohibiting discrimination against transgender people in employment, housing, public accommodations and other areas.²⁵ In addition, nearly 200 counties, cities, and other local governments ban such discrimination, including the cities of Tucson, Phoenix, Flagstaff and Tempe.²⁶

¶10 Although there is no federal law expressly prohibiting gender identity discrimination,²⁷ such discrimination is prohibited in federal employment and by federal contractors by executive order.²⁸ In addition, based on the Supreme Court's

²³ *Id.*

²⁴ *Injustice-Arizona, supra.*

²⁵ Human Rights Campaign, *Employment Non-Discrimination Act*. Available at <http://www.hrc.org/resources/entry/employment-non-discrimination-act> (last visited January 4, 2015).

²⁶ Movement Advancement Project, *Local Employment-Nondiscrimination Ordinances*. Available at http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances (last visited January 4, 2015).

²⁷ *See* footnote 25.

²⁸ Bendery, Jennifer, *Obama Signs Executive Order on LGBT Job Discrimination*, Huffington Post, July 21, 2014. Available at

decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a number of federal courts, as well as the U.S. Equal Employment Opportunity Commission, have interpreted the ban on sex discrimination in employment in Title VII of the Civil Rights Act of 1964 to include discrimination based on gender identity or expression.²⁹ The U.S. Departments of Education, and Housing and Urban Development also interpret the ban on sex discrimination in the statutes they administer to include discrimination based on gender identity.³⁰ Finally, United States Attorney General Eric Holder recently announced that the Department of

http://www.huffingtonpost.com/2014/07/21/obama-gay-rights_n_5605482.html; last visited January 4, 2015.

²⁹ See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Macy v. Holder*. EEOC Appeal No. 0120120821 (April 20, 2012) (available at <http://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf>, and <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>, last visited January 4, 2015). The same interpretation has been applied to the Equal Protection Clause of the Fourteenth Amendment. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011),

³⁰ HRC, *U.S. Dept. of Education: Title IX Protects Transgender Students*, April 29, 2014 (available at <http://www.hrc.org/blog/entry/u.s.-dept.-of-education-transgender-students-protected-under-title-ix>, last visited January 4, 2015); U.S. Dept. of Housing and Urban Development, *LGBT Housing Discrimination*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_op/LGBT_Housing_Discrimination (last visited January 4, 2015).

Justice also interprets Title VII's ban on sex discrimination to ban discrimination against transgender people.³¹

VI. CONCLUSION

¶11 This Court has already recognized that bias and prejudice based on gender identity has no place in our legal system.³² Available data shows that such bias exists not just among attorneys, but also among judges and other court officials. Therefore, the undersigned Arizona licensed attorneys request that the Court amend Rules 2.3 and 3.6 to include the phrase "gender identity" as indicated in Appendix A.

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³¹ U.S. Dept. of Justice, *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, December 18, 2014, <http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination> (last visited January 4, 2015).

³² Comment 3, ER 8.4.

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APPENDIX A

Proposed Rule Change

(Proposed deletions are shown with ~~strikethrough~~, new language is shown with underscoring)

Arizona Code of Judicial Conduct, Ariz. R. S. Ct. 81

Rule 2.3. Bias, Prejudice, and Harassment

(A) [no changes]

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) [no changes]

Rule 3.6. Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, ~~or~~ sexual orientation or gender identity.

(B)-(C) [no changes]