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81,010

CASE # 81,010

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SID J. WHITE
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February 2, 1993

Mr. White
Clerk
Florida Supreme Court
Supreme Court Building
500 S. Duval Street
Talahassee, FL 32301

RE: LETTER *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY

Honorable Members of the Court:

On January 4, 1993, the Board of Governors of The Florida Bar (the "Board of Governors") filed with this Court its Petition to amend the Rules Regulating The Florida Bar (the "Petition"). The Petition advocates the adoption of certain proposed amendments to these Rules (the "Proposed Amendments"), one of which would amend Rule 4-8.4 (d) ("Misconduct"), plus make pertinent revisions to the accompanying Comment, to prohibit, inter alia, discrimination by members of The Florida Bar against "others lawyers ... on account of ... religion [or] sexual orientation [.]" The Petition also advocates the adoption by the Court of proposed Rule 4-8.7 ("Discrimination"), which provides for discipline of any lawyer who is "adjudicated or held to have committed, in the course of the practice of law a prohibited discriminatory practice [.]" For the reasons that follow, Christian Legal Society ("CLS"), as *amicus curiae*, on behalf of itself and on behalf of its Florida members, opposes the adoption by the Court of these Proposed Amendments and thus recommends that the Court deny the Board of Governor's Petition in its entirety.

A. The Proposed Amendments Would Improperly Restrict an Attorney's Freedom to Make Significant Choices in His/Her Practice on the Basis of Sexual Orientation, Conduct Prohibited by Neither Federal Nor Florida State Law.

The language of the Proposed Amendments makes clear that, should they be adopted by this Court, Florida lawyers will be prohibited from making autonomous choices concerning the direction of their private practice and in the hiring, promoting, and firing of attorneys within their own law firms on the basis of sexual orientation. Although discrimination in the terms and conditions of employment on the basis of race, sex, religion, national origin, age, and disability is prohibited by federal

law,[1] there is no such similar prohibition on discrimination, under either federal or Florida state law, on the basis of sexual orientation.[2] The clear import of this lack of protection for sexual orientation is that discrimination with respect thereto does not contravene the public policy of either the United States or the State of Florida, and thus should not be the basis of a rule limiting the freedom of a significant section of The Florida Bar.

Many members of The Florida Bar, including the vast majority of the membership of the Florida Chapter of CLS, maintain the strong personal conviction that homosexual conduct is immoral. For this reason, there are many who also believe that homosexual conduct may constitute, in certain circumstances, an appropriate basis for decisions as to the types of cases and clients they accept and the terms and conditions of employment in their law firms. Although these beliefs clearly run counter to the "political correctness" so desired by a vocal minority in our society, these beliefs are firmly rooted in our nation's Judeo-Christian heritage. See Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986) (claim of a right to engage in consensual homosexual sodomy rejected as neither "deeply rooted in this nation's history and tradition" nor "implicit in the concept of ordered liberty" because sodomy was a criminal offense at common law and forbidden by laws of 13 states ratifying the Constitution); Leviticus 18:22; I Corinthians 6:9-10. The fact that some Floridians now fail to share these traditional beliefs does not, in and of itself, render these beliefs an appropriate basis for the imposition of professional sanctions. Indeed, the conscience of nongovernmental actors should be convinced, not coerced.[3]

Accordingly, because neither the United States Congress nor the Florida legislature has declared discrimination on the basis of sexual orientation to be unlawful or in violation of public policy, and because many members of The Florida Bar continue to believe that homosexuality may constitute an acceptable basis for significant decisions concerning the direction of their legal

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[1] See the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (race, sex, religion, national origin); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et. seq. (age); the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 et seq. (disability).

[2] The Florida Human Rights Act, Fla. Stat. §760.10 (1)(a), lists the characteristics that the people of Florida believe should be protected from employment discrimination; sexual orientation is not among them.

[3] The democratic institutions of our government (the state and federal legislatures) have respected the sanctity of Floridians' beliefs in this area; the state bar should hardly do less.

practices, The Florida Bar should not be permitted to punish such private, legal choices, especially when they are motivated by sincerely held religious or moral belief.

B. The Proposed Amendments Would Improperly Restrict the Expressly Protected Federal Right of Religious Organizations to Make Employment Decisions on the Basis of Religion.

The Proposed Amendments would also improperly prohibit certain members of The Florida Bar from making legitimate employment-related choices on the basis of religion and religious conviction.[4] The right of religious organizations to make choices with respect to the terms and conditions of employment on the basis of religion or similar religious conviction is expressly protected under Title VII of the Civil Rights Act of 1964, 20 U.S.C. §2000(e)(1). The United States Supreme Court expressly upheld this provision of Title VII against First Amendment challenge in Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos, 483 U.S. 327 (1987). The near-unanimous Court held that the religious exemption is a legitimate accommodation of the First Amendment rights of religious adherents that does not violate the Establishment Clause.

The clear effect of the adoption of the Proposed Amendments would be to require disciplinary action against lawyers working for religious employers, such as in-house counsel for religious colleges, seminaries, para-church ministries, or church denominations, as well as lawyers working for religious law firms and associations such as CLS itself, if religious belief is considered in the selection of their employees. These are precisely the types of employers expressly protected under Title VII in their right to prefer employee applicants on the basis of religious belief. Indeed, as suggested in Amos, any prohibition against making such choices on the basis of religion may well constitute a violation of the First Amendment rights of religious practitioners. See id., 483 U.S. at 334 ("'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause'" (quoting Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 144-145 (1987)).

Accordingly, because the Proposed Amendments are at odds with the clear constitutional and statutory right of religious employers to make legitimate decisions in the terms and

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[4] Rule 4-8.7 ("Discrimination") prohibits discriminatory practices "in the course of the practice of law." The Comment explains the latter phase as "including the conduct of a lawyer in the lawyer's workplace." Plainly, the Proposed Amendments would regulate employment practices of all Florida attorneys.

conditions of their employees' employment on the basis of religion or religious conviction, the Proposed Amendments should be rejected.

C. The Proposed Amendments Would Impermissibly Infringe Upon The First Amendment Right of Lawyers to Associate or Not Associate With Certain Individuals on the Basis of Their Beliefs or Practices.

Finally, the Proposed Amendments should be rejected because they would impermissibly infringe upon the First Amendment associational liberties of many religious members of The Florida Bar.

The United States Supreme Court has specifically recognized that the First Amendment protects the rights of individuals and groups to associate or not associate for expressive purposes. See Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987). This right, though not absolute, cannot be invaded by the government absent a "compelling state interest [], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Roberts, 468 U.S. at 623.

Many members of The Florida Bar are, or in the future may desire to be, involved in organizations formed for the purpose of advocating particular ideas. Indeed, some Florida attorneys are, or may in the future undoubtedly be, involved in associations which advocate certain religious principles or which oppose legislation aimed at increasing the rights of those engaged in homosexual or other previously unprotected sexual conduct. The rights of such groups to be selective in the constitution of their members, their leadership, and their objectives is clear and cannot be invaded absent a compelling governmental interest.

In Roberts, the state's interest in eradicating gender discrimination was found compelling. See id. Unlike Roberts, however, Florida has no such compelling state interest in preventing members of The Florida Bar from exercising their expressive right to define their practice on the basis of sexual orientation or in restricting the freedom of choice in employment matters by religious organizations. Indeed, neither the Congress nor the Florida Legislature has found any such interests.

Unlike the Proposed Amendments, the position advocated in this *amicus* letter by CLS does not attempt arbitrarily to impose a moral and religious position held by a few on the entire Florida Bar. Rather, CLS, by opposing the Proposed Amendments, seeks to foster the freedom of choice and self-definition that is already recognized by federal law and is essential to the creative, successful, and vigorous pursuit of law by the members of The Florida Bar. Because the Proposed Amendments would

significantly stifle inalienable rights, as well as interests and creativity of numerous members of the Florida Bar, Christian Legal Society, on behalf of its 4,500 members nationwide and in the Florida Bar, respectfully recommends that the Court deny the Petition of the Board of Governors in its entirety and reject the Proposed Amendments to the Rules Regulating The Florida Bar.

Respectfully submitted,

CHRISTIAN LEGAL SOCIETY

Steven T. McFarland

Steven T. McFarland, Director
Center For Law And Religious Freedom

cc: Mr. Jack Harkness, Exec. Dir., FSBA