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9 **IN THE ARIZONA SUPREME COURT**

10 **AMENDED PETITION TO AMEND**)
11 **RULES 53, 31(a)(2) and 41(g), ARIZONA**)
12 **RULES OF THE SUPREME COURT**)

13 Supreme Court No. R-05-0021
14 **COMMENT ON PETITION**
15 **(SUPPORTING)**

16 *“High expectations are the key to everything.”*

17 *– Sam Walton*

18 The State Bar of Arizona (“State Bar”) proposes a modification that would change Rule 41(g) to provide that lawyers shall “avoid” engaging in “unprofessional conduct.” Additionally, the State Bar proposes to modify Rule 31(A)(2) to provide that “unprofessional conduct” includes (1) “conduct unbecoming a member of the bar,” or (2) “a knowing and substantial violation of the oath of admission to the bar.”

19 This Comment **supports** the proposed rule modifications, but the following comments are presented. *First*, although a rule proscribing “conduct unbecoming” or “unprofessional conduct” will withstand constitutional challenges for vagueness and overbreadth, the language unquestionably is imprecise. *Second*, in order to provide fair notice to a lawyer that his or her conduct may be punishable under the proposed rules, additional clarification should be provided in the Comments to more fully explain the “nature of the offense” (proposed additional clarifying language is set forth *infra* at page 5). *Third*, the additional proposed Comment language also more emphatically articulates the very serious nature of a lawyer’s obligation to refrain from engaging in “unprofessional conduct” or “conduct unbecoming a member of the bar.” *Fourth*, at the same time, however, the

1 proposed rules should be enforced with principled restraint, being keenly aware of the fact that the
2 proposed rules involve viewpoint-based restrictions on the professional and private lives of lawyers.
3 *Fifth*, and finally, the Court and the State Bar respectfully should consider and remedy the potential
4 problem of multiplicitous charging under the proposed rules (that is, avoiding *unreasonable*
5 multiplication of charges based on the same underlying misconduct by a lawyer).

6 **1. Aspirational Goal of the Proposed Rule Changes**

7 It is not possible to disagree intelligently with the aspirational goal of the proposed rule
8 modifications. The Petition states that the rule modifications are proposed in response to the
9 recommendations of the Task Force on Professionalism, which evaluated and recommended possible
10 means to enhance “professionalism” of the legal profession. The notion is that increasing
11 “professionalism” among and by lawyers will improve the current adverse public image of the legal
12 profession. It would be irrational, of course, for any lawyer to suggest that members of the legal
13 profession should refrain from striving to enhance their professional conduct and public image.
14 Lawyers constantly should look for ways to practice recognized and accepted professional attributes,
15 including honesty, integrity, courtesy and respect for others.

16 Respectfully, however, it is a mistake to presuppose that enhancing the “professionalism” of
17 lawyers, by itself, will upgrade the public’s current negative image of the legal profession as a whole.
18 Other attributes of the legal profession appear to be equally, if not more, responsible for the public’s
19 negative view regarding lawyers. By and large, lawyers are viewed as persons who use the law to
20 advance their private ends. Rightly or wrongly, many members of the public view lawyers as a group
21 whose members merely promote themselves while pretending to serve clients or the public good.
22 The general perception appears to be that lawyers have not shown themselves as a group to truly care
23 about the public good, and they certainly have not shown they are prepared to sacrifice their own
24 well-being for it.

25 The legal profession has diminished in public perception for many reasons completely
26 unrelated to whether lawyers behave more “professionally.” Certainly it is commendable and entirely
27 appropriate, however, to attempt to reaffirm and reinforce aspirations of “professionalism” among

1 lawyers. On that basis alone the State Bar’s proposed rule changes should be approved by this Court.
2 Nonetheless, enhancing the “professionalism” of lawyers most likely will not, by itself, recapture the
3 perceived historical vision of an “ideal-driven” and respected profession.

4 **2. Definitional Vagueries and the Need for Additional Clarification**
5 **in the Comments to the Rules**

6 Purely from the standpoint of legal analysis, a rule proscribing “conduct unbecoming a
7 member of the bar” most likely will pass constitutional muster. United States v. Wunsch, 84 F.3d
8 1110 (9th Cir. 1996)(“we have little trouble with the notion that ‘conduct unbecoming a member of
9 the bar’ has some definable substance”); United States v. Hearst, 638 F.2d 1190, 1197
10 (9th Cir. 1980)(upholding prohibition against “conduct unbecoming a member of the bar” because the
11 phrase “refers to the legal profession’s ‘code of behavior’ and ‘lore,’ of which all attorneys are
12 charged with knowledge”), cert. denied 451 U.S. 938 (1981). Accordingly, it is probable that the
13 proposed rule changes would withstand constitutional challenges based on vagueness or overbreadth.

14 At the same time, however, the language “conduct unbecoming a member of the bar”
15 unquestionably *is* imprecise. This is because, unlike the substantive Rules of Professional Conduct,
16 the proposed rules are more “custom-based.” A lawyer charged with violating the proposed rules
17 nevertheless should be provided with advance notice that his or her conduct constitutes an offense
18 under the proposed rules. The lawyer should be given “fair warning” of the offensive nature of his or
19 her conduct. Cf. Parker v. Levy, 417 U.S. 733 (1974) (the language “conduct unbecoming an officer
20 and a gentlemen” under the Uniform Code of Military Justice (UCMJ) survived claim that it was
21 “void for vagueness” under the Due Process Clause of the Fifth Amendment and overbroad in
22 violation of the First Amendment).

23 The literal language of the proposed rules *is* very broad and arguably encompasses a broad
24 range of professional and private conduct. In Parker v. Levy, the Supreme Court noted that the Court
25 and other military courts had “narrowed the very broad reach of the literal language of the articles
26 [UCMJ, Arts. 133 and 134], and at the same time ha[d] supplied considerable specificity by way of
27 examples of the conduct which they cover.” Id. at 754. Here, of course, neither this Court nor the

1 State Bar have issued opinions regarding “conduct unbecoming.” Yet, the State Bar and this Court
2 *have* generated many statements regarding “unprofessional conduct” and specifying examples of the
3 types of conduct covered. The Supreme Court in Parker v. Levy also approved a commentator’s
4 observations regarding the scope of the “conduct unbecoming” offense:

5 “To constitute therefore the conduct here denounced, the act which
6 forms the basis of the charge must have a double significance and
7 effect. Though it need not amount to a crime, it must offend so
8 seriously against law, justice, morality or decorum as to expose to
disgrace, socially or as a man, the offender, and at the same time must
be of such a nature or committed under such circumstances as to bring
dishonor or disrepute upon the . . . profession which he represents.”¹

9 The Supreme Court in Parker v. Levy observed, nonetheless, that “areas of uncertainty as to the
10 coverage of the articles . . . remain[ed], . . .” 417 U.S. at 753-54. The Court emphasized that “further
11 content may be supplied . . . by less formalized custom and usage.” Id. The Supreme Court also did
12 make it clear, however, that an officer charged with the “conduct unbecoming” offense must have fair
13 notice that his or her conduct was punishable. 471 U.S. at 755-57.

14 Significantly, the Court also explained that “there is a substantial range of conduct to which
15 both articles [“conduct unbecoming”] clearly apply without vagueness or imprecision.” 417 U.S. at
16 754. Here, the State Bar’s proposed rule changes also would appear to “clearly apply without
17 vagueness or imprecision” to a substantial range of unprofessional behavior by lawyers. Equally
18 obvious, however, is that under the State Bar’s proposed rules there will be some types and gradations
19 of conduct as to which lawyers may not be put on notice that their conduct might be inappropriate.

20 For that reason, it respectfully is submitted that it is important for the Comments to the
21 proposed rules to more clearly and unambiguously explain the nature of the “conduct unbecoming”
22 offense. It should be made clear that engaging in “unprofessional conduct,” including “conduct
23 unbecoming a member of the bar,” is a separate and serious breach of a lawyer’s duties. The
24 following proposed clarification of the Comment to the “unprofessional conduct” or “conduct
25 unbecoming a member of the bar” offense is respectfully offered:

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¹ William Winthrop, Military Law and Precedents 711-12 (2d ed. 1920 Reprint); see 417 U.S. at 753-54.

1 “*Nature of Offense.* Conduct violative of this rule is action or
2 behavior as an officer of the court and/or member of the bar which, in
3 dishonoring or disgracing the person as an officer of the court and/or
4 member of the bar, seriously compromises the person’s character, *or*
5 action or behavior in an unofficial or private capacity which, in
6 dishonoring or disgracing the lawyer personally, seriously
7 compromises the person’s standing as an officer of the court and/or
8 member of the bar. There are certain moral attributes common to the
9 ideal officer of the court and member of the bar, a lack of which is
10 indicated by acts of dishonesty, unfair dealing, indecency, indecorum,
11 lawlessness, lack of integrity, disrespect, lack of courtesy and/or
12 failure to perform competently in serving clients. There is a limit of
13 tolerance based on customs of the legal profession and professional
14 necessity below which the professional and personal standards of an
15 officer of the court and member of the bar cannot fall without
16 seriously compromising the person’s standing as an officer of the
17 court and member of the bar.

18 This rule prohibits unprofessional conduct by an officer of the
19 court and member of the bar which, taking all the circumstances into
20 consideration, is thus compromising. “Conduct unbecoming a
21 member of the bar” means behavior more serious than slight, and of a
22 material and pronounced character. It means conduct morally and/or
23 professionally unfitting and unacceptable, rather than merely
24 inappropriate or unsuitable; misbehavior which is more than opposed
25 to good judgment or to good taste or propriety; conduct of such a
26 nature or committed under such circumstances as to bring dishonor or
27 disrespect upon the legal profession which the lawyer represents.

 This rule includes acts made punishable by any other rules
regulating the conduct of members of the bar, *provided* these acts *also*
amount to “unprofessional conduct” or “conduct unbecoming a
member of the bar.” Thus, a member of the bar who commits a
criminal act that reflects adversely on the lawyer’s honesty,
trustworthiness or fitness as a lawyer violates both this rule and
ER 8.4(c). Whenever the offense charged is the same as the specific
offense set forth in this rule, the elements are the same as those set
forth in the rule which treats that specific offense, with the *additional*
requirement that the act or omission constitutes unprofessional
conduct and/or conduct unbecoming an officer of the court and
member of the bar.

Examples of Offenses. [Incorporate State Bar’s proposed
Comment].

This proposed addition to the Comments to the State Bar’s proposed rules is closely modeled after the
“Explanation” provided in the UCMJ for Article 133 (“conduct unbecoming an officer and a
gentleman”). This proposed addition provides specificity regarding the nature of the offense. The
suggested language also clarifies that the rule encompasses serious misconduct by a lawyer, and thus

1 should not be utilized to charge lawyers for insubstantial, albeit inappropriate, behavior.² Finally, this
2 additional language clarifies that “unprofessional conduct,” including “conduct unbecoming,”
3 includes acts made punishable by the ethical rules, but only provided that these acts *also* amount to
4 “unprofessional conduct” under the proposed rules.

5 The military analog to the legal profession certainly is not a perfect fit, of course. The
6 profession of law is not the military or a police force. Assuredly, however, the legal profession *is*
7 charged with the historical legacy of the tireless and unwavering pursuit of justice for all. The role of
8 lawyers historically was understood to be that of seeking and protecting justice for their clients and
9 their communities, and that was ennobling:

10 “[N]obility in the legal profession is not limited to a high-profile
11 public practice. The simple, quiet, competent service rendered to
12 individuals is noble, too. Indeed, the reflective practitioner is the true
13 hero of our profession today – a lawyer who understands that our
14 professional responsibilities are threefold. First, of course, the lawyer
15 is a representative of clients. This is the role of the lawyer as an
16 attorney. Although anyone can be an attorney in a contractual sense –
an agent for someone else – only lawyers are trained to be attorneys in
the full professional sense, exercising an informed and independent
judgment. Second, lawyers – unlike contractual ‘attorneys’ – are
officers of the courts and legal system. Third, lawyers are public
citizens having a special responsibility for the quality of justice. . . .

17 Because lawyers are expected to perform every role, they cannot be
18 mere contractual ‘attorneys’ or narrow technicians of a legal craft.
19 They should view each client’s interest in the broader context of
20 justice, pursued with independent professional judgment, with
obedience of duties owed to the courts and legal system, and with
awareness of the leadership obligations of lawyers as public citizens.
To paraphrase Justice Brandeis, lawyers must have an aim high and a
vision broad.”³

21 Respectfully, the Arizona courts and lawyers have proceeded to date with reserve and restraint in
22 attempting to restore “professionalism” in the practice of law in Arizona. Decidedly more determined
23 action now may be appropriate to re-establish the expectations and attributes necessary to reintroduce
24 a true sense of “professionalism” and nobility in Arizona’s legal professionals.

25 ² Such less serious yet inappropriate behavior would seem most suitable for peer review action, rather than formal
26 disciplinary proceedings.

27 ³ Col. Donald L. Burnett, Jr., Twenty-Second Edmund H. Young Lecture in Legal Education: Professionalism: Restoring
the Flame, 158 Military L.Rev. 109, 144 (1998).

1 At the same time, and again respectfully, the Court’s adoption of rules to attempt to attain
2 these aspirations must (1) acknowledge the political and philosophical assumptions underlying such
3 rules; (2) understand the normative, value-based content of such rules; and, therefore, (3) avoid
4 viewpoint-based restrictions on fundamental rights such as choice of lifestyles; political beliefs and
5 activities; religious beliefs and activities; and, other conduct that may be offensive to some people.
6 This Court assumedly wants to create a vibrant, independent and professional bar, but not to create a
7 culture of quiescence among legal professionals.

8 **3. Need for Principled Restraint in Enforcement**

9 Although perhaps obvious, the rules and standards proposed by the State Bar, and approved
10 by this Court, are not content-neutral in the sense that such rules *do* clearly embody a certain moral
11 and political view of “professionalism.” Any rule regulating “unprofessional conduct” or “conduct
12 unbecoming a member of the bar” assumes, by force, that there are certain “fundamental principles”
13 of lawyer professionalism which outweigh the lawyer’s rights of self-determinism.⁴ Although
14 America, and particularly the American legal system, was founded on protecting the “marketplace of
15 ideas” concept of John Stuart Mill, the courts and lawyer regulatory agencies – as well as lawyers –
16 make decisions on a regular basis that are justified by the truth or falsity of a substantive moral
17 position.

18 Here, the State Bar’s proposed rule changes will empower the State Bar and the Court to make
19 determinations regarding conduct of lawyers – both in lawyers’ professional and private capacities –
20 that will embody the moral and political judgments of this Court and the State Bar. To be sure, the
21 concept of “lawyer exceptionism” (lawyers have diminished rights and liberties because of their
22 relationship with the legal system) has been accepted by American courts for more than a decade.
23 Gentile v. State Bar of Nevada, 501 U.S. 1030, 1056 (1991) (affirming that lawyers are “officers of
24 the court” whose responsibilities include conforming the conduct of individuals to the law);
25 Strickland v. Washington, 466 U.S. 668 (1984) (lawyers have an ethical obligation to ensure

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27 ⁴ An insightful discussion of some of the moral and philosophical assumptions inherent in lawyer regulation is found at
W. Bradley Wendel, “Certain Fundamental Truths”: A Dialectic on Negative and Positive Liberty in Hate Speech Cases,
65 Law & Contemp. Probs. 33 (Spring 2002).

1 reliability of the adversary system and not interfere with its operation). In some very real, not
2 imaginary, respects this idea of “lawyer exceptionalism” is somewhat disquieting. This country was
3 established on the concept that the citizenry, including lawyers, do not desire for the government to
4 make moral decisions for them. Additionally, from the historical perspective, the rules of law
5 established by even the highest court have not always acknowledged and protected those values
6 which deserved protection. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
7 Accordingly, and respectfully, this Court and the State Bar must acknowledge the political and moral
8 content inherent in the enactment and enforcement of rules regulating “unprofessional conduct” or
9 “conduct unbecoming.” In assessing whether conduct charged under the proposed rules is
10 “unprofessional” or constitutes “conduct unbecoming,” this Court and the State Bar therefore
11 respectfully should use a very reserved, strict analysis.

12 In attempting to encourage a reinvigorated culture of lawyer professionalism, this Court and
13 the State Bar respectfully ought exercise caution to ensure that such viewpoint-based restrictions are
14 not utilized to silence the unpopular voice. Adopting the State Bar’s proposed rules will empower
15 governing officials to make judgments and determinations of “professional” versus “unprofessional”
16 speech, ideas, and actions – both in lawyer’s professional and personal lives. Particularly with regard
17 to the purely private conduct of members of the bar, extreme care should be exercised to guard
18 against potential abuses of that power. It would not be appropriate for the Court or the State Bar to
19 declare particular lifestyles, beliefs or ideas to be “off limits” to members of the bar. The proposed
20 rules therefore should not be enforced to impress viewpoint-based restrictions relating to a lawyer’s
21 fundamental rights regarding religious, political, or gender-based or lifestyle choices. Respectfully,
22 this Court and the State Bar also must exercise caution to draw clear, understandable and, most
23 importantly, principled distinctions in defining and in regulating “unprofessional conduct” and
24 “conduct unbecoming” under the proposed rule changes.

1 **4. Potential Problem of Multiplicity**⁵

2 The scope of the proposed rule changes (that is, “unprofessional conduct” and “conduct
3 unbecoming a member of the bar”) obviously is broader than “conduct prejudicial to the
4 administration of justice” under Ethical Rule 8.4(d). Otherwise, if the conduct prohibited by the
5 proposed rule changes is the same, the proposed rules would be unnecessary and would constitute
6 “mere surplusage.” Instead, the proposed rules purport to restrict and to prohibit “unprofessional
7 conduct” and “conduct unbecoming” *at all times*, “whether or not engaged in the practice of law.”
8 The proposed rules thus are broader in scope and encompass conduct which may not be, strictly
9 speaking, “prejudicial to the administration of justice.”

10 The undetailed definition of “unprofessional conduct” allows for a broad spectrum of
11 misconduct to fall within its purview, however. Every breach of an ethical rule, and every “knowing
12 and substantial violation of the oath of admission to the bar,” arguably also could constitute and could
13 be charged as “unprofessional conduct” or “conduct unbecoming.” Respectfully, no legitimate
14 interest would be served by enacting rules that would allow or encourage an *unreasonable*
15 multiplication of charges based on the same underlying conduct.⁶

16 Unquestionably, the facts and circumstances of some disciplinary cases may well warrant a
17 charge, conviction and punishment for *both* a substantive ethics violation *and* for “unprofessional
18 conduct” under the proposed rules. Equally clear, however, is that – again depending on the facts of a
19 particular disciplinary matter – a charge, conviction and punishment only for the underlying ethics
20 violation may more accurately reflect the accused’s culpability. The use of “unprofessional conduct”
21 or “conduct unbecoming” charges appropriately should be limited only to those situations where the
22 accused lawyer’s misconduct is sufficiently serious that it also warrants a separate charge under the
23 proposed new rules.

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26 ⁵ “Multiplicity,” as used herein, refers to the practice of charging essentially the same offense in several counts.

27 ⁶ Nonetheless, if the State Bar, based on the particular facts and circumstances before it, concludes that a lawyer engaged in acts punishable by the Ethical Rules, *and* the misconduct is sufficiently serious that it also amounts to “unprofessional conduct” or “conduct unbecoming a member of the bar,” then both offenses should be chargeable.

1 The problem of potential multiplicity is real, not imagined. Unquestionably, and
2 appropriately, the State Bar has broad discretion to determine the manner in which to charge
3 disciplinary matters. At the same time, as has been acknowledged in the criminal law context, as a
4 matter of policy it is unwise to permit the charging of both greater and lesser-included offenses (and
5 thus unreasonably to multiply the charges against a defendant). Unreasonable multiplication of
6 charges also arguably implicates constitutional concerns. Multiplicity could lead to the imposition of
7 multiple punishments for what essentially is one offense. Unreasonable multiplication of charges also
8 may have an adverse psychological effect on a disciplinary Hearing Officer by suggesting that the
9 offending lawyer committed not one but multiple offenses or engaged in a pattern of misconduct,
10 both aggravating factors under the ABA sanctioning guidelines. In the extreme case, unreasonable
11 multiplication of charges could interfere with due process and the lawyer's right to a fair hearing.

12 Most offenses under the substantive ethical rules are capable of somewhat clear definition. It
13 is possible to articulate the "nature of the offense" and the elements needed to constitute a violation.
14 In contrast, the State Bar's proposed rules changes (to prohibit "unprofessional conduct" and
15 "conduct unbecoming") are more appropriately viewed as "custom-based" disobedience and/or
16 character offenses, making clarity of definition decidedly more difficult. Disciplinary offenses that
17 arise from "unprofessional conduct" or "conduct unbecoming" nonetheless would appear to require
18 proof of additional and unique elements not included in the substantive ethical rules, including that
19 the misconduct be serious, material and of the nature described in the additional "Comment" language
20 proposed at page 5 *supra*. The specific facts of each disciplinary case will determine whether such
21 "custom-based" disobedience and/or character offenses are separate from or multiplicitious with other
22 substantive ethics violations.

23 Practical standards should exist for determining whether multiplication of charges is
24 reasonable in a particular disciplinary case. Perhaps the most that can be hoped for is that the
25 disciplinary authorities will embrace a philosophy and policy that charges will not be sought in
26 greater number and degree than reasonably can be supported with the evidence and that are necessary
27 to fairly reflect the gravity of the lawyer's misconduct. In this regard it respectfully may be helpful,

1 however, for the Court and/or the State Bar to develop guidelines by which charging decisions are to
2 be made and implemented. The development of such guidelines would enhance and evidence
3 consistency in charging decisions, as well as undercut potential allegations regarding selective
4 enforcement of the proposed rules. In any event, the remedy to a potential multiplicity problem with
5 the proposed rules would appear to be best-suited to resolution by rule or guidelines, rather than
6 having to deal with uncertainty and the development of a body of case law regarding the multiplicity
7 issue.

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1 **Conclusion**

2 This Court and the State Bar in recent years have taken some bold – even extraordinary – and
3 commendable actions to enhance both the quality of, and public opinion regarding, the legal
4 profession in Arizona. The mindset that lawyers are, first and foremost, “officers of the court,” and
5 are advocates for their clients or causes second, has firmly taken hold. The result is a discernible
6 improvement in the manner in which members of the bar interact and interrelate.

7 But much work remains to be done if we truly want to elevate the public image of the legal
8 profession. There are many facets to that task. The rule changes proposed by the State Bar are
9 entirely appropriate and necessary. In this Commenter’s respectful opinion, however, the proposed
10 rule changes do not go far enough in expressing the serious nature of the requirement that lawyers
11 refrain from engaging in “unprofessional conduct,” including “conduct unbecoming a member of the
12 bar.” Accordingly, modest clarifications as set forth herein are suggested.

13 RESPECTFULLY SUBMITTED this ____ day of May, 2006.

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