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2 (FIRM STATE BAR NO. 00032000)

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5 (STATE BAR NUMBER 011474)

6 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 IN THE MATTER OF:

R-10-0031

8 PETITION TO AMEND ER 8.4, RULE 42,
ARIZONA RULES OF THE SUPREME
9 COURT

MARICOPA COUNTY ATTORNEY'S
COMMENT TO PETITION TO AMEND ER
8.4, RULE 42, ARIZONA RULES OF THE
SUPREME COURT

10 The Maricopa County Attorney hereby comments to the Petition to Amend ER 8.4, Rule
11 42, Arizona Rules of the Supreme Court.

12 Respectfully submitted this 20 day of May, 2011.

13 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

14 BY:


15 Mark C. Faull
16 Chief Deputy
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The State Bar of Arizona (the “Bar”) seeks to incorporate language from the 2003
3 Comment, Paragraph 3, into the Rule itself. Further, the Bar seeks to add the term “gender
4 expression” to the list of enumerated classifications that a lawyer cannot knowingly manifest
5 bias or prejudice against. The language in the existing Comment already prohibits bias or
6 prejudice based on sex, sexual orientation and gender identity, which already covers an
7 individual’s expression of their gender. The Bar neither explains why the existing language is
8 insufficient, nor why the Comment’s language cannot remain as a Comment, rather than being
9 incorporated into the Rule. The Maricopa County Attorney’s Office is particularly concerned
10 about the inclusion of “gender expression” and the possible issues the addition of this vague
11 language could lead to. We believe that this amorphous category is unnecessary given the
12 language already in the Comment.

13 The rules from other jurisdictions that are cited by the Bar in support of this change do
14 not include the term “gender expression”. Also, the Bar does not provide an explanation
15 regarding why this additional language is necessary or desirable. The term “gender expression”
16 is vague and subject to interpretations that might include sexually deviant behavior.

17 The existing language, in Comment form, appears sufficient to address any concerns of
18 bias or prejudice. Should the language in the Comment be codified into the Rule, however, the
19 language as it currently exists, which is similar to the language in the rules cited by the Bar,

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1 should remain. The term “gender expression” is vague, confusing, and subject to interpretation
2 that could be damaging to the legal profession and should be excluded for those reasons.

3 Respectfully submitted this 30th of May, 2011.

4 WILLIAM G. MONTGOMERY
5 MARICOPA COUNTY ATTORNEY

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8 Mark C. Faull
9 Chief Deputy
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