

1 **HELM, LIVESAY & WORTHINGTON, LTD.**
1619 E. Guadalupe, Suite One
2 Tempe, Arizona 85283-3970
Office: (480) 345-9500
3 Facsimile: (480) 345-6559
Email: livesay.roberta@hlwaz.com
4 Roberta S. Livesay - AZ Bar # 010982

5
6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

8 IN THE MATTER OF:

Supreme Court No. R-10-0031

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

**Comment to Petition to Amend ER 8.4,
Rule 42, Arizona Rules of the Supreme
Court**

12
13
14 The undersigned attorney hereby comments to the Petition to Amend ER
15 8.4, Rule 42, Arizona Rules of the Supreme Court. The State Bar of Arizona has
16 petitioned this Court to amend ER 8.4, Rule 42, Arizona Rules of the Supreme
17 Court, by adding the following language: “It is professional misconduct for a
18 lawyer to knowingly manifest bias or prejudice based upon race, gender, religion,
19 national origin, disability, age, sexual orientation, gender identity or expression,
20 or socioeconomic status in the course of representing a client when such actions
21 are prejudicial to the administration of justice; provided, however, this does not
22 preclude legitimate advocacy when such classification is an issue in the
23 proceeding.”

24 Respectfully, there is no need for such language to be added to ER 8.4. The
25 current ER 8.4 (d) encompasses all of the new language within the intent of the
26 current Rule. *See*, Comment [amended effective Dec. 1, 2002] to ER 8.4. To my
knowledge, there has been no finding of fact by any committee of the State Bar

1 that any offense has been committed that would necessitate this change to the
2 Rule, or that, but for the lack of this language being codified into the Rule instead
3 of merely in the comment, such offense would not have occurred.

4 While for the most part, I practice in areas of law where such revision will
5 not impact directly on my practice, I fear that this revision will marginalize
6 attorneys who are also people of faith. Attorneys who represent clients in private
7 placement adoptions may be asked by a birthmother to exclude from
8 consideration potential adoptive parents due to gender identity or expression, on
9 the basis of the birthmother's religious belief. If the attorney agrees, perhaps on
10 the basis of her own religious beliefs, does she violate new ER 8.4?

11 This is only one isolated example that comes quickly to mind. I do not
12 practice in the area of domestic relations or child custody or similar areas of law
13 where I fear the issue may present itself more often. The exclusion that "this does
14 not preclude legitimate advocacy when such classification is an issue in the
15 proceeding" is of some comfort. However, in the absence of any study showing
16 that the current ER with the committee comment has failed to deter any
17 objectionable conduct, and given that the new language steps into the realm of
18 religious freedom and beliefs that have prevailed for millennia, the new language
19 is fraught with uncertainty as to whether it will be used as a shield, or as a sword.

20 The current language is working well and seems far superior to the
21 proposed.

22 **CONCLUSION**

23
24 For the foregoing reasons, the undersigned attorney opposes the State Bar's
25 proposed amendments to the Arizona Rules of the Supreme Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Respectfully submitted this 1st day of November, 2011.

/s/ Roberta S. Livesay

Roberta S. Livesay
HELM, LIVESAY & WORTHINGTON, LTD.
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283-3970

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 1st day of November, 2011,

By: /s/ Terry Young

A copy was mailed to:

John A. Furlong
General Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, Arizona 85016

this 1st day of November, 2011,

By: /s/ Terry Young