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

7 IN THE MATTER OF:

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

Supreme Court No. R-10-0031

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

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13 The undersigned attorneys hereby submit this comment to the State Bar of  
14 Arizona's Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme  
15 Court. The State Bar has petitioned this Court to amend ER 8.4, Rule 42, Arizona  
16 Rules of the Supreme Court, with the following language: "It is professional  
17 misconduct for a lawyer to knowingly manifest bias or prejudice based upon race,  
18 gender, religion, national origin, disability, age, sexual orientation, gender identity  
19 or expression, or socioeconomic status in the course of representing a client when  
20 such actions are prejudicial to the administration of justice; provided, however,  
21 this does not preclude legitimate advocacy when such classification is an issue in  
22 the proceeding." We oppose this proposal because, as we will explain, it is a  
23 misguided effort that threatens the constitutional rights of attorneys while seeking  
24 to address a nonexistent problem of attorney discrimination. Adopting other  
25 regulatory language, which we discuss below, would protect the rights of  
26 attorneys while affirming the dignity of all clients by protecting them from all  
forms of invidious discrimination.

1           At the outset, we stress that the proposed rule appears to be a suggested fix  
2 for a nonexistent problem. The proposal’s apparent concern is to remedy and  
3 prevent the purported problem of attorneys manifesting bias and prejudice on the  
4 bases listed therein. But the State Bar has not even alleged, much less  
5 demonstrated, that any attorney has manifested bias or prejudice on any of these  
6 bases in the course of representing a client. On the contrary, it does not appear  
7 that a complaint has ever been filed in Arizona invoking the concerns that the Bar  
8 seeks to redress here. Accordingly, the Bar has failed to show any need for the  
9 proposed rule change.

10           Nevertheless, if Arizona’s attorneys are of such quality that they need an  
11 explicit rule to tell them not to prejudice the administration of justice by engaging  
12 in improper discrimination—a premise that we doubt—we submit that the State  
13 Bar could effectively accomplish that goal through a different amendment to ER  
14 8.4 and its comments. For example, the Bar could leave the relevant text of ER  
15 8.4 as it currently reads (“It is professional misconduct for a lawyer to . . . engage  
16 in conduct that is prejudicial to the administration of justice”), and substitute the  
17 following language in place of current Comment 3 to ER 8.4: “Conduct that is  
18 prejudicial to the administration of justice includes discriminating against a client  
19 in the course of representation without a rational and legitimate basis for that  
20 conduct.”

21           This alternative proposal would protect every client from the type of  
22 invidious discrimination that gave rise to protecting certain classifications, such as  
23 race or sex. It would also have the advantage of focusing all professional-  
24 misconduct inquiries on the reason for the attorney’s action (rather than on a list  
25 of protected classifications). And it would avoid injecting into the ethical rules  
26 the political agendas surrounding the classifications of “sexual orientation” or

1 “gender identity and expression.” Thus, inserting the above-suggested language  
2 in Comment 3 in place of the provision currently there (or the provision that the  
3 State Bar wants to write into the rule itself) is a sound alternative that effectively  
4 addresses the Bar’s goal of prohibiting discrimination.

5 Additionally, rather than jeopardizing attorney autonomy and constitutional  
6 freedoms, which is what the Bar’s current petition threatens to do, *see* Concerned  
7 Attorneys’ Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the  
8 Supreme Court, July 15, 2011, at 1-11, the Bar could propose a provision that  
9 expressly protects those interests. To that end, the Bar could include the  
10 following language in the new Comment 3: “Because attorneys’ advocacy and  
11 advocacy-based decisions implicate their constitutional rights and conscience  
12 concerns, this ethical rule does not forbid any advocacy in the course of  
13 representation or any advocacy-based decisions about whether to commence,  
14 decline, continue, discontinue, or terminate representation.” This language  
15 ensures that the Bar’s efforts to protect the dignity of clients by shielding them  
16 from arbitrary discrimination will not infringe the rights of attorneys.

17 In sum, then, we urge the Court to reject the State Bar’s pending petition to  
18 amend ER 8.4 because that proposal—through its attempt to prohibit certain  
19 forms of discrimination—threatens the constitutional rights of attorneys. The Bar  
20 could accomplish its goal of prohibiting discrimination while simultaneously  
21 protecting the rights of attorneys. Indeed, as we have shown herein, the Bar could  
22 achieve these two objectives by keeping the current language of ER 8.4 and  
23 replacing Comment 3 with the following:

24 Conduct that is prejudicial to the administration of justice includes  
25 discriminating against a client in the course of representation without  
26 a rational and legitimate basis for that conduct. Because attorneys’  
advocacy and advocacy-based decisions implicate their constitutional

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rights and conscience concerns, this ethical rule does not forbid any advocacy in the course of representation or any advocacy-based decisions about whether to commence, decline, continue, discontinue, or terminate representation.

**CONCLUSION**

For the foregoing reasons, we oppose the State Bar’s proposed changes to the Arizona Rules of the Supreme Court.

Respectfully submitted this 1st day of November, 2011.

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

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