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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 IN THE MATTER OF:

Supreme Court No. _____

10 PETITION TO AMEND COMMENT
11 [3] TO ER 8.4, RULE 42, ARIZONA
12 RULES OF THE SUPREME COURT

**Petition to Amend Comment [3] to ER
8.4, Rule 42, Arizona Rules of the
Supreme Court**

13 The Petitioner, Cathi W. Herrod, pursuant to Rule 28, Ariz. R. Sup. Ct.,
14 hereby respectfully petitions this Court to amend Comment [3] to Ethical Rule
15 8.4, within Rule 42, Ariz. R. Sup.Ct., which addresses what attorney behavior
16 constitutes action prejudicial to the administration of justice. The specific
17 language of the proposed amendment is set forth below and in Appendix “A”
18 attached hereto.
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20 **I. The Current Comment [3].**

21 Ethical Rule 8.4(d) provides that it is professional misconduct for a lawyer
22 to engage in conduct that is prejudicial to the administration of justice. The
23 current Comment [3] to Ethical Rule 8.4 reads: “A lawyer who, in the course of
24 representing a client, knowingly manifests by words or conduct, bias or prejudice
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1 based upon race, sex, religion, national origin, disability, age, sexual orientation,
2 gender identity or socioeconomic status, violates paragraph (d) when such actions
3 are prejudicial to the administration of justice. This does not preclude legitimate
4 advocacy when race, sex, religion, national origin, disability, age, sexual
5 orientation, gender identity or socioeconomic status, or other similar factors, are
6 issues in the proceeding. A trial judge's finding that peremptory challenges were
7 exercised on a discriminatory basis does not alone establish a violation of this
8 Rule.”

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12 Comment [3], as it currently exists in Arizona, tracks Comment [3] to Rule
13 8.4 of the ABA Model Rules of Professional Conduct, except that Arizona, in
14 addition to the specially protected classes recognized by the Model Comment, has
15 added “gender identity” to the list of specially protected classes. Of those states
16 that have adopted the model Comment, no state except Arizona has recognized
17 “gender identity” as an additional protected class. Recently, the State Bar of
18 Arizona proposed to add still another protected class to the list of protected classes
19 – namely “gender expression” - and to elevate the Comment to a Rule. The State
20 Bar withdrew that petition after a significant number of Arizona attorneys
21 objected to it.

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25 Many states have rejected the model Comment in its entirety. Among those
26 states are Alabama, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi,

1 Montana, Nevada, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode
2 Island, Texas, Virginia, West Virginia, and Wyoming. This petition does not seek
3 to eliminate Comment [3], but rather seeks to make it more inclusive and
4 objectively understandable so that attorneys know with some degree of certainty
5 what behavior is being proscribed and to what circumstances the Rule applies.
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8 **II. The Proposed Amendment.**

9 This Petition proposes to amend Comment [3] to read: “A lawyer may
10 violate this Rule when, in the course of representing a client, (a) the lawyer uses
11 words or engages in conduct that the lawyer knows or should have known
12 invidiously discriminates against, threatens, harasses, intimidates, or defames an
13 individual and (b) those words or that conduct creates a substantial likelihood of
14 material prejudice to the administration of justice by undermining the impartiality
15 of the judicial system. This Rule does not preclude legitimate advocacy. This
16 Rule shall not limit or impair the right of a lawyer to accept, decline, or withdraw
17 from the representation of a client. A trial judge’s finding that peremptory
18 challenges were exercised on a discriminatory basis does not alone establish a
19 violation of this Rule.”
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24 **III. Purposes of the Proposed Amendment.**

25 The proposed amendment serves several important purposes.

26 First, it clarifies what words and conduct are prohibited by limiting its

1 proscription to words or conduct that invidiously – that is, arbitrarily and
2 baselessly – discriminates, or that threatens, harasses, intimidates, or defames an
3 individual. This clarification is necessary because the current Comment merely
4 proscribes words or conduct that “manifests . . . bias or prejudice” against several
5 identified specially protected classes – a description that is vague and fails to
6 provide lawyers with any degree of certainty as to what specific conduct is
7 proscribed.
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10 Second, the amendment clarifies that, in order for an attorney to be subject
11 to discipline under Rule 8.4(d), the attorney’s conduct must create a substantial
12 likelihood of materially prejudicing the administration of justice by actually
13 undermining the impartiality of the judicial system. This amendment is necessary
14 in order to distinguish between conduct that actually prejudices the administration
15 of justice and conduct that some individual might merely perceive as being
16 subjectively offensive.
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19 Third, the amendment makes the Comment more inclusive by eliminating
20 the special classes of protected persons that, by their specific inclusion, appear to
21 exclude other equally deserving persons from protection. Conduct that actually
22 prejudices the administration of justice should subject an attorney to discipline
23 regardless of whether the conduct involves a specially identified group.
24 Proscriptions against invidious discrimination, as well as conduct that threatens,
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1 harasses, intimidates, or defames, should apply equally to everyone, not just
2 certain specially recognized individuals and groups.

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4 Fourth, the elimination of the list of specially protected classes prevents the
5 bar and the judiciary from creating policy that is more appropriately made by the
6 legislature. The list of protected classes in the current Comment recognizes
7 protected classes that the state legislature has not recognized. This amendment
8 protects the bar and the judiciary from wading into contentious issues that are
9 hotly debated by lawyers and that are better reserved for those branches of
10 government that are entrusted with policy decisions.

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13 Fifth, by eliminating the list of special classes of protected persons, the
14 amendment eliminates the need for frequent and endless future amendments to the
15 Comment to add additional classes of protected persons to satisfy the demands of
16 special interest groups. The necessity of this preventative purpose is historically
17 demonstrated. Recent history demonstrates that the current Comment will be
18 regularly subject to attempts to add protected classes. The Comment already
19 recognizes the special class of “gender identity” – a class not recognized in the
20 ABA Model Comment. And just last year it was proposed that a new class –
21 “gender expression” – be added to the ever growing list of specially protected
22 people. That process is theoretically endless as each new group seeks special
23 mention and protection for its particular characteristics or behavior.
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1 Finally, the proposed amendment makes it clear that the Rule may not
2 interfere with a lawyer's professional and moral autonomy in accepting, declining,
3 or withdrawing from representation. The current Comment purports to apply only
4 to acts of attorneys "in the course of representing a client." However, case law
5 suggests that determining when representation of a client begins is far from clear,
6 with many courts holding that an attorney-client relationship can arise through
7 informal contacts between an attorney and the alleged client and without the
8 necessity of a formal agreement of representation. Further, there are many
9 circumstances where the nature of the legal representation changes after an
10 attorney has agreed to the representation, either through the revelation of
11 information unknown to the attorney before agreeing to the representation or a
12 change in the client's strategies or goals after the representation has commenced,
13 either of which, had it been known to the attorney prior to agreeing to the
14 representation, may have led the attorney to have initially declined representation.
15 Consequently, the Comment needs to make clear that the Rule will not interfere
16 with a lawyer's right to accept, decline, or withdraw from representation. The
17 Preamble to the Arizona Rules of Professional Conduct states that a lawyer's
18 professional responsibilities are not only prescribed by the Rules of Professional
19 Conduct, but are "also guided by [the lawyer's] personal conscience." The
20 Preamble also provides that an attorney has an "interest in remaining an ethical
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1 person” and that a lawyer’s conflicting responsibilities “must be resolved through
2 the exercise of sensitive professional and moral judgment.” Therefore, the Rules
3 must not compel attorneys, in their client representation decisions, to violate their
4 conscience or sincerely held religious beliefs or moral principles. This
5 amendment is necessary to make clear that the Rule respects the religious, moral,
6 and ethical beliefs of attorneys in their client selection and retention decisions and
7 will not present attorneys with the choice of having to either violate their own
8 conscience or be disciplined by the bar.
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12 In short, it is important to amend Comment [3] in accordance with this
13 Petition in order to (1) cure the vagueness of the current Comment and objectively
14 define for attorneys the acts that could lead to professional discipline; (2) ensure
15 that attorneys are not subject to professional discipline that may adversely affect
16 their professional and personal reputations except in cases where it is clear that the
17 attorneys’ actions constitute invidious discrimination or that threaten, harass,
18 intimidate, or defame, and that have had the effect of substantially prejudicing the
19 administration of justice by actually undermining the impartiality of the judicial
20 system; (3) ensure the equal protection of all by not granting special protected
21 status to certain persons and groups and impliedly denying such protection to
22 others; (4) protect the bar and the judiciary from involving themselves in
23 contentious political and policy debates that are more appropriately left to the state
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1 legislature; (5) avoid repeated amendments to the Comment whenever an interest
2 group seeks to add to the list of specially protected groups; and (6) avoid
3 encroaching upon and violating the constitutionally and professionally protected
4 rights of attorneys to practice law without being forced to violate their sincerely
5 held religious, ethical, and moral principles.
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8 For the reasons set forth above, the Petitioner respectfully petitions this
9 Court to amend Comment [3] to Ethical Rule 8.4, under Rule 42 of the Arizona
10 Rules of the Supreme Court, as set forth in Appendix "A" attached hereto.
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13 **RESPECTFULLY SUBMITTED** this 10th day of January, 2012.
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15 _____
Cathi W. Herrod, AZ Bar No. 009115

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17 Electronic copy filed with the Clerk of the Supreme Court of Arizona
this 10th day of January , 2012,

18 By:

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Cathi W. Herrod
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[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in

1 that category. A pattern of repeated offenses, even ones of minor significance
2 when considered separately, can indicate indifference to legal obligation.
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4 [3] A lawyer may violate this Rule when, in the course of representing a client,
5 (a) the lawyer uses words or engages in conduct that the lawyer knows or should
6 have known invidiously discriminates against, threatens, harasses, intimidates, or
7 defames an individual and (b) those words or that conduct creates a substantial
8 likelihood of material prejudice to the administration of justice by undermining
9 the impartiality of the judicial system. This Rule does not preclude legitimate
10 advocacy. This Rule shall not limit or impair the right of a lawyer to accept,
11 decline, or withdraw from the representation of a client. A trial judge's finding
12 that peremptory challenges were exercised on a discriminatory basis does not
13 alone establish a violation of this Rule.
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15 [4] A lawyer may refuse to comply with an obligation imposed by law upon a
16 good faith belief that no valid obligation exists. The provisions of ER 1.2(d)
17 concerning a good faith challenge to the validity, scope, meaning or application of
18 the law apply to challenges of legal regulation of the practice of law.
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20 [5] Lawyers holding public office assume legal responsibilities going beyond
21 those of other citizens. A lawyer's abuse of public office can suggest an inability
22 to fulfill the professional role of lawyers. The same is true of abuse of positions
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1 of private trust such as trustee, executor, administrator, guardian, agent and
2 officer, director or manager of a corporation or other organization.
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