

Kathy I. Zatari
NATIONAL LAWYERS GUILD -
CENTRAL ARIZONA CHAPTER
P.O. Box 8172
Scottsdale, Arizona 85252
(602) 714-8517
zatariki@gmail.com

**IN THE SUPREME COURT
STATE OF ARIZONA**

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

Supreme Court No. R-12-0018

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

Introduction

The National Lawyers Guild – Central Arizona Chapter (NLG-AZc) urges this Court to reject Petitioner Cathi Herrod’s Petition to Amend Comment [3] to ER 8.4, filed January 10, 2012.¹ In essence, Petitioner would have this Court strip ER 8.4 of any language defining lawyer misconduct to include discrimination based on race, sex, religion, national origin, disability, age, sexual orientation, gender identity (or expression), or socioeconomic status. In its place, Petitioner’s proposed amendment

¹ See <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/1632/view/topic/Default.aspx>

provides nothing more than a vague proscription against conduct a lawyer knows or should know may harm an individual. The proposed amendment would effectively gut the rule of any protections for historically disfavored classes of people who seek legal counsel.

The standard Petitioner proposes would return us to an era some six decades ago when attorneys could engage, with impunity, in discriminatory conduct against women, racial and ethnic minorities, people with disabilities, and other disadvantaged groups. American Bar Association Model Rule 8.4 (upon which Arizona ER 8.4 is largely based) was promulgated in recognition of our profession's ethical responsibilities to ensure fairness and to combat bias against ethnic minorities, women, religious minorities, the LGBTQ community, and other groups facing discrimination. Since its promulgation in 1983, the rule (or one substantially similar to it) has been adopted by the vast majority of states.²

We are mindful, as attorneys, of our responsibility to secure the public trust. The Preamble of our Rules of Professional Conduct reminds us that as representatives of clients, officers of the legal system, and public citizens, we have a “special responsibility for the quality of justice.” The Preamble

² See http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html

further instructs us that our duties should not be seen within the narrow confines of a specific attorney-client relationship. Rather, it directs that “[w]hether or not engaging in the practice of law, lawyers should conduct themselves honorably.” The Petitioner’s proposed amendment is antithetical to our profession’s ethical responsibilities and to the values of a civil society.

By Removing Language Barring Discrimination Based on Race, Gender, Religion, National Origin, Disability, Age, Sexual Orientation, Gender Identity, or Socioeconomic Status, Petitioner’s Amendment Would Dismantle Legal Protections for Historically Disadvantaged Group

It is self-evident that people are not discriminated against simply as individuals. Rather, people face discrimination based on their gender, race, religion, or other classes with which they are identified. That Petitioner fails to grasp the extent of discriminatory conduct against those of certain races, religions, genders or sexual orientations is regrettable. Perhaps Petitioner does not believe people are discriminated against on such bases. She is entitled to her beliefs, however removed they may be from reality and recorded history.

Petitioner claims her proposal to remove language regarding race, gender, religion, and other class designations would make ER 8.4 “more inclusive.” She claims that “(t)he amendment makes the Comment more inclusive by eliminating the special classes of protected persons that, by

their specific inclusion, appear to exclude other equally deserving persons from protection.” The claim is as false as it is ludicrous. Comment [3] contains no such “exclusion” of “equally deserving persons.” The provision is not limited to any specific gender, any specific race or nationality, any specific sexual orientation, or any specific religion. If a straight white Christian male believes an attorney has discriminated against him because of his race, his sexual orientation, his religion, or his gender, he is certainly entitled to invoke the language of the existing provision. This Court should view these sorts of groundless claims of “exclusion” for what they really are – code for an agenda driven by those with extremist political views to dismantle hard-fought legal rights and protections for those who actually have suffered discrimination because of their race, gender, religion, or sexual orientation.

The Proposed Amendment is Unduly Vague, and Sets Forth No Ascertainable Standards of Conduct

The proposed amendment provides absolutely no standards of conduct by which to determine a violation of ER 8.4. Petitioner claims her proposed amendment “clarifies” standards for disciplinary review. In fact, the reverse is true. By striking all references to gender, race, religion, or other identifying class, the proposed amendment provides absolutely no

meaningful basis for review. It would have the Arizona Bar and this Court examine words or conduct that “discriminates, threatens, harasses, intimidates or defames” an individual. The proposed amendment would thus encompass activities like aggressive collection tactics and harassment utterly unrelated to discrimination based on identifying classes. The Bar and this Court would be inundated with any and all claims of perceived insult that may have nothing to do with discrimination based on gender, race, religion, sexual orientation, or other identifying characteristic.

Moreover, the proposed amendment would add the additional requirement that the attorney’s conduct “must create a substantial likelihood of materially prejudicing the administration of justice by actually undermining the impartiality of the judicial system.” Were the Court to accept this amendment, the effect would be to remove many well documented claims of discrimination. Attorneys would be permitted to engage in discriminatory conduct so long as their words or actions stayed outside the courthouse doors. The amendment would in effect create a private license to discriminate. It may be consistent with conduct and language that was tolerated many decades ago. That day has long since passed.

The proposed amendment is unduly vague, fails to meet even the most basic due process standards, and is impossible to enforce. NLG – AZc urges this Court to reject Herrod’s Petition in its entirety.

The Arizona Legislature Has No Authority to Regulate Attorney Conduct

Petitioner also claims that “(t)he elimination of the list of specially protected classes prevents the bar and the judiciary from creating policy that is more appropriately made by the legislature.” Since 1985, the State Bar of Arizona has been under the sole oversight of the Arizona Supreme Court. Quite simply, there IS no “policy role” for the legislature in regulating attorney conduct.

More importantly, there should be no “policy role” for the legislature to insert itself into the review of attorney conduct. Given the opportunity, the Arizona legislature could enact any number of laws permitting an attorney to engage in discriminatory conduct with impunity. The recent history of this legislature establishes that such actions are not merely speculative. To charge this legislature with the responsibility of determining standards for attorney conduct would thus be tantamount to charging the editors of *Hustler* with the oversight of obscenity standards. The regulation of attorney conduct

resides, and should continue to reside, within the sole jurisdiction of this Court.

Petitioner’s Proposed Amendment Violates Core Values of the State Bar of Arizona

The proposed amendment is anathema to every core value championed by the Arizona Bar. These core values – integrity, service to clients and the public, diversity, professionalism, promoting justice, and leadership – would mean nothing if Herrod’s Petition were granted. As to diversity, in particular, the Bar has said that this core value “represents our commitment to ensuring that the legal profession and the justice system reflect the community it serves in all of its social, economic, and geographical diversity.”³

There is simply no way, in the real world, to reconcile this core value with Petitioner’s proposed amendment. Her proposal would do nothing more than roll back the civil rights clock to the 1950’s. The Petitioner seeks a license long since rejected by civil societies that respect the rule of law.

³ See <http://www.azbar.org/aboutus/corevalues>

Conclusion

NLG – AZc urges this court to reject Herrod’s Petition in its entirety. Her proposed amendment does not “expand” protections beyond what she terms “specially recognized groups.” There are no “specially recognized” groups in the existing rule or Comment [3]. Any person – of any race, gender, religion or sexual orientation – may avail himself or herself of the protections of the existing rule. The Petitioner’s amendment is not needed to accomplish what she terms “inclusion”; under the existing rule, no one is denied the opportunity to present a claim of lawyer misconduct. This proposed amendment is nothing more than a thinly veiled attempt to strip Rule 8.4 of any language proscribing discrimination relating to gender, race, religion, sexual orientation, or other identifying class. NLG – AZc applauds the Arizona Bar’s declaration of core values, and its efforts to promulgate rules consistent with these values. As it stands, Comment [3] of Rule 8.4 simply describes a minimal standard of conduct in any decent society. We urge this Court to safeguard its language, and deny the pending Petition.

RESPECTFULLY SUBMITTED this 21st day of May 2012.

NATIONAL LAWYERS GUILD –
CENTRAL ARIZONA CHAPTER

By _____
Kathy I. Zatari
Authorized Representative
P.O. Box 8172
Scottsdale, Arizona 85252

Original and 6 copies hand-delivered
this 21st day of May 2012 to:

Clerk
Supreme Court of Arizona
1501 W. Washington, Suite 402
Phoenix, Arizona 85007

and copy mailed to:

Cathi W. Herrod
P.O. Box 97250
Phoenix, Arizona 85060
