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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 PETITION TO AMEND ETHICAL
12 RULE 8.4, RULE 42, ARIZONA
13 RULES OF THE SUPREME COURT

Supreme Court No. R-_____

**State Bar of Arizona Petition to
Amend ER 8.4, Rule 42, Ariz. R.
Sup. Ct.**

14 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona petitions the
15 Court to amend the comment to Ethical Rule (“ER”) 8.4, Arizona Rules of
16 Professional Conduct, contained in Rule 42, Ariz. R. Sup. Ct.

17 This petition is based on recommendations presented to the State Bar by a
18 nineteen-member task force that studied in detail ER 8.4’s comment [3] and attendant
19 issues. The proposal – revising only the comment, not the black letter of the rule –
20 balances the goals of promoting professionalism and nondiscrimination during the
21 representation of clients and supporting the fair administration of justice, while at the
22 same time respecting lawyers’ individual beliefs and freedom to choose the types of
23 client matters they will handle. It also provides lawyers with more specific guidance
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1 with respect to what constitutes “conduct that is prejudicial to the administration of
2 justice.”

3 **History of ER 8.4 Issue**

4 In June 2010, the State Bar filed a rule change petition (the “2010 petition”)
5 asking the Court to relocate most of the language currently in ER 8.4, comment [3],
6 into the rule itself and to add the phrase “gender expression,” a proposal that emanated
7 from the State Bar’s Sexual Orientation and Gender Identity Committee. In January
8 2011, the Court circulated the petition as part of its 2011 rules cycle, with comments
9 to be submitted by mid-May 2011.

10 The 2010 petition proposed deleting the first and second sentences of comment
11 [3] and adding a new ER 8.4(e), making it professional misconduct for a lawyer to:

12 (e) knowingly manifest bias or prejudice based upon race, gender,
13 religion, national origin, disability, age, sexual orientation, gender
14 identity or expression, or socioeconomic status in the course of
15 representing a client when such actions are prejudicial to the
16 administration of justice; provided, however, this does not preclude
legitimate advocacy when such classification is an issue in the
proceeding;

17 Only one comment – by the Maricopa County Attorney’s Office – was filed by
18 the deadline. After the deadline, seventy-one lawyers requested additional time for
19 comment. In light of this request, the State Bar, on July 21, 2011 asked the Court to
20 extend the comment period for ninety days. The Court reopened the matter for
21 comment until November 1, 2011 and allowed the State Bar to file a response to the
22 comments by December 31, 2011. During the extended comment period, additional
23 lawyers filed comments, both pro and con.
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1 After considering all comments, the State Bar, on December 20, 2011 filed a
2 motion asking to withdraw the 2010 petition to “further study the issue.” The Court
3 granted the Bar’s request in a December 22, 2011 order, in which it specifically noted
4 that “significant numbers of comments were received” and that the State Bar had filed
5 the motion to withdraw “to permit it to further study the issue.”

6 Slightly more than two weeks later, on January 10, 2012 an individual attorney,
7 Cathi W. Herrod, filed a new petition (“the Herrod petition”). The Court circulated
8 the Herrod petition for comments, which were due by May 21, 2012.

9 The Herrod petition proposes amending comment [3]:

10 A lawyer may violate this Rule when, who in the course of
11 representing a client, (a) the lawyer uses words or engages in conduct
12 that the lawyer knows or should have known invidiously discriminates
13 against, threatens, harasses, intimidates, or defames an individual and
14 (b) those words or that conduct creates a substantial likelihood of
15 material prejudice to the administration of justice by undermining the
16 impartiality of the judicial system. knowingly manifests by words or
17 conduct, bias or prejudice based upon race, sex, religion, national
18 origin, disability, age, sexual orientation, gender identity or
19 socioeconomic status, violates paragraph (d) when such actions are
20 prejudicial to the administration of justice. This Rule does not
21 preclude legitimate advocacy, when race, sex, religion, national
22 origin, disability, age, sexual orientation, gender identity or
23 socioeconomic status, or other similar factors, are issues in the
24 proceeding. This Rule shall not limit or impair the right of a lawyer to
25 accept, decline, or withdraw from the representation of a client. A trial
26 judge's finding that peremptory challenges were exercised on a
discriminatory basis does not alone establish a violation of this Rule.

27 In response to the Herrod petition, then-State Bar President Joe Kanefield,
28 along with then-President-Elect Amelia Craig Cramer, appointed a task force to
29 propose a State Bar comment to the Herrod petition. The task force was constituted

1 with a diverse group of attorneys having varying perspectives, including, among
2 others, representatives of those entities that had submitted comments in favor of and in
3 opposition to the State Bar's original petition, as well as others, including Maricopa
4 County Attorney Bill Montgomery; leaders of the State Bar's Sexual Orientation and
5 Gender Identity Committee; leaders of minority bar associations, including Asian,
6 Hispanic, African-American, Gay and Lesbian, and women; leaders of the Alliance
7 Defense Fund (now known as Alliance Defending Freedom); and community
8 organizations, including the NAACP, NOW, and the Secular Coalition of Arizona.
9 To meet the comment deadline, the task force was to prepare a report by March 30,
10 2012, for the Board of Governors' Rules Committee to consider.

11 During the task force's three meetings before that deadline – February 27,
12 March 12, and March 26, 2012 – it was clear that the task force could not reach a
13 consensus on a proposal.

14 The task force members agreed, however, that three meetings during a short
15 period of time were not sufficient to fully consider this serious issue and
16 recommended that the Court be asked to delay consideration of the Herrod petition for
17 a year.

18 In accordance with that recommendation, the State Bar Board of Governors
19 filed a comment on May 7, 2012, asking that the Court reject the Herrod petition and
20 delay action on the subject until the 2013 rules cycle, when the State Bar expected to
21 file a new proposal.

22 In response, the Court continued the Herrod petition, with comments due on
23 May 21, 2013, "to be considered in conjunction with any proposal emanating from the
24 State Bar Task Force established to study and make recommendations on this matter."
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1 The State Bar now asks the Court to adopt a version of the task force's
2 recommendation.

3 **Task Force ER 8.4 Proposal**

4 As part of its charge, the State Bar's task force reviewed ER 8.4 and comment [3]
5 and its history concerning the manifestation of bias or prejudice based upon certain
6 classifications of persons, the State Bar's 2010 petition, and the Herrod petition. It
7 also reviewed a variety of social and legal research submitted by task force members,
8 ranging from the Gay and Lesbian Task Force's Final Report to the State Bar Board of
9 Governors (April 1999) to "Hitting Below the Belt: Sex-Ploitive Ideology & the
10 Disaggregation of Sex and Gender," 14 REGENT U. L. REV. 215 (2001-02).

11 After reconvening for meetings on October 19 and November 2, the task force,
12 by majority vote, recommended melding aspects of the State Bar's 2010 petition with
13 changes recommended in the Herrod petition¹ to produce the following revised
14 comment [3]:

15 A lawyer violates paragraph (d) when, who, in the course of
16 representing a client, the lawyer knowingly discriminates against,
17 threatens, harasses, intimidates or defames an individual or group or
18 manifests by words or conduct, bias or prejudice based upon race,
19 sex, religion, national origin, disability, age, sexual orientation,
20 gender identity, gender expression, or socioeconomic status violates
21 paragraph (d) when such actions are prejudicial to the administration
22 of justice. This does not preclude legitimate advocacy when race, sex,
religion, national origin, disability, age, sexual orientation, gender
identity, gender expression, or socioeconomic status, or other similar
factors, are issues in the course of representing a client proceeding. A

23 ¹ The Herrod petition itself appeared to be based at least in part on a compromise drafted by interested
24 parties in December 2011, before the task force was established. The compromise was not submitted to
25 nor ever considered by the State Bar Board of Governors.

1 trial judge's finding that peremptory challenges were exercised on a
2 discriminatory basis does not alone establish a violation of this Rule.

3 The State Bar Board of Governors received and reviewed the task force's
4 recommendation and, having carefully considered the matter, now proposes that the
5 Court adopt the following amended version of comment [3]:

6 A lawyer violates paragraph (d) when, who, in the course of
7 representing a client, the lawyer knowingly discriminates against,
8 threatens, harasses, intimidates or defames an individual or group or
9 knowingly manifests by words or conduct, bias or prejudice based
10 upon race, sex, religion, national origin, disability, age, sexual
11 orientation, gender identity or socioeconomic status violates
12 paragraph (d) when such actions are prejudicial to the administration
13 of justice. This does not preclude legitimate advocacy when race,
14 sex, religion, national origin, disability, age, sexual orientation,
15 gender identity or socioeconomic status, or other similar factors, are
16 issues in the course of representing a client proceeding. A trial
17 judge's finding that peremptory challenges were exercised on a
18 discriminatory basis does not alone establish a violation of this Rule.

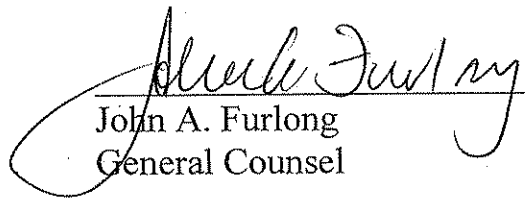
19 This proposed change specifies conduct (e.g., "threatens") that is problematic,
20 and, at the same time, retains the broader "manifests bias or prejudice" that not only is
21 part of Arizona's comment [3] but also is part of the American Bar Association's
22 comment [3] to Model Rule 8.4. It also clarifies that legitimate advocacy is justified in
23 the course of representing a client, not just in a court proceeding.

24 **Conclusion**

25 The State Bar respectfully requests that the Court adopt its new proposal, which
26 is based on its task force's recommendation, as set forth in Appendix A. The proposal
strikes an appropriate balance between lawyers' individual freedom and ensuring fair,
impartial and non-discriminatory administration of justice.

RESPECTFULLY SUBMITTED this 10th day of January, 2013.

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John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 10th day of January, 2013.

By: Kathleen A. Lundgren

APPENDIX A

Proposed changes (additions shown by underscoring and deletions shown by ~~strike-through~~) to ER 8.4, comment [3], Rule 42, Ariz. R. Sup. Ct.

[3] A lawyer violates paragraph (d) when, who, in the course of representing a client, the lawyer knowingly discriminates against, threatens, harasses, intimidates or defames an individual or group or knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status ~~violates paragraph (d) when such actions are prejudicial to the administration of justice.~~ This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the course of representing a client proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.