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(FIRM STATE BAR NO. 0003200)

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(STATE BAR NUMBER 003813)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:  
  
AMENDED PETITION TO AMEND RULES  
53, 31(a)(2) and 41(g), ARIZONA RULES OF  
THE SUPREME COURT.

ARIZONA SUPREME COURT  
No. R-05-0021

MARICOPA COUNTY ATTORNEY'S RESPONSE TO  
AMENDED PETITION TO AMEND RULES 53,  
31(a)(2), AND 41(g), THE ARIZONA RULES OF THE  
SUPREME COURT

The Maricopa County Attorney hereby responds to the Amended Petition to Amend Rules 53,  
31(a)(2) and 41(g), Arizona Rules of the Supreme Court.

Respectfully submitted this 5<sup>th</sup> day of May, 2007.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY: Philip J. MacDonnell  
PHILIP J. MACDONNELL  
CHIEF DEPUTY

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Several months ago, the Maricopa County Attorney’s Office filed a Comment to the State Bar’s  
3 initial Amended Petition to Amend Rules 53, 31(a)(2) and 41(g). The Supreme Court subsequently  
4 refused to adopt the Petition and has extended the time to comment on two alternative proposals, one  
5 which incorporates much of the original language in the Petition and one which suggests new language.  
6  
7 The Maricopa County Attorney’s Office wishes to supplement the original Comment in light of the new  
8 alternatives proposed by the Supreme Court.

9 The definition of “unprofessional conduct” in Alternative #1 in and of itself is of no concern.  
10 However, the Comment in Alternative #1 incorporates the language that the Maricopa County  
11 Attorney’s Office was concerned with originally. Namely, that lawyers should act professionally, at all  
12 times, “whether or not engaged in the practice of law”. Although the Comment has been restructured,  
13 this language remains and the Maricopa County Attorney’s Office would reiterate our object to this  
14 language as set forth in our initial Comment.  
15

16 Regarding Alternative #2, the Maricopa County Attorney’s Office finds the proposed  
17 definitional changes extremely troubling. Contrary to Alternative #1, the Comment in Alternative #2 is  
18 not problematic, but the definition of “unprofessional conduct” is.  
19

20 A statement that is aspirational and that describes appropriate conduct to members of the Bar is  
21 needed and encouraged, but Alternative #2 goes far beyond this and would create a broad new category  
22 of disciplinary possibilities that is ripe for abuse. To begin with, most of the descriptors used in  
23 proposed Rule 31(a)(2) are extremely vague. What constitutes “rudeness, disrespect, or incivility” in  
24 (a)(2)(E)(2); “without merit” in (a)(2)(E)(3); “intended to delay” in (a)(2)(E)(4); “repeatedly” in  
25 (a)(2)(E)(5); or “excessive or abusive” in (a)(2)(E)(6)? The conduct described in (a)(2)(E)(2-6) would  
26 all occur in the course of case preparation, settlement or trial. The court in these stages of a case has  
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1 oversight of the lawyers' conduct. If a judge believes that litigation is without merit, that tactics are  
2 inappropriate, that a lawyer has been tardy or absent for court proceedings, or that the discovery process  
3 has been abused, then the court has several sanctions at its disposal. If the court believes the conduct is  
4 unethical, then the court has a responsibility to notify the Bar. This system is already in place and the  
5 language in Alternative #2 is not a tool necessary for the court.  
6

7         What this proposed language would provide, however, is a tool for opposing counsel to  
8 manipulate or coerce the other party in the course of contentious litigation. Under the proposed  
9 language in subsection (4), for example, if a result of a claim is the draining of the other party's  
10 financial resources, that party's lawyer could assert this as an intended tactic in an attempt to intimidate  
11 the moving party and/or divert attention away from the merits of the case. Similarly, the proposed  
12 language in subsection (3) opens the door for claims of unprofessional conduct whenever there is a  
13 summary judgment, directed verdict or not responsible/not guilty finding in a case, as there would then  
14 have been a finding that the case was without merit. And perhaps most troubling from a prosecution  
15 perspective, the language in subsection (6) would allow opposing counsel to file a bar complaint  
16 whenever they think the State has not complied with their discovery requests, regardless of whether the  
17 court agrees with them or not. Because the plain language in Alternative #2 would seemingly allow  
18 counsel to make such complaints, they would not be acting unethically in doing so. The language in  
19 Alternative #2 is not necessary and would give litigants a Bar-sanctioned means to delay, distract and  
20 bully their opponents, although that is surely an unintended consequence.  
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23         Furthermore, neither the language in the Comment in Alternative #1 nor the definitional  
24 language in Alternative #2 is needed for the simple reason that the conduct described therein is already  
25 covered by existing Supreme Court Rules. Rule 42 covers most of the conduct the proposed language  
26 in Alternative #2 is aimed at (ER 3.1 deals with meritorious claims and contentions; ER 3.2 deals with  
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1 expediting litigation; ER 3.3 deals with candor toward the tribunal; ER 3.4 deals with fairness to the  
2 opposing party and counsel; ER 4.4 deals with respecting the rights of others; ER 8.4 deals with  
3 misconduct) and Rule 53 outlines grounds for discipline.  
4

5 For all of these reasons, the Maricopa County Attorney's Office would ask this Court to adopt  
6 Alternative #1 with the language "whether or not engaged in the practice of law" deleted and to deny  
7 Alternative #2 in its entirety.

8 Respectfully submitted this 18<sup>th</sup> of May, 2007.

9  
10 ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

11  
12 BY: Philip J. MacDonnell  
13 PHILIP J. MACDONNELL  
14 CHIEF DEPUTY

15  
16 Copies of the forgoing mailed  
17 this 18 day of May, 2007 to:

18 Clerk of the Court  
Arizona Supreme Court

19 Robert B. Van Wyck  
20 Chief Bar Counsel  
21 State Bar of Arizona  
4201 North 24<sup>th</sup> Street, Suite 200  
22 Phoenix, AZ 85016-6288  
(for Petitioner)  
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