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8 ARIZONA SUPREME COURT  
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11 **IN RE: PETITION TO AMEND ER**  
12 **8.4, RULE 42, ARIZONA RULES OF**  
13 **THE SUPREME COURT**  
14

R-17-0032

MARICOPA COUNTY ATTORNEY'S  
RESPONSE TO PETITION TO AMEND ER  
8.4, RULE 42, ARIZONA RULES OF THE  
SUPREME COURT

15 The Maricopa County Attorney hereby submits this Comment asking this  
16 Court to deny the Petition to Amend ER 8.4 because the overly broad language of the  
17 proposed change is unnecessary and it infringes on a lawyer's protected speech. The  
18 Petition to Amend ER 8.4 is based on the American Bar Association's (ABA)  
19 amendment to Model Rule 8.4(g) in 2016. Since that time, the revised Model Rule  
20 8.4(g) has been criticized on a numerous grounds.<sup>1</sup> The expansive and vague  
21 language threatens to infringe on speech protected by the First Amendment, leads to  
22 viewpoint discrimination, and fails to provide attorneys with adequate notice as to  
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27 <sup>1</sup> See e.g., Andrew Halaby and Briana Long, Letter to the Editor, ARIZONA ATTORNEY  
28 March 2017, at 12. See Appendix.

1 precisely what behavior is prohibited.<sup>2</sup>

2         Additionally, even if Petitioner had presented a proposal that satisfied free  
3 speech concerns, Petitioner has not provided any reason to change Arizona's current  
4 rule. Although Petitioner cites statistics from EEOC reports and reports filed with  
5 UN Committees, Petitioner shows no specific problem with Arizona lawyers that  
6 adopting the ABA change would cure. Indeed there are few conclusions that can be  
7 drawn from the statistics provided much less any conclusions about how granting the  
8 Petition would change them. Some conclusions Petitioner draws are themselves  
9 peculiar – such as the conclusion that lawyers only choose to work in government,  
10 the judiciary, or other public service work because they are “relegated” to that  
11 (apparently undesirable) work by invidious discrimination. [See Petition at 3].<sup>3</sup>  
12 Petitioner neither gives examples involving Arizona lawyers nor offers any specific  
13 hypothetical situations that this rule change could correct. Petitioner's citation to  
14 general nationwide statistics and bias studies falls short of demonstrating any  
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21 <sup>2</sup> The Attorneys General in South Carolina, Texas, Louisiana, and Tennessee have  
22 either opposed amendments to their state's rules of professional conduct based on the  
23 ABA language or opined that the amendment would violate the Constitution. The  
24 Montana legislature also rejected the proposed amendment in a joint resolution. See  
Appendix.

25 <sup>3</sup> Several of the statistics presented discuss hiring rates and the odds of becoming a  
26 partner in a law firm. Even if we assume that this data supports a conclusion of bias  
27 in hiring or partnership selections, how would the proposed rule eliminate this bias?  
28 Would this new rule subject law firms to discipline based on their hiring and  
partnership statistics?

1 problem in Arizona that needs to be or even can be corrected by the proposed  
2 changes.

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4 Arizona's current ethical rules already adequately prohibit conduct that  
5 manifests bias and prejudice when it is prejudicial to the administration of justice.  
6 This prohibition is sufficient for lawyer regulation. The proposed rule change does  
7 attempt to place some limits on its reach by inserting the phrase "conduct related to  
8 the practice of law." However, that phrase is so broad and undefined that it could  
9 cover the vast majority of what any lawyer does in any given day. Additionally, the  
10 proposed rule fails to define critical terms (certainly critical if you're the one facing  
11 discipline) like "harassment" and "discrimination."<sup>4</sup> Without defining its own terms,  
12 the proposed change apparently leaves to the judgment of the bar or the disciplinary  
13 authority to define prohibited conduct on a case by case basis providing little notice  
14 as to what is forbidden. Worse, the undefined terms makes the forbidden conduct  
15 completely malleable based on the shifting opinions of the bar who brings the charges  
16 and the disciplinary authority who rules on them.

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21 While Petitioner concludes by championing "the Rule of Law" and the  
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24 <sup>4</sup>The Petition does not specifically ask this Court to adopt the ABA comments to this  
25 rule. The comments attempts to provide some definitions of these terms but those  
26 definitions are even more concerning from a suppression of speech and overbreadth  
27 perspective than the proposed rule itself. Because Petitioner did not specifically  
28 request the addition of the comments to our rules, there is no point in discussing it  
adding the ABA comments.

1 “American values of fairness and equality” [Petition at 12], the unnecessary rule  
2 change would significantly infringe on another equally important American value –  
3 the ability for our citizens – including lawyers – to say what they believe, even if that  
4 belief is offensive to some. While there are limits to the freedom of speech, the  
5 current rule’s focus on actions that are prejudicial to the administration of justice  
6 strikes a reasonable balance. The proposed rule change fails to strike any balance at  
7 all and is instead an attempt to eliminate speech we do not like. For that reason  
8 alone, the Petition should be denied.  
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12 Respectfully submitted this 20 day of May, 2018.

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