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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of: )  
 ) Supreme Court No.  
 ) R - 21-0008  
PETITION TO AMEND ARIZONA RULES OF )  
THE SUPREME COURT RULE 24 )  
REGARDING JURY SELECTION )  
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The State Conference NAACP in Arizona was formed in 1911, only two years after the national NAACP was formed. African Americans in Arizona have been fighting for their freedom and equality for over 100 years. It's clear the goal has not yet been reached. This change would be one step closer to achieving "justice for all" as promised in the national Pledge of Allegiance.

**By Adding Language Barring Discrimination Based on Sex, Religion,  
National Origin, Disability, Age, Sexual Orientation, Gender,  
Petitioner's Amendment Would Improve Legal Protections for  
Historically Disadvantaged Groups**

It is self-evident that people are not discriminated against simply as individuals. Rather, people face discrimination based on their race, sex, religion, or other classes with which they are identified. Some have argued that today the sheer number of women attorneys means that discrimination is over. However, the facts show otherwise.<sup>1</sup> Sexual harassment complaints against judges, lawsuits regarding partnership decisions, and complaints about glass ceilings continue. The odds of a woman being made partner is less than one third of the odds for a man.<sup>2</sup> The 2003 EEOC report cited by Latoure shows that conditions of employment and promotions are now bigger issues than hiring. Women are relegated to “soft” law i.e. family law and trusts and estates versus corporate law or litigation or are relegated to government and public service work. The number of women in the profession has not decreased segregation.<sup>3</sup> As Latoure shows, “The EEOC report indicates, for example, that 20.7% of white women attorneys are employed by the government or the judiciary, in contrast to 7.6% of white men. The percentages of African-American lawyers and Hispanic lawyers in government and the judiciary are higher, 43.8% and 37.5%, respectively

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<sup>1</sup> Audrey Wolfson Latoure, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 Val. U. L. Rev. 859 (2005), Available at:

<http://scholar.valpo.edu/vulr/vol39/iss4/3>

<sup>2</sup> *Ibid.*, footnote 186.

<sup>3</sup> *Ibid.*, footnote 190

indicating even more prejudice. Moreover, women occupy less prestigious and less remunerative positions that deal with “personal plight, and that can be held on a part time basis.” Fiona Kay even goes so far as to characterize the legal profession as a ghettoizing occupation, rather than an integrating field, due to the manner in which women and minorities are “more highly represented among positions of lower authority, lower supervisory powers and lower prestige.”

Though that report was in 2005, things have not changed. The Society of American Law Teachers filed a report with the United Nations Committee on the Elimination of Racial Discrimination in 2014 with an impressive compilation of data.<sup>4</sup> They argued that racial minorities still face explicit and implicit bias and that such bias undermines legal education and the legal profession.<sup>5</sup> Since their last report, discrimination against minorities has increased rather than decreased.<sup>6</sup> They argue that the Supreme Court’s retreat from equality and affirmative action and the maintenance of public and private structural disparities violates several

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<sup>4</sup> Society of American Law Teachers Response to the U.S. Report of June 12, 2013, Racial Discrimination in the Legal Profession, Response to the Periodic Report of the United States of June 12, 2013, accompanied by the Common Core Document and Annex submitted on December 30, 2011, to the United Nations Committee on the Elimination of Racial Discrimination, June 30, 2014.

<sup>5</sup> Paragraph 2

<sup>6</sup> Paragraph 3

provisions of the International Convention on the Elimination of Racial Discrimination (ICERD).

To indicate that such discrimination still occurs among the profession as well as in the public, one study of bias used an identical legal memo for review by law firm partners with only the identification of the author different. If the reviewers thought the author was an African American, they gave it a 3.2 out of 5.0 rating but if they thought the author was a Caucasian, they gave it a 4.1 rating out of 5.0. In another study, 6,500 professors were studied at 259 top U.S. universities from 89 disciplines. Fictional PhD students whose names were changed to indicate ethnicity and gender but whose message was otherwise the same contacted the professors. Faculty ignored women and minorities at a higher rate than white males especially in higher-paying disciplines and private institutions.

These studies make it clear that bias has not evaporated but is very much endemic in the legal profession. Thus the preemptory challenges and jury strikes made by a prosecutor and agreed to by a judge cannot be guaranteed to be without prejudice. As the legal profession should embody the Rule of Law that includes equality and fairness, we must take internal steps to ensure that we hold ourselves to the highest standard.

## **The Proposed Amendment Enhances the Core Values of the State Bar of Arizona**

The proposed amendment is germane to every core value championed by the Arizona Bar – integrity, service to clients and the public, diversity, professionalism, promoting justice, and leadership. 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.”<sup>7</sup>

Alex Long, professor of law at University of Tennessee argues that even though including nondiscrimination language in the rules may not have a huge impact on discrimination and diversity, it is still worth doing.<sup>8</sup> His argument is that underrepresentation of individuals from various groups is still a significant problem. This is especially harmful in the legal profession because of the public perception and public trust. If the legal profession believes in equality and equal justice, then we have to live it. While blatant forms of discrimination are not so obvious anymore, implicit bias and institutional obstacles loom large. The King and Spalding suit kicked open

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<sup>7</sup> <http://www.azbar.org/aboutus/mission-vision-andcorevalues/> (accessed on Jan. 30, 2017)

<sup>8</sup> Alex B. Long, Professor of Law, University of Tennessee, Employment Discrimination in the Legal Profession: A question of ethics? University of Illinois Law Review, Vol. 2016, p. 444.

the ugly door. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Twenty years later, the *Clackamas Gastroenterology Associates Inc. v. Wells*.<sup>538</sup> U.S. 440, 450 (2003) suit showed the problem still existed. The Long article discusses the structural problems and resource limits of using these rules on discrimination issues and why they are not often used. But Long argues that including nondiscrimination rules should be enforced because lawyers must disseminate values of justice inside and outside the profession.

Passage of the rule cements the legal profession's commitment to the core values of equality of opportunity, equal treatment, access to justice, and diversity. "The legal system is, of course, based on principles of equality. Discriminatory conduct on the part of lawyers is especially troubling because it displays a lack of respect for these fundamental principles. In short, discriminatory conduct on the part of a lawyer raises a serious question regarding that lawyer's fitness as a lawyer. The legal profession's toleration of such conduct—or at least its failure to expressly condemn it—sends a signal to the public and members of the profession about the extent to which the profession has truly internalized these principles."<sup>9</sup> That is why we must ensure that such discriminatory conduct is not reflected in our jury selection.

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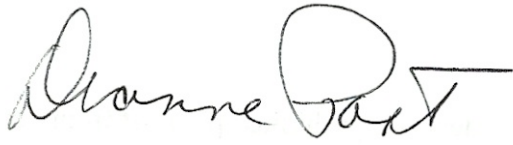
<sup>9</sup> Ibid

Discriminatory behavior impacts access to justice, diversity in the profession, and the public's perception of the legal profession. "As the ABA's Presidential Diversity Initiative has explained, "Without a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice." Such diversity must likewise extend to a jury. How can it be a "jury of our peers" when there are no peers on the jury? How can it reflect "we the people" when certain categories of people are excluded?

### **Conclusion**

In the last four years, racial discrimination and white supremacy has once again become hot topics in society. We have seen attacks on many segments of our society including women, immigrants, refugees, Muslims, Blacks, persons with disabilities, and veterans, from the highest quarters. The FBI has stated that white supremacy is the greatest threat to our national security. We have seen a mob of white supremacists attack the Capitol in Washington, D.C. to overturn an election. In the face of such attacks, lawyers who support the Rule of Law and long held American values of fairness and equality must be ever more vigilant to uphold these values in their own practice, in the courts, and in the society as a whole.

RESPECTFULLY SUBMITTED this February 11, 2021.

A handwritten signature in black ink that reads "Dianne Post". The signature is written in a cursive style with a large, looped initial "D" and a horizontal line extending from the end of the name.

Dianne Post

Electronic copy filed with the Clerk of the Supreme Court of Arizona this date: February 11, 2021