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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)
	) Supreme Court No. R-
PETITION TO AMEND ER 8.4, RULE 42,	)
	) Petition to Amend Rule
ARIZONA RULES OF THE SUPREME COURT	) 8.4, Rule 42
	)
	)
_____	)

Pursuant to Rule 28, Rules of the Supreme Court, the National Lawyers Guild, Central Arizona Chapter, respectfully petitions this court to adopt amendments to Rule 8.4, Rule 42, Supreme Court Rules governing attorney discipline and discrimination, as proposed below.

I. Background and purpose of the Proposed Rule Amendment

The American Bar Association Model Rule 8.4 (upon which Arizona's 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.[1]

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 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 proposed amendment is completely in concert with our profession's ethical responsibilities and to the values of a civil society.

By Adding Language Barring Discrimination Based on Race, Sex, Religion, National Origin, Ethnicity, Disability, Age, Sexual Orientation, Gender, Gender Identity, Marital Status or Socioeconomic Status, Petitioner's Amendment Would Improve Legal Protections for Historically Disadvantaged Groups

[1] See http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (accessed on 30 January 2017)

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.[2] 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.[3] 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.[4] 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. Moreover, women occupy less prestigious and less remunerative positions

[2] 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
[3] Ibid., footnote 186.
[4] Ibid, footnote 190

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 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.[5] They argued that racial minorities still face explicit and implicit bias and that such bias undermines legal education and the legal profession.[6] Since their last report, discrimination against minorities has increased rather than decreased.[7] They argue that the Supreme Court's retreat from equality and affirmative action and the maintenance of public and private structural disparities violates several provisions of the International Convention on the Elimination of Racial Discrimination (ICERD).

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[5] 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.

[6] Paragraph 2

[7] Paragraph 3

The unequal education, training and employment of minorities in the legal profession negatively impacts the equal treatment of the under-represented communities in the U.S. including in political office.[8] According to the ABA, minority representation in the law is only 9.7% compared to 20.8% among accountants and auditors, 24.6% among physicians and surgeons, and 18.5% among college and university teachers.[9] Since 2000, minority entry into the legal profession has slowed dramatically. The knock on effect of course is lower representation as lawyers and judges, political representatives, academics and as officers at large businesses – for Blacks at about one-third their population rate and for Hispanics about one-fourth their population rate.[10]

An even more recent survey [11] found that women and minorities are making very small and very slow gains. Both groups increased their representation among law firm partners from 2016 but only by .67% for women and .53% for minorities. As associates, women hold fewer positions than they did in 2009 while minorities increased .72%. However, the increase in minorities is linked to Asian increases who are up 2.2% while

[8] Paragraph 5
[9] Paragraph 65
[10] Paragraph 66 and 67
[11] Women and Minorities Make Slow Progress in Filling Ranks at Law Firms, By Elizabeth Olson, New York Times, Jan. 4, 2017

Hispanics increased .45% and African Americans only .06% and they along with women remain below their 2009 levels. The report noted that disabled lawyers are "scarce" at the associate and partner levels — only 283 lawyers across firms. The number of LGBT lawyers was 2,431 last year, including 825 partners.

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. 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.

Petitioner's 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. 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."[12]

The current Arizona Rule 8.4 has no black-letter anti-discrimination provision. Twenty-four U.S. jurisdictions have some type of antidiscrimination rule in their rules of professional conduct for lawyers. [13]

In Arizona's comment to the rule, it states:

> (3) A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude

[12] http://www.azbar.org/aboutus/mission-vision-andcorevalues/ (accessed on Jan. 30, 2017)
[13] Samson Habet, *ABA Delegates Overwhelmingly Aoprove Anti-Bias Rule,* ABA/BNALaw. Manual on Prof. Conduct, Aug. 10, 2016.

> legitimate advocacy when race, sex, religion, national original, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

However, the language in the comment limits application to when such actions are prejudicial to the administration of justice as opposed to the profession as a whole. Under that language, the effect would be to exclude many claims of discrimination. Attorneys would be permitted to engage in discriminatory conduct so long as their words or actions stayed outside the courthouse doors.

Yet, 22% of white women and 25% of minority women report harassment at work and minority men are 13% more likely than white men to report harassment. "In our most comprehensive specification the annual income gap between white heterosexual women and white heterosexual men is over $4,900 a year, while for minority women (including lesbians) the gap is over $9,000,"… [14]

[14] Heather Antecol, Deborah A. Cobb-Clark, and Eric Helland, "Bias in the Legal Profession: Self-Assessed versus Statistical Measures of Discrimination," *The Journal of Legal Studies*, Vol. 43, No. 2 (June 2014)

Alex Long, professor of law at University of Tennessee argues that even though including nondiscrimination language in the ethics rules may not have a huge impact on discrimination and diversity, it is still worth doing.[15] 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 the ugly door. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Twenty years later, the *Clackamas Gastroenterology Associates Inc. v. Wells.*538 U.S. 440, 450 (2003) suit showed the problem still existed. The Long article discusses the structural problems and resource limits of using these ethical rules on discrimination issues and why they are not often used. But Long argues that including the nondiscrimination rules in the ethical rules should be done because the lawyer disciplinary process serves multiple functions including dissemination of values inside and outside the profession. Such rules can educate lawyers and make them stop and think.

[15] 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.

Such a "soft law" approach is appropriate because it is difficult to prove implicit bias and structural causes of discrimination. Such a rule can educate lawyers about their duties and the subtle ways that discrimination manifests. Though it may be infrequently enforced, it can show lawyers the nature of the problem and need for change much like the *pro bono* assignments educate lawyers about the problem of lack of access to justice.

Further, it 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." [16]

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

[16] Ibid

bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice." Partly for this reason, diversity has increasingly come to be seen by the legal profession as a fundamental value of the profession.

The non-discriminatory language needs to be in the rule rather than in the comment to prevent well-documented claims of discrimination in law firm hiring, retention, training and promotion. More concerning is harassment by an attorney of witnesses, especially documented in rape and domestic violence cases, and harassment of court personnel, coworkers, including secretaries and paralegals, and other lawyers, especially women.

The ABA model rule still allows an attorney to decline or withdraw from a case based on that individual's personal belief and inability to represent a client to the fullest as required by the rules. The comments to the new ABA Model rule ensure that those who represent the most vulnerable of our society are not prohibited from doing so. Thus all sides are protected.

II. Contents of the Proposed Rule Amendment

After 18 years of discussion and two years of intense effort, the ABA added the following language to the model rules in August 2016:

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

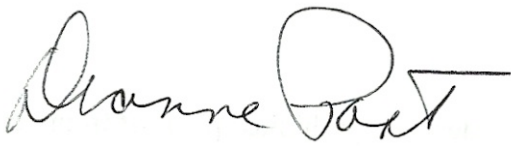
This petition asks that the Supreme Court adopt this rule as 8.4 (h).

Conclusion

Discrimination has once again become a hot topic in society. We have already seen attacks on many segments of our society including women, immigrants, refugees, Muslims, Blacks, persons with disabilities, and veterans, from the highest quarters. 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. It is well past time to

make Arizona a state with a black-letter rule against discrimination against our most vulnerable citizens.

RESPECTFULLY SUBMITTED this 23 day of February 2017.



NATIONAL LAWYERS GUILD –
CENTRAL ARIZONA CHAPTER
By Dianne Post Authorized Representative

Electronic copy filed with the Clerk of the Supreme Court of Arizona this 23rd day of February 2017.