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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,	) 17-0032
	) Petitioners Reply
ARIZONA RULES OF THE SUPREME COURT	)
	)
____	)

As the original petitioner, in response to the submissions regarding the proposed rule change, the NLG replies as follows:

FACTUAL BASIS

The legal profession is the nation's least-diverse profession according to Stanford law professor and leading ethics scholar Deborah Rhode. Eighty-eight percent of lawyers are white, compared to 81 percent of architects and engineers, 78 percent of accountants, and 72 percent of physicians and surgeons. Blacks, Latinos, Asian-Americans, and Native Americans make up a fifth of law school graduates, but they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations.

Women make up a third of the profession but only a fifth of law firm partners, general counsels of Fortune 500 corporations, and law school deans. Rhodes says both unconscious bias and double standards are at play as women and lawyers of color are ignored for networking and mentoring. [1]

The 2016 NALP report on diversity showed that women associates decreased more often than not since 2009 and Black associates have decreased every year since 2010 but for a small increase in 2016. Minority women and Black men are the least represented in law firms at every level. Asian-Americans and Hispanics have increased by less than 1% since 2009. Chung suggests that who's to blame is all of us. If diversity and inclusion is not engrained in the culture, it doesn't work. [2]

Since the submission of the petition in February 2017, the need for such an ethics rule has become even more urgent. The phenomena of #metoo has spread throughout the globe and illustrated that not only was Anita Hill right 25 years ago, but that women have suffered sexual harassment, discrimination and violence on an every day basis in every walk of life for centuries. Harassment of women is not just about education or employment or obtaining benefits, it is about every facet of women's lives

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[1] Debra Cassens, "Law is the Nation's Least-diverse profession, law prof says," Weiss, ABA Journal, May 28, 2015.
[2] Diversity in the Legal profession has Flatlined since the Great Recession; Who is to Blame? Above the Law, Renwei Chung, January 6, 2017.

where they face harassment from walking down the street to entering a restaurant to refusing a date.

My first time in court I was rudely told by the judge to get away from the lawyer's table and go sit in the back because secretaries were not allowed at the table. Other women lawyers have reported that they were tagged as the court reporter. Bryan Stephenson, an African-American of Equal Justice Initiative fame, tells the story of his court appearance before a new judge who told him he does not allow defendants to sit at the lawyer's table without their attorneys. He had to explain that he was the attorney. These indignities towards women and people of color happen daily and cause real, serious, and long-lasting harm.

A recent report by the Centers for Disease Control and Prevention [3] estimates that 1 in 3 women and 1 in 6 men in the U.S. experience contact sexual violence in their lifetime. A 2016 report from the Equal Employment Opportunity Commission estimates that between 25 percent to 85 percent of women in the U.S. experience workplace sexual harassment in their lifetimes. [4]

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[3] Smith, S.G., Chen, J., Basile, K.C., Gilbert, L.K., Merrick, M.T., Patel, N., Walling, M., & Jain, A. (2017). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control.

[4] Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace." June 2016.

A recent study in the Journal of Health and Social Behavior [5] looked at the consequences of this discrimination and harassment on physical and mental health. Women reported more stress and depression than men and reported discrimination four times more often than men. Women who reported discrimination are significantly more likely to self-report mental health problems, and women who experience sexual harassment are significantly more likely to report worse physical health. The more intersectional the discrimination (i.e. more types of discrimination combined e.g. age/gender or race/gender) the worse the health reports. Discrimination and harassment are not just legal and social justice issues but health issues as well.

The current federal administration's involvement in numerous cases of sexual abuse of women, bragging about sexual assault toward women, denigrating women and their body parts and bodily processes illustrates the growing public disparagement of women in our society. The actions of the administration have emboldened those who harbor these opinions not just to speak but to act. Hate crimes have risen dramatically, police shootings of

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[5] Catherine E. Harnois, João L. Bastos, First Published online: April 2, 2018

https://doi.org/10.1177/0022146518767407 Discrimination, Harassment, and Gendered Health Inequalities: Do Perceptions of Workplace Mistreatment Contribute to the Gender Gap in Self-reported Health? 1-17, American Sociological Association 2018, jhsp.sagepub.com

unarmed and innocent African Americans and public exhibitions by Neo-Nazi's and the KKK have increased.

New York Attorney General Eric Schneiderman recently resigned after four women came forth with allegations regarding his violent behavior toward them. Many are shocked that a man who sued Harvey Weinstein, won an award for pro-choice, and championed women's rights is now accused of violating those same rights in a violent way. But it comes as no surprise to women themselves who are used to public pronouncements and actions regarding non-discrimination and equality only to find very different behavior from the same person in private. Bill Cosby leaps to mind.

The recent incidents of a Starbucks employee calling the police because two Black men were in her shop, a Yale student calling the police on another Yale student who was African American for sleeping in a study room, and a neighbor calling the police on two women leaving a rental AirBNB show clearly that such bias is something people of color encounter daily. As Justice Sotomayor wrote in *Kisela v. Amy Hughes*, 584 U. S. ____ (2018), the court has sided with the police so that officers can shoot first and ask questions later effectively gutting the Fourth Amendment. Black Lives Matter has argued that from slavery to lynching to police shootings, the bias and violence against people of color has changed little and Black lives

remain in clear and present danger. Many residents of Montgomery, Alabama have criticized the new Legacy Museum that documents thousands of murders of African Americans saying, "let sleeping dogs lie." The problem is, the dogs are not sleeping.

Intersectional discrimination is not a figment of imagination but a well recognized phenomena. The EEOC has a list of cases related to race and age, race and disability, race and gender, race and national origin, race and pregnancy, race and religion, and race and sex.[6] These cases have to be treated differently as they represent a doubling or even tripling of the impact of discrimination.

The coarsening of the body politic and public disregard for the Rule of Law, including attacks on judges and journalists, by this administration is precisely the reason why lawyers must step up in support of the Constitutional values we swore to uphold. If this is the "new normal" then we need this rule so as not to ping pong from one extreme to another as regimes come and go but to provide a level playing field for all that includes American values of equality, fairness, and justice. Lawyers and bar

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6 https://www1.eeoc.gov//eeoc/initiatives/erace/caselist.cfm?renderforprint=1#intersectional

associations should be especially diligent to maintain not only codes of civility but democratic values that are being assailed daily.

Even Supreme Court justices don't avoid such harassment. A study done in 2015,[7] reports that 65.9 percent of all interruptions were directed at the three women justices. In 2002, 45.3 percent were directed at the two female justices, while in 1990, 35.7 percent of interruptions were directed at the single female justice, Sandra Day O'Connor. The justices who accounted for most of the interrupting were men, according to the study. Women interrupted only 15 percent of the time, while men interrupted 85 percent of the time, more than their 78 percent representation on the court.

Our knowledge and our society has advanced from when I was in grade school and heard that "sticks and stones may break my bones but words will never hurt me." In fact words hurt a lot. Today we call that bullying and it's a crime or violation of the rules depending on the facts. Discrimination and harassment is not just water-cooler chatter or locker room talk, it has serious consequences not just for the harassed lawyer's career but for physical and mental health as well.

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[7] Jacobi, Tonja and Schweers, Dylan, Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments (October 24, 2017). 103 Virginia Law Review 1379 (2017); Northwestern Law & Econ Research Paper No. 17-03. Available at SSRN: https://ssrn.com/abstract=2933016

LEGAL ISSUES

First Amendment Principles are Enhanced by this Rule.

Before the consideration of any First Amendment question, the court must first consider if the First Amendment applies at all. In *Keller v. State Bar of California*, (496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990)), the court made a distinction between regulation or improvement of the quality of legal services and activities outside of that purview. The guiding standard to determine whether the action is regulation is whether the action is necessary for the regulation of the profession and improvement of the quality of services. If so, First Amendment analysis is not applicable. The ethical rules and an admonishment not to discriminate are necessary for the regulation of the profession and the improvement of the quality of services for the public. The court specifically said that proposing ethical codes for the profession is an activity that the Bar can engage in without *Keller* analysis.

That statement was repeated in *Gentile v. State Bar of Nevada*, (501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)) when the court held that compulsory dues may be used for activities connected with disciplining members or proposing ethical codes for the profession. Therefore, such ethical rules do not come under First Amendment analysis and even if they

did, the Fourteenth Amendment rights of equal treatment would counter balance any alleged interference with First Amendment rights.

The point of "free speech" is not only to protect the expression of new or disfavored ideas, but also to facilitate the expression of ideas by disfavored people – those very people who have been silenced for centuries. The proposed rule does not call for censure of comments that are offensive, upsetting or disagreeable to someone, it is rather focused on the conduct that constitutes discrimination, harassment, and abuse. The parameters of that conduct already exist in a extensive body of existing law from both criminal and civil cases that can be relied on for definition, application and precedent as in the usual course of the legal analysis we do. Thus there is more than adequate knowledge of what conduct is at issue and no violation of due process.

Nor does the rule suggest censuring someone for arguing facts. In this "new normal" society of "alternative facts," real facts would be welcome. The proposed rule also states clearly that legitimate advice or advocacy is protected. The problem is beliefs about the worth or ability of certain groups and the manifestation of those beliefs in discrimination and harassment. But one person's "beliefs," whether religious or otherwise, do not defeat another persons right to be treated fairly under the law.

Many words have been spilled from the opposition about so called "politically correct" speech. But in today's "new normal", what is "politically correct?" It appears that derogatory public comments and attacks on persons of different religions, those speaking different languages, someone wearing a different style of dress or head gear, women, immigrants and all manner of people are fair game. The viewpoint being accepted today is not what many would consider "politically correct" but extremely divisive, harmful, and discriminatory.

The speech of lawyers is already circumscribed both inside and outside the courtroom. The State's interest in regulating a specialized profession against a lawyer's First Amendment interest is balanced by the court. (*Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)) A lawyer's duties, and the "practice of law" do not end outside the courtroom door. Our duty applies not only to representing clients and interacting with witnesses and court officials but also requires that lawyers adhere to the law. Our own obedience to the law is important if we purport to believe in the "Rule of Law." We do make arguments and sometimes take actions when we believe the law is wrong or should be changed, but we are required to have a good faith argument to support that claim. Therefore, we should follow the laws regarding non-discrimination

and sexual harassment as much as we should follow the laws regarding theft and assault.

Lawyers also often engage in discussion or argument about issues in which we represent extremely opposing points of view. One can disagree about issues without attacking the person – a person who may not even be involved. One can believe in single sex bathrooms (presumably outside of their own homes, airplanes, trains etc.) without attacking people they perceive as transgender who may or may not ever have used any public bathroom.

Some argue there is no scientific justification for "transgender." There is no scientific justification for race either. Scientific breakthroughs have made it perfectly clear that there is only one race – human. Therefore should all our centuries of legislation and cases regarding race be null and void? No one would be so foolish as to argue that. While newer scientific methods have proven that race does not in fact even exist, that has not wiped out the attitude, the myths, the stereotypes, and the negative treatment based on perceived race. The categories of race or gender are mostly determined by society not fact. That is what prejudice is – prejudging someone based on a characteristic s/he might or might not have and that might or might not impact the issue at hand. That is precisely why we have to eradicate it. Yet

we cannot free minds easily. We can only proscribe certain behaviors so that the damage inflicted on the vulnerable is decreased.

One can disagree on same-sex marriage due to their religious beliefs without attacking others who do not hold those beliefs. One can disagree on immigration without referring to those seeking to come to the U.S as "animals." That is the essence of the First Amendment – the ability to voice our opinions and petition the government for change. The First Amendment never gave anyone license to insult and assault another who disagrees. Nor does the First Amendment give anyone the right to impose their beliefs on others.

Lawyers must also follow the laws in the operation of our law firms – we must not violate the Equal Pay Laws and pay men more than women and whites more than people of color. We must not violate the Labor Laws and require people to work overtime without pay or go without breaks. We must not subject some of our employees to sexual harassment or others to racial abuse.

The requirement for lawyers of honesty and fair dealing crosses all boundaries not just in our professional lives. We are not free to break the law in our private lives. The creed we swear to says we should have a devotion to public service and the public good and protect the integrity of

the profession. It doesn't say – just when we are in the courtroom or our offices. That means that in our volunteer work, our religious life, our associations and our political activities we cannot bring disrepute upon lawyers or the profession by violating the law, by abusing people, or by practicing discrimination. That is all this ethical rule says. Lawyers should not bring disrepute on the legal profession or disadvantage certain groups by engaging in harassment or discrimination against those historically disadvantaged groups.

Freedom from Discrimination does not Violate Anyone's Religious Rights

Much of the opposition to this suggested rule seems to emanate from religious objection to the LGBT community. However, the right of the historically disadvantaged groups to be free from discrimination is not trumped by some other person's religious beliefs. That issue has been and is being litigated. In *U.S. v. Lee*, (455 U.S. 252, 102 S. Ct. 1051, 71 O. Ed. 2d 127 (1982)), the court held that not all burdens on religion are unconstitutional (page 258). But when there is a broad public interest in maintaining a certain program (in the *Lee* case social security, in this case non-discrimination laws), that is a very high order and there is no basis to object (p. 260). When people enter into commercial activity as a matter of

choice, they accept that their own conduct as a matter of conscience and faith cannot be used to deny the statutory rights of others.

That specific issue is being argued at the U.S. Supreme Court this term in *Masterpiece Cake Ltd v. Colorado Civil Rights Commission* where the question is whether a business that is open to the public can engage in discriminatory conduct contrary to neutral and generally applicable law because of an alleged religious belief. If the Rule of Law is to be upheld, the court must rule that public accommodation laws that recognize civic duty in treating the public equally mean that a religious belief bows to equal protection actions to maintain the social order and the vision that is America.

Among the many amicus briefs filed in the *Masterpiece* case, the National Women's Law Center argued that if women are not able to participate in the marketplace free from discrimination the effects for women and all protected persons are far-reaching. Those effects would lead to a very dark, negative, and Hobbesian United States. Such non-discrimination laws are fundamental to combating economic and dignity harms associated with women's unequal access to publicly available goods and services in addition to the physical and sexual harms.

As the brief argued:

> For much of this nation's history, women were treated as inferior citizens under law. Women's secondary status often was rooted in

> genuinely held religious beliefs about sex-based hierarchy and women's role within the family. As our society changed, and awareness of and concern with sex discrimination grew, states broadened public accommodation laws, originally passed to prohibit racial discrimination, to prohibit discrimination against women in the public market.

The same can be said for every minority and historically disfavored group. Slavery was once justified by religion. Banning of Muslims is justified by religion. LGBT discrimination is justified by religion. Grave harms to individuals and society ensue when certain segments of society are excluded from full participation based on the beliefs of others. Everyone is entitled to their own beliefs. No one is entitled to impose them on others. That is the fundamental basis of the First Amendment.

<u>The Rule Adheres to the Standards of Due Process.</u>

The structure of the Arizona Rules of Professional conduct states that, "It is professional misconduct for a lawyer to:…" Then follows a list of (a) through (g). No sanctions are mentioned. Rather the structure lists the current rule and then has Comments. In those comments, the general principles are outlined, the limitations are stated, examples are used, prohibitions are listed, and definitions are given. The interpretation of the rule is provided in attached "related opinions" so that a lawyer has guidance about what is proper from both the Comments and from the "related

opinions." If an attorney has a question, they can submit it and get an answer.

The ABA Model Rule follows the same format. It has comments that elaborate the meaning of the terms. Comment 3 defines discrimination and harassment and relies on current law. Comment 4 defines what is related to the practice of law. This "style" of rule/definitions/explanatory opinions should be quite familiar to every lawyer as we learn it in our first year of law school.

As one group pointed out, most states have no black letter law in their lawyer's ethical codes proscribing discrimination, nor does Arizona. That in itself should be shocking and reveals much about our profession. The nondiscrimination provisions of the proposed rule are negative law proscribing something; it is not positive law requiring some action. No one is asked or required to be for any particular position. The proposed rule clearly states that lawyers are not required to take cases. The apocalyptic visions some prophesy are sheer fantasy.

How far does this statute or regulation go? What are the limits to discretionary powers? What did the legislature intend by that language? What if this rule conflicts with other professional rules? These are not new or strange concepts for lawyers. Lawyers draw lines. Lawyers harmonize

statutes. That is what we do. There is no need to wander off into parallel universes with outlandish examples. Rule, definition, interpretation, application – these are common structures for us. Due process is not violated by this very normal procedure. Lawyers are the perfect group to implement nondiscrimination laws in our own profession because we stand for the Rule of Law that includes equality and fairness. We have the skills to interpret and apply the language to specific situations.

CONCLUSION

The headline in the January 2017 Arizona Attorney on page 34 reads "Rooting out Bias in the Legal Profession." This ethics rule isn't about one opinion versus another or one political position versus another. The ABA rule does not advocate for one position or one "politically correct opinion." In fact it does the opposite by advocating the eradication of discrimination against those groups long disfavored and ill-treated in our society. These very groups have been silenced and prevented from exercising their First Amendment rights for hundreds of years. Neither slaves nor women could sue or testify in court, neither received pay for their work, neither kept their own children, neither could sign contracts or attend school, pursue a profession or get an occupational license. Neither could speak in public and women could not speak in church – some still can't. Neither could bring

criminal charges for violence done to them. The historically disfavored groups facing daily discrimination and harassment are the silenced ones. The First Amendment rights for those groups were and often still are meaningless so long as discrimination and harassment keep them silent.

This kind of deep-seated, historical bias does not disappear by itself. It takes work and recognition that change is necessary. Without such work and change, many sectors of society have no confidence in the legal system. The legal profession, of all professions, because of our dedication to justice should lead the way to root out bias. This ethics rule will protect those historically disfavored groups that have suffered in the past and continue to suffer and will help to level the playing field.

The submissions opposing the rule seem to be generated by the same groups and same people across the country focusing on a specific ideological position. An underlying fear seems to be the fact that by 2020, 50.2% of American children will be from today's minority groups. By 2044, 50.3% of Americans of all ages will be from those same groups.[8] It would be far better for Arizona to step up and recognize these inevitable changes now and build a truly multi-cultural legal profession than continue to hide behind centuries of white and male privilege and prolong the denial.

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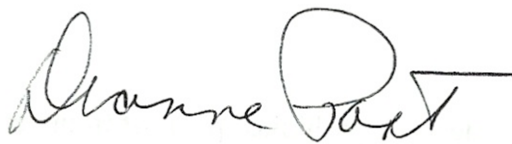
[8] National Geographic, April 2018, page 91.

Because other states have rejected this rule is not a reason for Arizona to do so. Because something is hard is not a reason to refuse to recognize past wrongs and take steps to remedy it. In the past, Arizona has been a leader in human rights. The balancing of rights between conflicting principles is what lawyers do. The legal profession is precisely the right group to take on this challenge. I urge you to do so.

RESPECTFULLY SUBMITTED this 22nd date of May 2018.



NATIONAL LAWYERS GUILD
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By Dianne Post, Authorized Representative

Electronic copy filed with the Clerk of the Supreme Court this 22 May 2018.