

(3)
LF

NOV 2 2005

CLERK SUPREME COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Robert B. Van Wyck
Chief Bar Counsel
Bar No. 007800
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288
(602) 252-4804

FILED
NOV 29 2005
NOEL K. DESSAINT
CLERK SUPREME COURT
BY: *[Signature]*

BEFORE THE ARIZONA SUPREME COURT

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

Supreme Court No. R-05-0021

Pursuant to Rule 28 of the Rules of the Supreme Court, the State Bar of Arizona Board of Governors, through the undersigned, submits the following amended petition to the Supreme Court to approve modifications to Arizona Rules of the Supreme Court Rules 53, 32(a)(2) and 41(g), as set forth in Appendix A. The recommended amendments close gaps in the discipline rules concerning unprofessional behavior.

In 2003, then State Bar President Pamela Treadwell-Rubin appointed the Task Force on Professionalism. After two years of work, the Task Force presented a report to the Board of Governors in April of 2005. The Board of Governors at their May 2005 approved the Task Force's recommendations concerning changes to the Arizona Rules of the Supreme Court contained in this amended petition.

1 The Board recommends that Rule 31(A)(2) be amended to define
2 "unprofessional conduct" and that Rule 41(g), which enumerates the duties and
3 obligations of members, be amended to provide that members shall avoid
4 engaging in "unprofessional conduct."

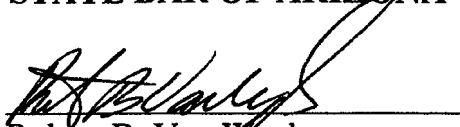
5 Further, the Board recommends the addition of a comment relating to the
6 amended Rule 41(g). The comment gives guidance to lawyers about the
7 expectations of professionalism and endeavors to comport with the holding of
8 the Ninth Circuit in U.S. v. Wunsch, 84 F.3d 1110 (9th Cir. 1996).

9 Finally, prior to the 2003 amendments, the former Rule 51(g) stated that
10 violations of the oath were grounds for discipline. The Bar supports reinstating
11 the language enumerating violations of the oath as grounds for discipline in
12 Rule 53 and further recommends that such language should include violations
13 of Rule 41.

14 For the reasons set forth above, the State Bar of Arizona respectfully
15 petitions this Court to amend Rules 31, 41 and 53, Arizona Rules of the
16 Supreme Court, as set forth in Appendix A.

17 **RESPECTFULLY SUBMITTED** this 28th day of November 2005.

18 **STATE BAR OF ARIZONA**

19
20 
21 Robert B. Van Wyck
22 Chief Bar Counsel

23 Original, seven copies and an
24 electronic copy filed with the Clerk
25 of the Supreme Court of Arizona
26 this 28th day of November 2005.

By: 

APPENDIX A

Rule 31(a)(2)

A. - D. [No change in text.]

E. “Unprofessional conduct” includes:

- (1) conduct unbecoming a member of the bar, or;
- (2) a knowing and substantial violation of the oath of admission to the bar.

Rule 41

(a) – (f) [No change in text.]

(g) ~~To abstain from all offensive personality~~ avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged.

(h) [No change in text.]

Comment [200 amendment]

(1) Unprofessional conduct is conduct unbecoming a member of the Bar. Professionalism requires lawyers to act at all times with honesty and integrity. Moreover, professionalism requires lawyers to conduct their professional business with courtesy and respect, and to render excellent service to their clients and communities. Lawyers should act as professionals, whether or not engaged in the practice of law. As officers of the court, lawyers are held to a higher standard of conduct than are other public citizens.

(2) When a lawyer engages in unprofessional conduct, it brings disrepute on the entire legal system and a decline in the public’s opinion of lawyers. Lawyers are likely to become increasingly dissatisfied when the public opinion of lawyers declines and commercial pressures increase. This, in turn, leads to an increased likelihood of unprofessional conduct. In the absence of remedial measures, the problems created by unprofessional behavior will continue to increase.

(3) Nothing in this rule should be construed to limit or constrain a lawyer from engaging in legitimate advocacy, on his or her own behalf or on behalf of a

client, even when the cause may be controversial or the subject of popular disapproval. Legitimate advocacy includes a lawyer's obligation to advance arguments and raise issues, within the bounds of the law, while acting honorable and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. The following cases are illustrative of some of the types of conduct that are unprofessional. See [Arizona Cases] *In re Piatt*, 191 Ariz. 24, 951 P.2d 889 (1997) (sexual harassment of two clients, exploited and extorted client by telling client that if she didn't respond sexually, lawyer could no longer represent her, unless paid more money); *In re Ziman*, 174 Ariz. 61, 847 P.2d 106 (1993) (offensive and profane comment made to an arbitrator); *In re Moore*, SB-02-0043-D (2002) (asked female client inappropriate, personal questions of a sexual nature, embraced client and asked to see her breasts, asked for meetings at lawyer's home); *In re Medansky*, SB-04-0120-D (2004) (threatened client's wife with physical violence after contentious divorce hearing) *In re Banta*, SB-05-0003-D (2005) (used profanity to a physician, profane name in referring to non-attorney justices of peace, called opposing counsel a "liar" and judge's ruling "crazy", told opposing counsel at deposition to "go perform an unnatural sex act on himself". [Other Jurisdictions] See *Disciplinary Proceedings Against Beaver*, 510 N.W.2d 129 (Wis. 1994) (verbally threatened and attacked adverse party); *In re Eisenberg*, 675 N.W.2d 747 (Wis. 2004) (vulgar language to police dispatcher, falsely stated lawyer had emergency, called police detective vulgar names, ignored examiner instructions and left hearing before hearing concluded); *Disciplinary Proceedings Against Ray*, 651 N.W.2d 727 (Wis. 2002) (yelled at and threatened third party); *Disciplinary Proceedings Against Johann*, 574 N.W.2d 218 (Wis. 1998) (disparaging remarks against two judges handling personal child custody matter, distributed flyer criticizing her child's father, stated he was rapist and encouraged boycott of firm who represented father); *Disciplinary Proceedings Against Blask*, 573 N.W.2d 835 (Wis. 1998) (engaged in two physical altercations); *Disciplinary Proceedings Against Sandy*, 561 N.W.2d 327 (Wis. 1997) (obscenity to client); *Disciplinary Proceedings Against Bruckner*, 467 N.W.2d 780 (Wis. 1991) (traded photographs of nude minor); *Disciplinary Proceedings Against Strasburg*, 452 N.W.2d 152 (Wis. 1990) (verbally abused and threatened legal action for fees prior to completion of legal work); *Disciplinary Proceedings Against Eisenberg*, 423 N.W.2d 867 (Wis. 1988) (used offensive, undignified and discourteous remarks to prosecutor concerning witness and in closing argument concerning the prosecutor); *State v. Ledvina*, 237 N.W.2d 683 (Wis. 1976) (mailed insulting

letters to police officer, encouraged injury to another during an election campaign, circulated embarrassing documents of police officer's supporters); State v. Heilprin, 207 N.W.2d 878 (Wis. 1973) (rude, discourteous, abusive, threatening, aggressive, and hostile statements); The Florida Bar v. Perlmutter, 582 So.2d 616 (Fla. 1991) (verbally abusive correspondence on behalf of client and allegations prejudicial to honor of party); The Florida Bar v. Hefty, 213 So.2d 422 (Fla. 1968) (immoral conduct with stepdaughter); The Florida Bar v. McKeever, 766 So.2d 992 (Fla. 2000) (conviction for felony physical child abuse); Shortes v. Hill, 860 So.2d 1 (Fla. Dist. Ct. App. 2003) (negative and demeaning remarks about judge's ruling in an appeal); In re Ballou, 295 P.2d 316 (Wash. 1956) (told client in open court during a hearing that client could lie); In re Discipline of Laprath, 2003 SD 114, 670 N.W.2d 41 (2003) (inflammatory statements in letters); In re Disbarment of Holobachka, 198 N.E.2d 381 (Ind. 1964) (belligerent and defiant conduct, refused to comply with a lawful subpoena or to appear pursuant to a subpoena); Snyder v. State Bar, 555 P.2d 1104 (Cal. 1976) (filed fraudulent declaration with offensive descriptions of opposing counsel and opposing parties); Hawk v. Superior Court, 116 Cal.Rptr. 713 (1974) (after numerous warnings, made personal comments about opposing counsel in presence of jury); Hanson v. Superior Court, 109 Cal.Rptr.2d 782 (2001) (argued to a jury in a criminal case that goal of prosecution and defense was to misrepresent the facts); People v. Hill, 952 P.2d 673, (Cal. 1998) (dismissive, sarcastic and abrasive personality when acting as representative of state's interests).

Rule 53

(a) – (i) [No change in text.]

(j) Violation of the oath, or of the duties and obligations of members pursuant to Rule 41.