

1 Jeffery S. Slater (SBA#012889)  
LAW OFFICE OF JEFFERY S. SLATER, P.C.  
2 10963 North 130th Place  
Scottsdale, Arizona 85259  
3 Telephone: (480) 560-9602  
4 Email: [Slaterlaw@cox.net](mailto:Slaterlaw@cox.net)

5 **IN THE SUPREME COURT**  
6 **STATE OF ARIZONA**

7 PETITION TO AMEND CANON 2.3,  
8 RULE 81, ARIZONA RULES OF  
9 THE SUPREME COURT

Supreme Court No. R-

**Petition to Amend**  
**Canon 2.3 in Rule 81**  
**of the**  
**Arizona Rules of the Supreme Court**

10  
11  
12 Pursuant to Rule 28 of the *Arizona Rules of the Supreme Court*, 10 attorneys  
13 named below petition the Court to amend *Judicial Canon 2.3* of *Ariz.R.Sup.Ct.81*.

14 I. SUMMARY.

15 The purpose for this petition is to request that the canon governing judges (and  
16 their staffs) from engaging in improper bias and prejudice be conformed to the  
17 corresponding ethics rule which governs lawyer bias and prejudice.

18 Despite the arguable fact that judges (and their staffs) should be held to at  
19 least the same standards applicable to lawyers, *Judicial Canon 2.3* fails to hold  
20 judges (or their staffs) to all of the standards applicable to lawyers.

21 The shortcoming in *JC2.3* is found in the canon's failure to provide protection  
22 for "*gender identity*", which is expressly recognized for protection in a key comment  
23 to the corollary ethics rule applicable to lawyers (i.e. Comment 3 of *Ethics Rule 8.4*,  
24 *Ariz.R.Sup.Ct.42*).

25 "Gender identity" refers to a person's internal sense of being male or female  
26 independent of their sexual orientation or their sex designation assigned at birth.

1 Because a person’s gender identity may be different from their sex assigned at  
2 birth, the outward manifestation of their gender identity may not conform to  
3 traditional gender norms/expectations. This inconsistency is known as “gender non-  
4 conformity”, a condition common among the transgender component of society.

5 Those who are transgender are often subjected to discrimination due to their  
6 gender non-conformity, which accounts for efforts by some governmental entities  
7 (but unfortunately not all) to adopt protections pertaining to “gender identity”.

8 This Court should affirmatively protect gender identity by adding the words  
9 “gender identity” to the list of protections set forth in *JC2.3*.

10 II. JC2.3 FAILS TO CONFORM TO THE LAWYERS’ ETHICS RULE.

11 Comment [3] of *ER8.4* identifies each and all of the improper bases on which  
12 lawyers should not knowingly manifest bias or prejudice through their words or  
13 conduct while representing a client.

14 The list of these bases specifically includes protection for **gender identity**:

15 A lawyer who in the course of representing a client, know-  
16 ingly manifests by words or conduct, bias or prejudice  
17 based upon race, sex, religion, national origin, disability,  
18 age, sexual orientation, **gender identity** or socioeconomic  
19 status violates [*ER8.4(d)*] when such actions are prejudi-  
cial to the administration of justice. [Bold print and  
brackets added.]

20 *See, Comment [3] to ER8.4.*

21 *JC2.3*, which is arguably the judicial counterpart to *ER8.4*, lists the bases on  
22 which judges and their staffs likewise should not engage in bias or prejudice by their  
23 words or conduct in the performance of judicial duties.

24 Unlike *ER8.4*, however, *JC2.3* does not include “gender identity” or any other  
25 protective language of a similar nature:

26 (A) A judge shall perform the duties of judicial office,

1 including administrative duties, without bias or  
2 prejudice.

3 (B) A judge shall not, in the performance of judicial du-  
4 ties, by words or conduct manifest bias or prejudice,  
5 or engage in harassment, including but not limited to  
6 bias, prejudice, or harassment based upon race, sex,  
7 gender, religion, national origin, ethnicity, disability,  
8 age, sexual orientation, marital status, socioeconomic  
9 status, or political affiliation, and shall not permit  
10 court staff, court officials or others subject to the  
11 judge's direction and control to do so.

12 (C) A judge shall require lawyers in proceedings before  
13 the court to refrain from manifesting bias or prejudice,  
14 or engaging in harassment, based upon attributes in-  
15 cluding but not limited to race, sex, gender, religion,  
16 national origin, ethnicity, disability, age, sexual orien-  
17 tation, marital status, socioeconomic status, or poli-  
18 tical affiliation, against parties, witnesses, lawyers, or  
19 others.

20 (D) The restrictions of paragraphs (B) and (C) do not  
21 preclude judges or lawyers from making legitimate  
22 reference to the listed factors, or similar factors,  
23 when they are relevant to an issue in a proceed-  
24 ing.

25 *See, JC2.3.*

### 26 III. GENDER IDENTITY DESERVES EXPRESSED PROTECTION.

Various government entities, particularly within the United States federal government, have published information regarding "gender identity" and the need for its expressed protection from bias and discrimination.

The sources of this information are too numerous to try to identify in this petition. For efficiency's sake, the petitioner directs the Court to the publications of the following two federal government authorities: (1) the U.S. Office of Personnel

1 Management (“OPM”); and (2) the U.S. Equal Employment Opportunity  
2 Commission (“EEOC”).<sup>i</sup>

3 The OPM, as the staffing agency for the U.S. government, defines “gender  
4 identity” as one’s sense of gender, which if different from the sex assigned at birth  
5 makes one “transgender” and necessitates protection from workplace discrimination:

6 It is the policy of the Federal Government to treat all of its  
7 employees with dignity and respect and to provide a work-  
8 place that is free from discrimination whether that discrimina-  
9 tion is based on race, color, religion, sex (including **gender**  
10 **identity** or pregnancy), national origin, disability, political af-  
11 filiation, marital status, membership in an employee organiza-  
12 tion, age, sexual orientation, or other non - merit factors.  
13 **Agencies should review their anti-discrimination policies to**  
14 **ensure that they afford a non-discriminatory working envi-**  
15 **ronment to employees irrespective of their gender identity**  
16 **or perceived gender non-conformity.**

17 \* \* \*

18 *Gender identity* is the individual’s internal sense of being male  
19 or female. Gender identity is generally determined in the early  
20 years of an individual’s life and, if different from the indivi-  
21 dual’s physical gender, may result in increasing psychological  
22 and emotional discomfort and pain. The way an individual ex-  
23 presses his or her gender identity is frequently called “gender  
24 expression,” and may or may not conform to social stereo-  
25 types associated with a particular gender.

26 *Transgender*: Transgender individuals are people with a gender  
identity that is different from the sex assigned to them at birth  
. . . [Italics and quotations in original with bold print added.]

See, excerpt from the OPM website at: [www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/](http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/), a  
copy of which is attached as Exhibit A to this petition.

1 The EEOC, in fashion similar to the OPM, recognizes the correlation between  
2 “gender identity” and transgender status along with the associated risks of workplace  
3 discrimination, and thus has issued rulings to try to reduce such discrimination:

4 The EEOC enforces the prohibitions against employment  
5 discrimination in Title VII of the Civil Rights Act of 1964,  
6 the Equal Pay Act of 1963, the Age Discrimination in Em-  
7 ployment Act of 1967, Sections 501 and 505 of the Rehabi-  
8 litation Act of 1973, Titles I and V of the Americans with  
9 Disabilities Act of 1990 (ADA), Title II of the Genetic In-  
10 formation Non-discrimination Act (GINA), and the Civil  
11 Rights Act of 1991. These laws prohibit discrimination  
12 based on race, color, sex, religion, national origin, age, dis-  
13 ability, and genetic information, as well as reprisal for pro-  
14 tected activity. The Commission’s interpretations of these  
15 statutes apply to its adjudication and enforcement in federal  
16 sector as well as private sector and state and local govern-  
17 ment.

18 **The EEOC has held that discrimination against an indi-  
19 vidual because that person is transgender (also known  
20 as gender identity discrimination) is discrimination be-  
21 cause of sex and therefore is covered under Title VII of  
22 the Civil Rights Act of 1964.** See *Macy v. Department of  
23 Justice*, EEOC Appeal No. 0120120821 (April 20, 2012),  
24 (Web citation omitted) . . . [Bold print added.]

25 *See*, excerpt of the EEOC website at: [www.eeoc.gov/federal/otherprotections.cfm](http://www.eeoc.gov/federal/otherprotections.cfm), a  
26 copy of which is attached as Exhibit B.

#### 27 IV. CONCLUSION.

28 From the foregoing, the Court can see that “gender identity” is a basis upon  
29 which there tends to exist, but should not be, bias and discrimination.

30 Efforts by various government entities, including this Court in its  
31 implementation of *ER8.4*, reflect legitimate admonitions against such bias and  
32 discrimination.

33 To conform the Arizona judicial canon pertaining to bias and discrimination to  
34 these existing standards, the Court should modify *JC2.3* to include “gender identity”  
35 as a basis for protection.  
36

1 Attached as Exhibit C is the proposed new version of *JC2.3* (with redlined  
2 additions of the words “gender identity” where appropriate).

3 **RESPECTFULLY SUBMITTED** this 9th day of January, 2015.

4 /s/ Jeffery S. Slater (State Bar #012889)

5 /s/ Amelia C. Cramer (State Bar #018297)

6 /s/ Louis A. Goodman (State Bar #007399)

7 /s/ Richard K. Mahrle (State Bar #005166)

8 /s/ James E. Barton, II (State Bar #023888)

9 /s/ Andrew Shackelford (State Bar #027911)

10 /s/ Andrea L. Crawford (State Bar #028706)

11 /s/ John Phebus (State Bar #015964)

12 /s/ Jessica M. Hernandez (State Bar #021818)

13 /s/ Claudia D. Work (State Bar #018701)

14 Electronic version (with exhibits) filed with the Clerk of the Supreme Court of  
15 Arizona this 9th day of January, 2015.

16 By: /s/ Jeffery S. Slater

17 <sup>i</sup> The governmental information cited herein qualifies as admissible evidence  
18 worthy of judicial notice for the following reasons: (1) the information is “self-  
19 authenticating” pursuant to the “Official Publications” distinction set forth in Rule  
20 902(5) of the *Arizona Rules of Evidence*; (2) it meets the “Public Records” exception  
21 to the hearsay rule pursuant to *Ariz.R.Evid.803(8)*; and (3) the information qualifies  
22 for judicial notice pursuant to *Ariz.R.Evid201(b)(2)*, because it can be accurately and  
23 readily determined from sources (i.e. the government) whose accuracy cannot  
24 reasonably be questioned. *See, e.g., Pedersen v. Bennett*, 230 Ariz. 556, 559, 288  
25 P.3d 760, 763 (Ariz.2012) (judicial notice appropriate for online information posted  
26 by the Arizona Department of State); *Poll v. Stryker Sustainability Solutions, Inc.*,  
2014 U.S. Dist. LEXIS 6309 (D. AZ. Jan.17, 2014) (judicial notice appropriate for  
online information posted by the United States Food & Drug Administration); and  
*E.E.O.C. v. E.I. du Pont de Nemours & Co.* (E.D. La. Oct. 18, 2004), No. 03-1605,  
2004 U.S. Dist. LEXIS 20753.