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8 **IN THE SUPREME COURT**
9 **OF THE STATE OF ARIZONA**

10 In the Matter of :) Supreme Court No. R-_____
11)
12)
13 PETITION TO AMEND) Comment on Attorney
14 RULES 46-74, ARIZONA RULES OF) Discipline Task Force's
15 THE SUPREME COURT) Petition to Amend
Rules 46-72,
Rules of the Supreme Court

16 Undersigned counsel respectfully submits her brief comments on the above-
17 referenced Petition and Amended Petition regarding proposed changes to the
18 disciplinary process in Arizona.

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20 1. There is an error in the Comment posted earlier today (June 11, 2010)
21 by a group of respondents' counsel that included undersigned counsel.
22 Specifically, a section captioned: "J. Special Discipline Proceedings: Rule 57," at
23 page 23 of the document, was included near the end of the drafting process without
24 the approval of undersigned counsel or all of the signatories to the comment.
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1 Undersigned counsel does not agree with the analysis set forth in that section
2 and in fact, reads *In re Creasy*, 198 Ariz. 539 (Ariz. 2000), to specifically hold that
3 the Arizona Supreme Court does in fact have jurisdiction over disbarred lawyers
4 for conduct before, during and after their disbarment. And that is exactly as it
5 should be. Thus, undersigned counsel has no objection to the Task Force’s
6 recommendations regarding Rule 57(a)(5)(b) of the Arizona Rules of the Supreme
7 Court.¹
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10 2. Undersigned counsel also wishes to express her support for the critical
11 importance of proportionality analysis, as referenced in the comments by Mauricio
12 Hernandez and the Pima County Bar Association, and as explored in detail by
13 Richard Alcorn in his comment. Undersigned counsel’s experience as a bar
14 counsel and as a respondent’s counsel have led her to the firm belief that
15 proportionality is absolutely crucial in the disciplinary process, for the reasons
16 already expressed very well by Mr. Alcorn.
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19 3. Finally, undersigned counsel would like to call the Court’s attention to
20 the following clause in the heading to proposed Rule 54, Ariz.R.Sup.Ct., “Grounds
21 for Discipline”:
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23 Misconduct by an attorney, both members and non-members,
24 individually or in concert with others, including the following acts or
25 omissions, shall constitute grounds for discipline, whether or not the

26 ¹ The change is only in regard to placement anyway—there is no proposed change to the substance of that section as it already exists today under Rule 56(g)(2), Ariz.R.Sup.Ct.

1 act or omission occurred in the course of an attorney-client
2 relationship: [...] (emphasis added).

3 Undersigned counsel is concerned that this clause could lead to future
4 litigation over whether or not conduct outside the course of a representation may
5 be grounds for discipline. As this Court is aware, a significant amount of time and
6 effort was spent a few years ago revising Rule 41(g), Ariz.R.Sup.Ct., to remove the
7 phrase “offensive personality” and to substitute the term “unprofessional conduct.”
8 During that process, many members of our State Bar expressed concern that they
9 could be subjected to discipline for conduct unrelated to their practice or to any
10 attorney-client relationship. The common example tossed around was—is an
11 attorney going to be disciplined for cursing at a soccer game? This Court took
12 those legitimate and well-founded concerns under consideration and revised the
13 rules in a manner that makes clear that while *certain specified conduct outside the*
14 *practice of law* will usually be sanctionable, such as conviction of a felony under
15 Rule 53(h), other types of “off-duty” conduct will not necessarily be sanctionable.
16 *See, e.g.,* the comment to Rule 41, Ariz.R.Sup.Ct. (2007 Amendment).

17 Additionally, the ethical rules (“ERs”) falling under the number “1” all
18 involve an attorney-client relationship. *See, e.g.,* the heading above ER 1.1:
19 “CLIENT-LAWYER RELATIONSHIP.” Other ERs contain phrases such as: “in
20 representing a client” at the start of the text, thereby alerting us to the fact that the
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1 subject rule or sub-section also applies only in the course of a representation. On
2 the other hand, many ERs do apply to a lawyer regardless of whether there is an
3 attorney-client relationship involved.

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5 In sum, we have existing rules and case law that clarify this subject, and
6 make it clear that the heading to the proposed Rule 54 is imprecise. While it may
7 very well be that litigation of the matter would lead to the conclusion that the
8 language of the specific ER (or comment to the rule as in Rule 41) still applied
9 despite the contradictory heading in Rule 54, undersigned counsel submits that it
10 would be preferable to eliminate the issue before it happens. This can easily be
11 accomplished by inserting the word “may” in place of the word “shall” in the
12 above-referenced clause.
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17 RESPECTFULLY SUBMITTED this 11th day of June, 2010.

18
19 /s/

20 _____
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