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

7 IN THE MATTER OF:

8 PETITION TO AMEND COMMENT
9 [3] TO ER 8.4, RULE 42, ARIZONA
10 RULES OF THE SUPREME COURT

Supreme Court No. R-12-0018

**Comment in Support of Petition to
Amend Comment [3] to ER 8.4, Rule
42, Arizona Rules of the Supreme
Court**

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12 I, Abigail J. Toth, do hereby submit this Comment in support of Cathi W.
13 Herrod’s Petition to Amend Comment [3] to ER 8.4, Rule 42, Arizona Rules of
14 the Supreme Court. Ms. Herrod’s Petition proposes to amend Comment [3] to ER
15 8.4, Rule 42, Arizona Rules of the Supreme Court, so as to read as follows: “A
16 lawyer may violate this Rule when, in the course of representing a client, (a) the
17 lawyer uses words or engages in conduct that the lawyer knows or should have
18 known invidiously discriminates against, threatens, harasses, intimidates, or
19 defames an individual and (b) those words or that conduct creates a substantial
20 likelihood of material prejudice to the administration of justice by undermining
21 the impartiality of the judicial system. This Rule does not preclude legitimate
22 advocacy. This Rule shall not limit or impair the right of a lawyer to accept,
23 decline, or withdraw from the representation of a client. A trial judge’s finding
24 that peremptory challenges were exercised on a discriminatory basis does not
25 alone establish a violation of this Rule.”

26 I support Ms. Herrod’s proposed amendment for several reasons.

1 First, the current Comment [3] is vague and, consequently, does not provide
2 attorneys with sufficient notice of what behavior could lead to discipline. The
3 current Comment [3] leaves too much discretion to disciplinary authorities to find
4 violations based on conduct that may be offensive or “politically incorrect” but
5 that does not, in fact, substantially and materially prejudice the administration of
6 justice. Attorneys should not be subject to professional discipline merely because
7 someone claims to feel offended at their conduct. The proposed amendment cures
8 this defect by making it clear that the only acts that violate the Code are acts of
9 “invidious” discrimination, or acts that threaten, harass, intimidate, or defame an
10 individual, **and** that create a substantial likelihood of material prejudice to the
11 administration of justice by undermining the impartiality of the judicial system.
12 Attorneys are entitled to this important clarification.

13 Second, the current Comment [3] follows the ill-conceived trend of many
14 non-discrimination regulations of singling out certain groups for special
15 protection and then adding groups to that list as special interest groups emerge to
16 advocate for their interests. The proposed amendment cures this defect, first, by
17 prohibiting invidious discrimination against anyone, not just members of certain
18 groups, and, second, by preventing certain groups from using the Bar and the
19 legal profession’s nondiscrimination policies to advance their own agendas rather
20 than the interests of the legal profession as a whole.

21 Finally, the proposed amendment’s provision that the Rule shall not limit or
22 impair the right of a lawyer to accept, decline, or withdraw from the
23 representation of a client is a necessary clarification of and improvement over the
24 current Comment. One of the most important aspects of an attorney’s
25 professional and ethical autonomy is to be able to decide which cases to take and
26 which cases to decline. Indeed, the Code repeatedly calls upon attorneys to

1 exercise their moral and ethical judgment in professional matters. A necessary
2 corollary of those directives is that lawyers must not be forced to violate their
3 moral and ethical principles in practicing law and, therefore, must retain their
4 right to decline or withdraw from representation when to do otherwise would
5 violate their sincerely held moral values. Ms. Herrod's Petition recognizes and
6 supports this important principle.

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8 **CONCLUSION**

9 For all the foregoing reasons, I support Ms. Herrod's Petition to Amend
10 Comment [3] to ER 8.4, Rule 42, of the Arizona Rules of the Supreme Court.

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12 Respectfully submitted this 18th day of April, 2012.

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14
15 /s/ Abigail J. Toth
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17 Electronic copy filed with the Clerk
18 of the Supreme Court of Arizona
19 this 18th day of April, 2012,

20 By: /s/ Abigail J. Toth
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9 this 18th day of April, 2012,

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