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6 Attorneys on behalf of Mutual Insurance
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8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-21-0045

11 **PETITION TO AMEND RULES OF**
12 **CRIMINAL PROCEDURE 16.3, 18.3,**
13 **18.4 & 18.5; RULES OF CIVIL**
14 **PROCEDURE 16 & 47; JUSTICE**
15 **COURT RULE OF CIVIL**
PROCEDURE 134; RULE OF
PROCEDURE FOR EVICTION
ACTIONS 12

COMMENT TO PROPOSED
AMENDMENT OF RULES 16 & 47 OF
THE ARIZONA RULES OF CIVIL
PROCEDURE

16 Undersigned counsel, on behalf of the Mutual Insurance Company of Arizona
17 (“MICA”), support the Petition to Amend Rules 16 and 47 of the Arizona Rules of Civil Procedure
18 to establish procedures for and to encourage more robust use of juror questionnaires following the
19 abolition of peremptory strikes. Recommendations to fine-tune the proposed amendments are
20 reflected below.

21 **A. MICA’s Interest**

22 MICA has a deep interest in rule changes that significantly affect trial practice and
23 procedure. MICA is a physician-owned and directed medical professional liability company that
24 insures the majority of physicians in private practice in the State of Arizona. MICA is involved
25

1 in defending medical malpractice claims, which are some of the most complex claims flowing
2 through Arizona’s court system. Since 2000, MICA has taken nearly 400 cases to verdict.

3 **B. Proposed Rule 16**

4 MICA strongly supports the use of case-specific written questionnaires in order to
5 facilitate voir dire.

6 The proposal accurately captures that it is premature to discuss time limits on trial
7 proceedings, preliminary jury instructions, and exhibit management during the scheduling
8 conference. *See* Proposed Amendment to Rule 16(d). This proposed amendment should be
9 adopted.

10 The proposed amendment to Rule 16(e)(2)(D), however, should be reconsidered as
11 to timing. The trial-setting conference should be focused on setting trial and any other
12 housekeeping matters that may assist in ensuring that the matter is prepared to be set for trial.
13 Although the parties could generally discuss the general “areas of inquiry” to be included in the
14 juror questionnaire, e.g., the parties in a medical negligence action may agree to forgo questions
15 about the credibility of law enforcement officers, it is likely premature to ask the parties to be
16 prepared to identify and discuss “specific questions” to be asked during voir dire. That task is
17 better reserved for the Trial Management Conference, as is currently done with the proposed voir
18 dire the parties submit with their Joint Pretrial Statement. *See* Proposed Amendments to Rule
19 16(e)(2)(D) and 16(f)(4).

20 In the event the Court decides to adopt the proposal’s recommendation to discuss
21 specific questions to be asked on the juror questionnaire or during voir dire, the trial courts will
22 need to establish appropriate deadlines for the submission of proposed voir dire and to allow
23 enough time to discuss same during the otherwise very brief trial-setting conference.

24 **C. Proposed Rule 47**

25 MICA appreciates the proposed changes to Rule 47 that – if adopted – will reflect
26 the Court’s support for implementing the use of case-specific juror questionnaires. MICA

1 supports the proposal's consideration of and provisions for jury privacy, the jurors' oath or
2 affirmation in support of their responses to the questionnaire, and the Court's guidance to the jury
3 pool about voir dire in general and the purpose of the questionnaire. The proposal's
4 recommendation that for-cause challenges be established by a preponderance of the evidence
5 considering the totality of the circumstances is prudent, as it helps to alleviate concerns about the
6 ease with which a juror was previously rehabilitated by simply asking, "Despite those experiences,
7 do you think you could be fair and impartial?"

8 The use of juror questionnaires will encourage prospective jurors to be candid and
9 forthright about their experiences that may have a bearing on their ability to be fair and impartial,
10 and will streamline oral voir dire in multiple ways. First, the questionnaires will allow the Court
11 and the parties to stipulate to excuse jurors with documented hardship and who cannot be seated
12 for cause. In the case of jurors with extreme views who may be excused on the basis of their
13 questionnaire alone, this will further protect the integrity of the remaining jury pool who will not
14 be exposed to these views, which risks poisoning the jury. Eliminating these two categories of
15 jurors (undue hardship and obvious cause) will then reduce the jury pool to the most likely
16 prospective jurors and will allow the parties time to explore their beliefs and experiences with
17 them and to rehabilitate them or develop the record on for-cause challenges as appropriate.
18 Although the elimination of peremptory strikes will likely extend voir dire so counsel can identify
19 jurors that should be struck for cause, the use of juror questionnaires in this way will help to
20 mitigate this additional time required and will make for the most efficient use of the Court's
21 resources.

22 **D. Proposed Comments to Rule 47**

23 The proposed comment to Rule 47(c)(3) provides that the Court may administer the
24 questionnaire in advance of trial or immediately prior to oral voir dire. In order to be of the most
25 use to the parties, the juror questionnaires should be administered in advance of trial. This would
26 allow the parties and the Court to excuse in advance certain jurors from having to attend the in-

1 person voir dire – which benefits the jurors whose appearance would create a hardship – and
2 would allow the parties to prepare for oral voir dire to follow up on jurors’ responses. Asking the
3 jurors to complete the questionnaire immediately prior to oral voir dire is a waste of judicial
4 resources while the Court and the parties wait for the jurors to complete the lengthy questionnaire.
5 The prospective jurors then need to wait while the Court and the parties review the lengthy
6 responses from dozens of jurors. The jurors may need to wait further while the Court and the
7 parties identify and discuss which jurors should be excused based on their responses. Because
8 one benefit of the questionnaire is to streamline oral voir dire, excusing jurors at this juncture will
9 prevent those jurors from needlessly responding to oral voir dire. For these reasons, the rule
10 should be amended to add a provision requiring that the questionnaire be administered in advance
11 of trial, with the questionnaires provided to the Court and the parties upon completion. If the
12 Court leaves it to the trial court’s discretion on the timing of when to administer the questionnaire,
13 the comment should be amended to reflect a recommendation or preference for providing the
14 questionnaire in advance of trial when feasible.

15 MICA fully supports the proposed comment to Rule 47(c)(5) that encourages trial
16 courts to permit liberal oral voir dire, to support the use of open-ended questions that elicit
17 narrative responses, and to refrain from attempting to superficially rehabilitate jurors with leading,
18 conclusory questions asking the jurors to affirm that they can set aside their beliefs and
19 experiences in order to serve as a fair and impartial juror.

20 CONCLUSION

21 Arizona has long been a national leader in improving jury practices. Encouraging
22 and incorporating the effective use of case-specific juror questionnaires will further establish
23 Arizona as a forward-thinking leader in this regard. Although MICA opposed abolishing
24 peremptory strikes, the implementation of comprehensive juror questionnaires may serve to
25 mitigate some of the concerns underlying their opposition. Juror questionnaires are expected to
26 be most effective when completed and provided to the parties in advance of trial to allow the Court

1 and the parties sufficient time to review them and to adapt and prepare their oral voir dire
2 accordingly.

3 For the foregoing reasons, undersigned support the proposed amendment of Rules
4 16 and 47 of the Arizona Rules of Civil Procedure and support the implementation of case-specific
5 juror questionnaires in advance of oral voir dire.

6 DATED this 26th day of April, 2022.

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