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

9 In the Matter of:

Supreme Court No. R-23-

10 **PETITION TO AMEND RULE 76**
11 **OF THE ARIZONA RULES OF**
12 **CIVIL PROCEDURE**

PETITION

13 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby petitions the Court to amend Arizona Rule of
15 Civil Procedure 76, which governs post-hearing procedures in matters subject to
16 compulsory arbitration under A.R.S. § 12-133. Current Rule 76(b) does not provide
17 adequate time for the parties to make, and the arbitrator to rule on, verified requests
18 for costs under A.R.S. § 12-332 or motions for attorneys’ fees, filed after the
19 arbitrator’s notice of decision. Moreover, under the current rule, if the arbitrator
20 does not timely rule on a request for costs or fees, the arbitrator’s notice of decision
21 becomes the final award under Rule 76(c). This can result in penalizing the
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1 prevailing party, who may be forced to appeal an award solely because there has not
2 been a ruling on costs and fees.

3 The State Bar’s proposed amendments to Rule 76(i) provide more time for the
4 arbitrator to make rulings on costs and fees, (ii) set forth a procedure for the court
5 and parties to follow when the arbitrator does not timely rule, and (iii) provide that
6 the deadlines within the rule are triggered by the filing or service of documents
7 instead of the receipt of documents so as to be consistent with the balance of the
8 Arizona Rules of Civil Procedure.
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11 Appendix A is a blackline of the proposed amendments to Rule 76. Appendix
12 B is the clean version.

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14 **I. BACKGROUND.**

15 This Petition had its genesis when a member of the State Bar contacted the
16 Arizona State Bar’s Committee on Civil Practice and Procedure (“Committee”) and
17 requested it consider amendments to the rules governing compulsory arbitration. He
18 was particularly concerned with the potential for Rule 76(c) to result in prejudice to
19 a party when an arbitrator does not timely rule on a request for costs and fees. The
20 Committee formed a subcommittee to consider these concerns, and eventually
21 looked at other aspects of Rule 76.
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24 Currently, under Rule 76(b)(1), either party may submit a proposed form of
25 award to the arbitrator within 10 days of the arbitrator filing a notice of decision.

1 The proposed award may include blanks for requested costs and fees. The other
2 party then has five days from receiving the proposed form of award to file an
3 objection. Rule 76(b)(3). Finally, the arbitrator has 10 days from receiving the
4 objection to file the final award. Rule 76(b)(4).

6 Rule 76 does not expressly address a request for taxable costs under A.R.S. §
7 12-332 or a motion for attorneys' fees. Nevertheless, it is standard practice for the
8 prevailing party to file a request for costs and motion for attorneys' fees at the same
9 time as it submits a proposed form of award. A response and reply are generally
10 forthcoming. However, Rule 76(b) does not presently provide adequate time for the
11 standard motion, response, reply, and decision regarding attorneys' fees.

14 This is problematic because under the current Rule 76(c), when an arbitrator
15 does not make a final award within 50 days of the notice of decision, the notice of
16 decision "will constitute the arbitrator's award." Thus, the rule leaves no discretion
17 to the judge to include costs and fees, potentially leading to inequitable results.

19 The notice of decision rarely, if ever, includes an award of costs and fees. If
20 an arbitrator fails to rule on a request for costs and fees within the 50 days allowed
21 for filing an award, his or her notice of decision then becomes the final award, bereft
22 of an award of costs and fees. The prevailing party is then forced to either appeal a
23 favorable substantive decision or let it stand and thus forgo an award of costs and
24 fees to which it believes it is entitled.

1 Given this, the State Bar believes that Rule 76 should be amended to (i) allow
2 more time for the arbitrator to rule on requests for costs and fees and (ii) include a
3 procedure for the court and parties to follow when the arbitrator fails to make a
4 timely ruling on a request for costs and fees.
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6 **II. THE PROPOSED AMENDMENTS TO RULE 76.**

7 **a. Rule 76(b).**

8 The State Bar's proposed amendment to Rule 76(b) would allow either party
9 to submit a proposed form of award within 15 days of the filing of the arbitrator's
10 notice of decision. In addition, any verified request for an award of taxable costs
11 under A.R.S. § 12-332 and any motion for attorneys' fees must also be filed within
12 15 days after the notice of decision is filed. As noted above, the current rule requires
13 only that a proposed form of award be submitted within 10 days of the arbitrator
14 filing a notice of decision. The State Bar proposes extending the deadline to 15 days
15 to give a prevailing party sufficient time to draft a request for taxable costs and
16 motion for attorneys' fees.
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20 The proposed amendment to Rule 76(b)(3) would give an opposing party 15
21 days to file any objections to the proposed form of award, including any request for
22 costs or motion for attorneys' fees. This has been increased from five to 15 days so
23 that an opposing party has adequate time to file a response to any request for costs
24 or motion for attorneys' fees.
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1 The proposed amendment to Rule 76(b)(3) would allow for five days to file
2 any reply brief. The arbitrator will then have 10 days from the filing of any reply
3 brief to rule on the request for costs and motion for attorneys' fees.
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5 The proposed amendments also change the trigger for these deadlines from
6 "receipt" or "receiving" to "filing" or "service," which is consistent with the
7 remaining Arizona Rules of Civil Procedure.
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9 **b. Rule 76(c).**

10 Like the current version of Rule 76(c), under the proposed Rule 76(c), if an
11 arbitrator does not rule within a certain timeframe, the arbitrator's notice of decision
12 becomes the final award. The proposed amendment to Rule 76(c) extends that
13 timeframe from 50 days to 75 days.
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15 The proposed amendment to Rule 76(c) also provides that, in the event the
16 notice of decision becomes the arbitrator's final award, a prevailing party seeking
17 costs and/or fees must file a motion to alter or amend the award no later than 90 days
18 after the notice of decision is filed. In this way, parties may protect themselves from
19 having a notice of decision become the arbitrator's award even if it does not address
20 costs and fees.
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22 Because of the addition of this new procedure, the proposed amendment to
23 Rule 76(c) makes clear that a motion to alter or amend the award extends the
24 timeframe for appealing an arbitrator's award until the motion to alter or amend the
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1 award is ruled on. (Under Rule 77(b) (which the Petition does not propose
2 amending), a party must file an appeal of an award no later than 20 days after (i) the
3 award is filed or (ii) the date on which the notice of decision becomes an award
4 under Rule 76(c), whichever comes first.)

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6 The proposed amendment to Rule 76(c) further authorizes the arbitrator to
7 rule on the motion to alter or amend the award because it is preferable to have the
8 arbitrator—who saw the work the parties did on the case—rule on costs and fees.
9 However, if the arbitrator fails to timely rule on the motion to alter or amend, the
10 proposed amendment is that the matter shall be referred to the assigned judge for
11 appropriate action by the clerk or court administrator pursuant to Rule 76(e).
12 Appropriate action may include ruling on the pending motion, ordering the arbitrator
13 to make a ruling within a specified timeframe, or other such action.
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16 **c. Rule 76(e) - Deadline for referral of an action to assigned judge.**

17 Current Rule 76(e) provides that “[i]f the arbitrator does not file an award with
18 the clerk within the later of 145 days after the arbitrator’s appointment or 30 days
19 after a noticed hearing, the clerk or the court administrator must refer the matter to
20 the assigned judge for appropriate action.” In order to accommodate the enlarged
21 timeframes for the arbitrator to rule on requests for costs and motions for attorneys’
22 fees, the State Bar proposes extending these respective deadlines to 170 days from
23 the appointment of the arbitrator and 100 days after a noticed hearing.
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1 **d. Rule 76(g) - Arbitrator's compensation.**

2 The proposed amendment to Rule 76(g) also provides that an arbitrator is not
3 entitled to compensation until he or she has filed an award that addresses any timely
4 requests for costs or motions for attorneys' fees. The current rule only requires that
5 an award be filed but does not specify that the award must address requests for costs
6 or fees. This change is made to incentivize an arbitrator to issue a timely ruling on
7 any request for costs and fees.
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10 **e. Table of Proposed Amendments to Deadlines.**

11 For ease of reference, the below table sets forth the proposed changes to the
12 deadlines in Rule 76.
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Deadline	Current Rule 76	Proposed Rule 76
Submission of Proposed Form of Award (Rule 76(b)(1))	10 days after notice of decision is filed	15 days after notice of decision is filed
Request for Costs and Attorneys' Fees (Rule 76(b)(1))	No specified deadline	15 days after notice of decision is filed
Objections to Proposed Form of Award, Request for Attorneys' Fees and Costs (Rule 76(b)(3))	5 days of receiving proposed form of award and request for costs and fees	15 days of service of proposed form of award and request for costs and fees
Replies in support of Proposed Form of Award, Request for Attorneys' Fees and Costs (Rule 76(b)(3))	No specified deadline	5 days of service of objections

Deadline	Current Rule 76	Proposed Rule 76
Arbitrator's award (Rule 76(b)(4))	10 days of receipt of objections	10 days of service of reply
Notice of Decision becomes Arbitrator's Award (Rule 76(c))	50 days after notice of decision filed	75 days after notice of decision is filed
Motion to alter or amend the award (Rule 76(c))	None	90 days after notice of decision is filed
Referral to assigned judge for appropriate action (Rule 76(e))	Later of 145 days after arbitrator's appointment or 30 days after a noticed hearing	Later of 170 days after arbitrator's appointment or 100 days after a noticed hearing

CONCLUSION

For the foregoing reasons, the State Bar respectfully petitions this Court to amend Rule 76 as set forth in the attached Appendices.

RESPECTFULLY SUBMITTED this 9th day of January 2023.

/s/ Lisa M. Panahi

Lisa M. Panahi
General Counsel

Electronic copy filed with the Clerk of the Supreme Court of Arizona this 9th day of January 2023.

by: P Seguin

APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline.)

(a) Arbitrator's decision.

Within 10 days after completing the hearing, the arbitrator must:

- (1) make a decision;
- (2) if the original paper file was obtained from the superior court, return it to the clerk by messenger or certified mail;
- (3) notify the parties that their exhibits are available for retrieval;
- (4) notify the parties or their counsel of the decision in writing; and
- (5) file a notice of decision with the court.

(b) Arbitrator's award.

- (1) ***Submission of proposed award; costs; attorney's fees.*** Within ~~10~~15 days after the notice of decision is filed, either party may submit a proposed form of award to the arbitrator. ~~The~~ Any verified request for an award of taxable costs under A.R.S. § 12-332 and any motion for attorney's fees must also be filed within 15 days after the notice of decision is filed. If a request for costs or a motion for attorney's fees is filed, the proposed award may~~should~~ include blanks for ~~requested~~ amounts for attorney's fees and costs.
- (2) ***Award exceeding limit.*** If an arbitrator finds that the appropriate award in an action exceeds the limit for compulsory arbitration set by local rule or statute, the arbitrator must render an award for the full amount.
- (3) ***Objections to proposed award.*** Within 15 days of ~~receiving~~service of the proposed form of award, an opposing party may file objections, including to any request for costs and any motion for attorney's fees. Any replies must be filed within 5 days of service of the objections.
- (4) ***Final award.*** Within 10 days of ~~receiving~~filing of the ~~objections~~reply, the arbitrator must rule on the objections and file one signed original award with the clerk. On the same day the arbitrator must mail or otherwise deliver copies of it to all parties or their counsel.

APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline.)

- (c) **Arbitrator's failure to file award.** If an award or stipulation for entry of another form of relief is not filed with the court within ~~50~~75 days after the notice of decision is filed, the notice of decision will constitute the arbitrator's award. If the notice of decision becomes the arbitrator's award, a prevailing party seeking costs and/or fees must file a motion to alter or amend the award no later than ninety days after the notice of decision was filed. The arbitrator is authorized to rule on the motion, but the matter must be referred to the assigned judge for appropriate action by the clerk or the court administrator under Rule 76(e) if the arbitrator does not timely rule. If a timely motion for costs and/or fees is filed under this Rule, the time to file a notice of appeal under Rule 77(b) begins to run from the date of filing of a written decision on that motion.
- (d) **Judgment.** If no appeal is filed by the deadline for filing an appeal under Rule 77(b), any party may file a motion to enter judgment on the award. If no party files such a motion within 90 days of the filing of the notice of decision and if no appeal is pending, the clerk or court administrator must notify the parties in writing that the action will be dismissed without prejudice unless a motion to enter judgment is filed within 30 days after the date of the notice. If no motion is filed within that time, the court must dismiss the action without prejudice and enter an appropriate order regarding any bond or other posted security. No further notice to the parties is required before dismissing the action.
- (e) **Referral of an action to the assigned judge.** If the arbitrator does not file an award with the clerk within the later of ~~45~~170 days after the arbitrator's appointment or ~~30~~100 days after a noticed hearing, the clerk or the court administrator must refer the matter to the assigned judge for appropriate action.
- (f) **Arbitrator's compensation.** An arbitrator assigned to an action under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12-133(G) per day for each day, or part of a day, necessarily expended in hearing the action. For this rule's purposes, "hearing" means any fact-finding proceeding or oral argument resulting in the filing of an award, or at which the parties agree to settle and stipulate to the action's dismissal. The fee to be paid in each county must be decided by a majority vote of the judges in that county. The amount must be incorporated into a superior court order that is filed with the Supreme Court clerk, with a copy filed with the clerk in that county. When more than one action arising out of the same transaction is heard at the same hearing or hearings, it will be considered as one action for purposes of compensating the arbitrator.

APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline.)

(g) Payment of compensation. The arbitrator is not entitled to receive compensation under Rule 76(f) until after an award or amended award addressing any timely request for costs or attorney's fees is filed with the clerk, or, if the parties agree to settle and stipulate to dismiss the action at a proceeding before the arbitrator, until after the action is dismissed.

APPENDIX B

(a) Arbitrator's decision.

Within 10 days after completing the hearing, the arbitrator must:

- (1) make a decision;
- (2) if the original paper file was obtained from the superior court, return it to the clerk by messenger or certified mail;
- (3) notify the parties that their exhibits are available for retrieval;
- (4) notify the parties or their counsel of the decision in writing; and
- (5) file a notice of decision with the court.

(b) Arbitrator's award.

- (1) ***Submission of proposed award; costs; attorney's fees.*** Within 15 days after the notice of decision is filed, either party may submit a proposed form of award to the arbitrator. Any verified request for an award of taxable costs under A.R.S. § 12-332 and any motion for attorney's fees must also be filed within 15 days after the notice of decision is filed. If a request for costs or a motion for attorney's fees is filed, the proposed award should include blanks for amounts for attorney's fees and costs.
- (2) ***Award exceeding limit.*** If an arbitrator finds that the appropriate award in an action exceeds the limit for compulsory arbitration set by local rule or statute, the arbitrator must render an award for the full amount.
- (3) ***Objections to proposed award.*** Within 15 days of service of the proposed form of award, an opposing party may file objections, including to any request for costs and any motion for attorney's fees. Any replies must be filed within 5 days of service of the objections.
- (4) ***Final award.*** Within 10 days of filing of the reply, the arbitrator must rule on the objections and file one signed original award with the clerk. On the same day the arbitrator must mail or otherwise deliver copies of it to all parties or their counsel.

APPENDIX B

- (c) Arbitrator's failure to file award.** If an award or stipulation for entry of another form of relief is not filed with the court within 75 days after the notice of decision is filed, the notice of decision will constitute the arbitrator's award. If the notice of decision becomes the arbitrator's award, a prevailing party seeking costs and/or fees must file a motion to alter or amend the award no later than ninety days after the notice of decision was filed. The arbitrator is authorized to rule on the motion, but the matter must be referred to the assigned judge for appropriate action by the clerk or the court administrator under Rule 76(e) if the arbitrator does not timely rule. If a timely motion for costs and/or fees is filed under this Rule, the time to file a notice of appeal under Rule 77(b) begins to run from the date of filing of a written decision on that motion.
- (d) Judgment.** If no appeal is filed by the deadline for filing an appeal under Rule 77(b), any party may file a motion to enter judgment on the award. If no party files such a motion within 90 days of the filing of the notice of decision and if no appeal is pending, the clerk or court administrator must notify the parties in writing that the action will be dismissed without prejudice unless a motion to enter judgment is filed within 30 days after the date of the notice. If no motion is filed within that time, the court must dismiss the action without prejudice and enter an appropriate order regarding any bond or other posted security. No further notice to the parties is required before dismissing the action.
- (e) Referral of an action to the assigned judge.** If the arbitrator does not file an award with the clerk within the later of 170 days after the arbitrator's appointment or 100 days after a noticed hearing, the clerk or the court administrator must refer the matter to the assigned judge for appropriate action.
- (f) Arbitrator's compensation.** An arbitrator assigned to an action under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12-133(G) per day for each day, or part of a day, necessarily expended in hearing the action. For this rule's purposes, "hearing" means any fact-finding proceeding or oral argument resulting in the filing of an award, or at which the parties agree to settle and stipulate to the action's dismissal. The fee to be paid in each county must be decided by a majority vote of the judges in that county. The amount must be incorporated into a superior court order that is filed with the Supreme Court clerk, with a copy filed with the clerk in that county. When more than one action arising out of the same transaction is heard at the same hearing or hearings, it will be considered as one action for purposes of compensating the arbitrator.

APPENDIX B

(g) Payment of compensation. The arbitrator is not entitled to receive compensation under Rule 76(f) until after an award or amended award addressing any timely request for costs or attorney's fees is filed with the clerk, or, if the parties agree to settle and stipulate to dismiss the action at a proceeding before the arbitrator, until after the action is dismissed.