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

9 In the Matter of:

Supreme Court No. R-22-0047

10 **PETITION TO AMEND RULE**
11 **80(a) OF THE ARIZONA RULES**
12 **OF CIVIL PROCEDURE**

COMMENT

13 This is the State Bar of Arizona’s comment on the above Petition, which
14 would amend Rule 80(a) of the Arizona Rules of Civil Procedure to add a third way
15 to make binding agreements or consents between parties or attorneys. The State Bar
16 supports the proposed amendment, with slightly revised language to the new
17 subsection proposed in the Petition, as further discussed below.

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19 **I. RULE 80(a) AND THE PETITION’S PROPOSED CHANGE**

20 Rule 80(a) has long provided that if the matter is disputed, no agreement or
21 consent between parties or attorneys in any matter is binding unless one of two
22 alternatives is satisfied: (1) the agreement or consent is in writing, or (2) the
23 agreement or consent is made orally in open court and entered in the minutes. The
24 Petition proposes adding a third alternative: the agreement or consent is made before
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1 a mediator or judicial officer and is memorialized either before a “court reporter” or
2 in “an audio or video recording.”

3 **II. THE STATE BAR SUPPORTS THE PETITION**

4 The State Bar supports the Petition’s proposed amendment, with the revised
5 language set forth below.

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7 First, the proposed amendment’s scope is narrow and focused. Unlike the first
8 two Rule 80(a) alternatives, which refer to all agreements or consents between
9 parties or attorneys in any matter, the proposed third alternative applies solely to
10 agreements or consents made before mediators or judicial officers. The presence of
11 the neutral allays concern that parties, or attorneys would, unwittingly or not, create
12 a muddled record in transcript or on tape if left to their own devices.
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15 Second, the proposed amendment presents a cost-effective and reliable
16 alternative to documenting agreements reached before a neutral. The reliability and
17 trustworthiness of certified reporters cannot be gainsaid; their important, albeit
18 sometimes overlooked, role in litigation is attested to by any number of civil rules.
19 See, e.g., Ariz. R. Civ. P. 28(a)(1)(C); 29(a); 30(b)(3)(A); 43(g)(2). Further, if a
20 certified reporter is not available, there is no reason to deny the neutral and the
21 parties/attorneys use of an audio or video recording if they feel comfortable doing
22 so. Indeed, recordings have become ubiquitous in the larger world precisely because
23 they are cheap and reliable. Using them within the narrow confines of the proposed
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1 amendment furthers “secure the just, speedy, and inexpensive determination” of
2 actions. Ariz. R. Civ. P. 1.

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4 That said, the State Bar proposes revised language to the proposed amendment
5 as follows:

6 **(a) Agreement or Consent of Counsel or Parties.** If disputed, no agreement
7 or consent between parties or attorneys in any matter is binding, unless:

8 (1) it is in writing; or

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10 (2) it is made orally in open court and entered in the minutes; or

11 (3) it is made before a mediator or judicial officer, is memorialized either
12 before a certified reporter or in an audio or video recording, and, in the case of a
13 mediated agreement, the parties state that the terms of the agreement may be
14 disclosed, as necessary, to gain court approval of the agreement or to enforce the
15 agreement.

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17 The State Bar recommends changing “court reporter” to “certified reporter.”
18 The latter is the term used throughout the Arizona Rules of Civil Procedure, as well
19 as Rule 30 of this Court. That convention should be followed in any amended Rule
20 80(a).
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22 The additional language proposed to Rule 80(a) above is necessary because
23 the proposed amendment in the Petition, unless revised, is likely to result in mediated
24 settlements that are reliably documented but which nevertheless remain privileged,
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1 and therefore inadmissible, for purposes of enforcement. This Comment suggests an
2 alternative revision of the proposed amendment that would avoid a conflict between
3 the Rule and the privilege statute, in which the statute would necessarily prevail.
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5 The mere recital of the terms of a mediated settlement, outside of court and
6 before a mediator or judicial officer, does not reliably evidence the parties'
7 agreement to the public disclosure of the terms of that settlement. Nor does recital
8 of the terms of a mediated settlement, by itself, evidence agreement that the
9 settlement is not confidential. This conclusion is confirmed by Arizona Revised
10 Statute § 12-2238(D), the mediation privilege statute, which directly addresses the
11 presumptive confidentiality of mediated settlement agreements and provides that
12 “when necessary to enforce or obtain approval of an agreement that is reached by
13 the parties in a mediation, the terms of an agreement that is evidenced by a record
14 *that is signed by the parties are not confidential.*” (Emphasis added.) Absent a signed
15 transcript of a recorded mediated settlement agreement or an explicit recital in the
16 record that the parties agree that the settlement terms are not confidential or may be
17 disclosed as necessary to gain court approval of the agreement or to enforce the
18 agreement, this proposed amendment will create a conflict between the amendment
19 and the privilege statute. Therefore, the State Bar proposes the above-stated
20 language as a solution to this issue.
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1 **III. CONCLUSION**

2 The State Bar supports the Petition to amend Rule 80(a), but respectfully asks
3 the Court to adopt the language set forth in this Comment to address the issues raised
4 above.
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6 RESPECTFULLY SUBMITTED this 1st day of May, 2023.

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8 */s/ Lisa M. Panahi*

9 Lisa M. Panahi
10 General Counsel
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