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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND RULE 53(b)(3)
OF THE ARIZONA RULES OF CIVIL
PROCEDURE

Supreme Court No. _____

**Petition to Amend Rule 53(b)(3),
Arizona Rules of Civil Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona respectfully petitions this Court to amend Rule 53(b)(3) of the Arizona Rules of Civil Procedure to address a practical problem that has arisen in the appointment of special masters. To ensure that a master does not have any disqualifying conflicts of interest, the Rule requires a prospective master to file an affidavit disclosing any such conflicts before a court appoints him or her as a master. In practice, however, courts (in an effort to save time) frequently appoint a master without first requiring such an affidavit or even notifying a prospective master that his or her appointment is being contemplated.

The State Bar's proposed amendment attempts to solve this problem by requiring a prospective master to file a conflicts affidavit *after* a court's referral of a matter to him or her, but *before* he or she accepts the appointment. The proposed amendment to the Rule is shown in Appendix A.

1 Discussion

2 Rule 53 strives to ensure that a prospective master is free from any grounds
3 for disqualification or, to the extent such grounds may exist, the parties consent to
4 waive such grounds with the court's approval. Specifically, Rule 53(a)(2) provides:

5 A master shall not have a relationship to the parties,
6 counsel, action or court that would require
7 disqualification of a judge under Rule 81 of the Rules of
8 the Supreme Court of Arizona unless the parties consent
9 with the court's approval to appointment of a particular
person after disclosure of any potential grounds for
disqualification.

10 To implement that rule, Rule 53(b)(3) currently provides that before a court
11 appoints a person as a special master, the prospective appointee must file an
12 affidavit disclosing whether there are any potential conflicts of interest or other
13 grounds that may disqualify him or her from acting as a special master:

14 The court may enter the order appointing a master only
15 after the prospective appointee has filed an affidavit
16 disclosing whether there is any ground for
17 disqualification under Rule 81 of the Rules of the
18 Supreme Court of Arizona, and, if a ground for
19 disqualification is disclosed, after the parties have
consented with the court's approval to waive the grounds
of disqualification.

20 While this rule should work in theory, it breaks down in practice. Courts
21 often appoint a master without first requiring a conflicts affidavit or even letting the
22 prospective master know that his or her appointment is being considered. This
23 reflects the practical reality that, because courts have little time to deal with
24 discovery disputes, they often prefer to make an appointment at the same time that
25 they decide that a master is necessary. This practice, however, is likely to leave the
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1 appointed master in a quandary about how to comply with Rule and defeats the
2 Rule's purpose in assuring the parties and the appointing court that a master does
3 not have a disqualifying conflict of interest.

4 To address this issue, the State Bar proposes replacing Rule 53(b)(3) with a
5 provision that would allow the appointment of a master without first requiring a
6 conflicts affidavit, but that would require the prospective master to file such an
7 affidavit (or declaration) before he or she accepts the appointment:

8 Before accepting an appointment as a master, the
9 prospective appointee shall file an affidavit or declaration
10 disclosing whether there is any ground for
11 disqualification under Rule 81 of the Rules of the
12 Supreme Court of Arizona. If a potential ground for
13 disqualification is disclosed, the prospective appointee
14 shall not proceed with the appointment unless the parties
15 have consented (with the court's approval) to waive the
16 ground for disqualification.

17 Under this proposal, a court would not need to wait until a conflicts
18 affidavit/declaration is filed before entering an order appointing the master, which
19 would promote judicial efficiency (and would be consistent with what many judges
20 now do). At the same time, it would give a prospective master the clear direction to
21 complete a conflicts check before accepting an appointment, and, by requiring the
22 filing of the affidavit/declaration before the master accepts the appointment, it
23 would afford the parties and the court a fair opportunity to evaluate whether any
24 conflict or other issue identified in the affidavit/declaration would be disqualifying.

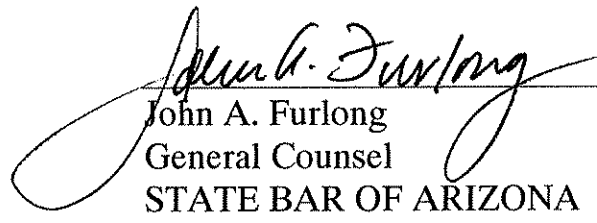
25 Conclusion

26 The State Bar believes that its proposed amendment to Rule 53(b)(3) would
continue to serve the purpose of the Rule while being more likely to be observed in

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practice. The State Bar respectfully requests this Court to amend Rule 53(b)(3) in the form set forth in Appendix A.

RESPECTFULLY SUBMITTED this 5TH day of October, 2011.



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Electronic copy filed with the Clerk of the Supreme Court of Arizona this 5TH day of October, 2011.

By: Kathleen A. Lundgren

APPENDIX A

1 **Rule 53(b). Order appointing master**

2 * * * *

3 (3) *Entry of Order.* ~~The court may enter the order appointing a master~~
4 ~~only after the prospective appointee has filed an affidavit disclosing whether there~~
5 ~~is any ground for disqualification under Rule 81 of the Rules of the Supreme Court~~
6 ~~of Arizona, and, if a ground for disqualification is disclosed, after the parties have~~
7 ~~consented with the court's approval to waive the grounds of disqualification.~~

8 Acceptance of Appointment. Before accepting an appointment as a master, the
9 prospective appointee shall file an affidavit or declaration disclosing whether there
10 is any ground for disqualification under Rule 81 of the Rules of the Supreme Court
11 of Arizona. If a potential ground for disqualification is disclosed, the prospective
12 appointee shall not proceed with the appointment unless the parties have consented
13 (with the court's approval) to waive the ground for disqualification.

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