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

10 **PETITION TO AMEND RULE 56 OF**  
11 **THE ARIZONA RULES OF CIVIL**  
12 **PROCEDURE**

Supreme Court No. \_\_\_\_\_

**Petition to Amend Rule 56 of**  
**Arizona Rules of Civil Procedure**

13 Pursuant to Rule 28 of the Arizona Supreme Court, the State Bar of Arizona  
14 petitions the Court to amend Rule 56 of the Arizona Rules of Civil Procedure  
15 (“Rule 56” or “Arizona Rule 56”). The proposed amendments modify Rule 56 in  
16 several respects: (i) some are purely stylistic changes proposed to clarify and update  
17 the language of the rule, with no intended substantive change; (ii) the amendments  
18 also incorporate, on a selective basis, aspects of the December 2010 amendments to  
19 Federal Rule of Civil Procedure 56 (“Federal Rule 56”); and (iii) some proposed  
20 changes address identified problems or ambiguities in the current Rule 56.  
21 Appendix A provides a redlined version of the proposed amendments. Appendix B  
22 shows an amended Rule 56 incorporating the proposed amendments. Proposed  
23 explanatory comments are found at Appendix C.

24 **I. INTRODUCTION AND BACKGROUND**

25 Historically, Arizona Rule 56 has incorporated some aspects of Federal  
26 Rule 56 while departing from the federal rule in other significant respects.  
Although the two rules have never been in total conformity, Arizona Rule 56 has

1 been updated on a periodic basis to adopt modifications to Federal Rule 56 as that  
2 rule has evolved over time.

3 Extensive amendments to Federal Rule 56 were adopted by the United States  
4 Supreme Court on April 28, 2010, and went into effect in December 2010. The  
5 Federal Rule 56 amendments were the culmination of a lengthy study by the  
6 Committee on the Rules of Practice and Procedure of the United States Judicial  
7 Conference. According to the Committee's report, the process generated extensive  
8 and "often conflicting" public comment, prompting substantial changes to the  
9 Committee's original proposal and resulting in "a leaner and stronger summary  
10 judgment procedure." Report of Civil Rules Advisory Committee, Judicial  
11 Conference of the United States (May 9, 2009, revised June 15, 2009) ("Advisory  
12 Committee Report"), at 6. Because the December 2010 amendments to Federal  
13 Rule 56 were far-reaching both in style and in substance, the State Bar conducted a  
14 comprehensive review to evaluate whether conforming changes should be made to  
15 Arizona Rule 56.<sup>1</sup> As part of this review, the State Bar evaluated whether other  
16 stylistic or substantive changes should be made to Arizona Rule 56 to modernize  
17 the rule or to address concerns identified by practitioners.

18 The proposed amendments incorporate many of the stylistic improvements of  
19 the Federal Rule 56 amendments, making the text more concise and easier to  
20 follow. In other respects, however, the proposed amendments depart from Federal  
21 Rule 56. For example, the proposal maintains Arizona's detailed requirements for a  
22 separate statement of facts, with only minor modifications as described below.  
23 Federal Rule 56 has no parallel requirement; the federal Advisory Committee  
24 withdrew its original proposal to incorporate such a "point-counterpoint" procedure

25 \_\_\_\_\_  
26 <sup>1</sup> In December 2009 the State Bar's Civil Practice and Procedure Committee formed a  
subcommittee to review and make recommendations on proposed amendments to Arizona  
Rule 56 based on the then-pending proposal to amend Federal Rule 56.

1 into Federal Rule 56, leaving this issue to local court rule. Advisory Committee  
2 Report at 7 (“near avalanche of comments” on this issue shows that “there is less  
3 desire for national uniformity than might have been expected”). As another  
4 example, the amendments to Rule 56(f) proposed in this petition, where an  
5 opposing party asserts that further discovery is needed to respond to a summary  
6 judgment motion, depart significantly from current Rule 56(f) and from the  
7 counterpart Federal Rule 56(d) in an effort to address identified practitioner  
8 concerns.

9 The following provides an overview of the proposed changes to each section  
10 of Rule 56.

## 11 **II. OVERVIEW OF PROPOSED AMENDMENTS TO ARIZONA RULE 56**

### 12 **A. Section 56(a). Motion for Summary Judgment or Partial** 13 **Summary Judgment.**

14 Current Arizona Rules 56(a) and (b) address the timing of bringing a motion  
15 for summary judgment; the standard for granting summary judgment appears later,  
16 in subsection (c). Historically, the language and placement of Arizona’s summary  
17 judgment standard have tracked Federal Rule 56, with only minor wording  
18 differences.<sup>2</sup> The December 2010 amendments to Federal Rule 56 moved the  
19 summary judgment standard from section (c) to section (a) and modified the  
20 language in various respects. The Federal Rule 56 Committee Note emphasizes  
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22 <sup>2</sup> Before the December 2010 amendments, Federal Rule 56(c) provided in relevant  
23 part: “The judgment sought should be rendered if the pleadings, the discovery and  
24 disclosure materials on file, and any affidavits show that there is no genuine issue as to  
25 any material fact and that the movant is entitled to judgment as a matter of law.” Arizona  
26 Rule 56(c) currently provides in relevant part: “The judgment sought shall be rendered  
forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file,  
together with the affidavits, if any, show that there is no genuine issue as to any material  
fact and that the moving party is entitled to a judgment as a matter of law.”

1 that notwithstanding these changes, “[t]he standard for granting summary judgment  
2 remains unchanged.”

3 To maintain uniformity with Federal Rule 56, conforming changes are  
4 proposed to Arizona Rule 56. As shown in Appendix A, the proposed amendment  
5 moves the summary judgment standard from section (c) to section (a) and  
6 incorporates, verbatim, the language of Federal Rule 56. To avoid any implication  
7 that these changes alter substantive Arizona law for obtaining summary judgment,  
8 the State Bar also proposes a comment making clear that “these changes are  
9 stylistic and are not intended to alter the substantive requirements for obtaining  
10 summary judgment as developed in Arizona case law. . . .” See Appendix C,  
11 proposed comment to Section (a).

12 **B. Section 56(b). Time to File a Motion.**

13 The timing provisions of Arizona Rule 56 have historically differed from the  
14 counterpart federal rule requirements. Both before and after the December 2010  
15 amendments, Federal Rule 56 allowed any party to move for summary judgment “at  
16 any time until 30 days after the close of all discovery.” In contrast, Arizona  
17 Rule 56 sets forth different timing requirements for a claimant and a defending  
18 party: (i) section (a) restricts a claimant’s ability to move for summary judgment  
19 until after the answer is due or the adverse party has moved for summary judgment;  
20 (ii) section (b), on the other hand, allows a defending party to move for summary  
21 judgment at any time. In either case, under Arizona’s rule, the motion must be filed  
22 no later than ninety days before the date set for trial.

23 The proposed amendment declines to follow the federal rule approach based  
24 on identified practitioner concerns that allowing a claimant to move for summary  
25 judgment on commencement of an action might encourage gamesmanship and a  
26 proliferation of premature summary judgment motions and Rule 56(f) motions

1 seeking continuances in order to conduct discovery. Additionally, the filing of a  
2 summary judgment motion at the outset of litigation might hamper a defendant's  
3 ability to secure counsel since potential counsel might decline to take on a case due  
4 to the burden of immediately having to file a responsive pleading and an opposition  
5 to a summary judgment motion on top of the pre-existing demands of counsel's  
6 other work. On the other hand, however, the current rule creates a situation where  
7 an opposing party may file a motion to dismiss (without answering); and a claimant  
8 would be unable to move for summary judgment until after the motion to dismiss  
9 was resolved. This creates potential inefficiencies by preventing a claimant from  
10 cross-moving for summary judgment on substantive issues presented in a motion to  
11 dismiss. Accordingly, the proposed amendment authorizes a claimant to move for  
12 summary judgment after an opposing party moves to dismiss under Rule 12(b)(6).

13 The proposed amendment also simplifies the rule's structure by combining  
14 former sections (a) and (b) in a new section (b) and adding three subsections for  
15 clarity. These proposed changes make the new section (b) easier to follow and  
16 allow the remaining sections of Rule 56 to maintain their current lettering,  
17 notwithstanding the proposed addition of new section (a). The language in  
18 proposed subsection (3) has been modified to clarify that any dispositive motion  
19 deadline established by the court will control over the ninety-day period provided in  
20 the rule.

### 21 **C. Section 56(c). Motion and Proceedings.**

22 The proposed amendments to section (c) of Arizona Rule 56 make several  
23 stylistic changes and clarify ambiguities in the current rule. Section (c) has been  
24 divided into three subsections to make it easier to follow. The standard for granting  
25 summary judgment which appears in subsection (1) is moved to section (a), as  
26 discussed above.

1 Proposed subsection (1) modifies aspects of the current requirement that, on  
2 timely request by any party, the court “shall” set a hearing. The proposed changes  
3 clarify that the court need not hold a hearing if a motion is uncontested. The  
4 changes also provide that the court has discretion to decline to conduct a hearing “if  
5 it determines that the motion should be denied.” This change is intended to promote  
6 judicial economy in cases where summary judgment is not appropriate and the  
7 court determines that it would not be assisted by oral argument, while ensuring that  
8 parties receive their “day in court” before summary judgment can be granted  
9 against them.

10 Proposed subsection (2) modifies the current rule in two primary respects:  
11 (i) minor wording changes are proposed to clarify that the fifteen-day time period  
12 for serving reply memoranda and affidavits runs from the date of *service* of the  
13 opposition (the current rule is unclear on this point); and (ii) a requirement is added  
14 that, if parties agree to an extended briefing schedule, they must file a written  
15 stipulation with the court to ensure that the court is aware of the change to the  
16 briefing schedule.

17 Proposed subsection (3) makes one minor stylistic revision to the language  
18 currently appearing in subsection (2) setting forth the requirements for the  
19 statement of facts.

20 Notably, the proposed amendments do not incorporate the December 2010  
21 revisions to Federal Rule 56(c). As noted above, Arizona's section (c) has  
22 historically departed from Federal Rule 56(c) in significant respects, including that  
23 the federal rule omits Arizona's “point-counterpoint” statement-of-facts procedure.  
24 The Arizona federal district court has adopted a similar “point-counterpoint”  
25 procedure by local rule which is consistent with the state court procedure. *See*  
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1 LRCiv 56.1(a) and (b) (requiring separate and controverting statements of fact and  
2 specifying that “background” facts need not be included).

3 The differences between the Arizona and Federal Rules 56(c) are even more  
4 significant with the December 2010 amendments to the federal rule, which  
5 substantially rewrote section (c). The federal Advisory Committee's Note states  
6 that section (c) of the federal rule is “new” and is intended to establish a “common  
7 procedure for several aspects of summary judgment motions synthesized from  
8 similar elements developed in the cases or found in many local rules.” Advisory  
9 committee note (2010 amendments). The State Bar considered possible revisions to  
10 incorporate some or all of new section (c) of Federal Rule 56, but ultimately  
11 concluded that this area should be left to case law development, as the new federal  
12 rule language does not fit easily within the structure of Arizona's rule and Arizona  
13 has its own body of summary judgment case law. There was also concern that  
14 section (c) is so firmly established in Arizona law and practice that wholesale  
15 revisions such as those adopted at the federal level could have unintended  
16 consequences, particularly given that the federal rewrite of section (c) has a limited  
17 history with practitioners and has not yet been interpreted by the federal courts.

18 **D. Section 56(d). Declining to Grant All the Requested Relief.**

19 The proposed amendments modify section (d) to conform to the stylistic  
20 revisions to counterpart Federal Rule 56(g), which simplified the language of this  
21 section and made it more concise. No substantive change is intended. Section (d)  
22 cross-references new section (h), which allows the court to grant summary  
23 judgment on independent consideration in appropriate circumstances.  
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1           **E. Section 56(e). Form of Affidavits and Depositions; Further**  
2           **Testimony; Defense Required.**

3           Before the December 2010 amendments to Federal Rule 56, section (e) of the  
4 federal rule was similar, although never identical, to section (e) of Arizona Rule 56.  
5 The December 2010 amendments to Federal Rule 56(e) entirely rewrote this  
6 section, moving some portions of the language to new section (c) of the federal  
7 rule. The State Bar considered whether conforming changes should be made to  
8 Arizona's rule, but concluded that the requirements spelled out in this section are  
9 well-established and are frequently cited in Arizona's summary judgment case law,  
10 creating a risk of confusion or other unintended consequences if the section were  
11 eliminated or changed in material respects.

12           Accordingly, the proposed amendments instead suggest minor stylistic  
13 revisions which make the text more concise and improve clarity. The first sentence  
14 of section (e) is modified to conform to the 2010 stylistic revisions to Federal Rule  
15 56(c)(4). The section has also been subdivided into four subsections to make it  
16 easier to follow. No substantive change is intended.

17           **F. Section 56(f). When Facts are Unavailable to the Nonmovant;**  
18           **Request for Rule 56(f) Relief.**

19           The proposed amendments modify section (f) in several significant respects  
20 to address identified ambiguities and problems with the current rule and practice.  
21 Under current section (f), a party opposing a summary judgment motion may file an  
22 affidavit setting forth the reasons why it cannot “present by affidavit facts essential  
23 to justify” an opposition. The section provides that the court has several options on  
24 receiving such an affidavit, including that it may refuse the application, order a  
25 continuance to allow discovery to be taken, or order other appropriate relief.  
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1 Arizona Rule 56(f) tracks both the former and current Federal Rule 56(f), with  
2 minor wording differences.

3 Practitioners and members of the judiciary have identified a number of  
4 problems and limitations with section (f), including that it: (i) is silent regarding the  
5 impact a Rule 56(f) affidavit has on the timing of a party's opposition to the  
6 underlying motion; (ii) lacks a defined procedure for resolving Rule 56(f) requests  
7 in a timely manner to avoid undue delay on the pending summary judgment  
8 motion; and (iii) may be abusively employed for purposes of delay, in part due to  
9 the lack of any such defined procedure.

10 The proposed amendment reflects an effort to set forth a clear and uniform  
11 procedure for addressing Rule 56(f) requests in an expedited manner in order to  
12 prevent abuse and streamline the resolution of such requests. Among other changes,  
13 the proposed amendments would require a party seeking Rule 56(f) relief to confer  
14 with opposing counsel in an effort to resolve the issues and to file a separate  
15 certification of counsel attesting to those efforts along with the Rule 56(f) request.  
16 The changes also set forth a mandatory, expedited procedure for hearing and  
17 resolution of Rule 56(f) requests, to the extent that counsel are unable to resolve the  
18 issue by stipulation. These procedures are intended to facilitate resolution of  
19 section (f) disputes and minimize the need for court intervention. As noted in the  
20 proposed comment, section (f) affidavits must continue to satisfy the specificity  
21 requirements set forth in existing Arizona case law. *See, e.g., Simon v. Safeway,*  
22 *Inc.*, 217 Ariz. 330, 173 P.3d 1031 (App. 2007) (identifying what an affidavit must  
23 show).

24 The specific amendments proposed include the following:

25 (1) To encourage a uniform procedure, subsection (1) specifies that a party  
26 seeking relief must file a "Request for Rule 56(f) Relief and for Expedited

1 Hearing,” along with a supporting affidavit, as required under the current section.  
2 Subsection (1) sets forth the options available to the court in ruling on the request,  
3 which include deferring consideration of the motion and allowing time for further  
4 discovery; denying the requested relief and ordering an opposition by a date certain;  
5 or issuing any other appropriate order. It is contemplated that even in denying the  
6 request, a court may allow a brief extension of the time for opposition to  
7 accommodate the new hearing procedure. *See Proposed Section 56(f)(1)(B).*

8 (2) Subsection (2) clarifies that absent a court order extending the time for  
9 response, filing a request for Rule 56(f) relief does not extend the date for opposing  
10 a motion for summary judgment. Among other things, this would encourage parties  
11 to seek relief under the rule as soon as possible after receiving a summary judgment  
12 motion.

13 (3) Subsection (3), modeled after Arizona Rule of Civil Procedure 26(g),  
14 requires that a party seeking relief attempt to resolve the issue by good-faith  
15 personal consultation with the opposing party and to submit a separate certification  
16 regarding such consultation with its section (f) affidavit.

17 (4) Subsection (4) provides that the party moving for summary judgment is  
18 generally not required to file a response to the request for Rule 56(f) relief; but, if it  
19 chooses to do so, it must file the response within two days of the scheduled hearing.

20 (5) Finally, subsection (5) adopts an expedited hearing procedure requiring  
21 courts to hold a telephonic or in-person hearing within seven days after any hearing  
22 request filed by the party seeking the relief. In addition to limiting the delay  
23 occasioned by Rule 56(f) practice on ultimate resolution of a summary judgment  
24 motion, it is anticipated that the mandatory nature of the expedited hearing  
25 procedure, when combined with the personal consultation requirement of  
26 subsection (3), will lead to a decrease in abusive Rule 56(f) practice and an increase

1 in informal resolution of Rule 56(f) issues by the parties without the need for court  
2 involvement.

3 **G. Section (g). Affidavits Made in Bad Faith.**

4 The proposed amendments modify section (g) to conform to the stylistic  
5 revisions to counterpart Federal Rule 56(h), which simplified the language of this  
6 section and made it more concise. The proposed modification departs from the  
7 current Arizona rule and from Federal Rule 56(h) in two respects. First, section  
8 (g)'s reference to the sanction of "contempt" is eliminated. The proposed new text  
9 allows "other appropriate sanctions," leaving it to the court to determine whether a  
10 sanction of contempt is warranted by the applicable substantive law. Second, the  
11 language of section (g) has been modified to make clear that notice and an  
12 opportunity to respond are required before the court may impose any sanctions.

13 **H. Section (h). Judgment Independent of the Motion.**

14 The proposed amendments add new section (h), which is modeled after  
15 Federal Rule 56(f) as adopted in December 2010. The Advisory Committee Report  
16 to the federal amendments explained that this new section "reflects procedures that  
17 have developed in the decisions without any explicit anchor in the text of" Rule 56,  
18 which recognize the court's inherent authority to dispose of matters on summary  
19 judgment on the court's own initiative, where appropriate.

20 The proposed section (h) amendments are intended to strike a balance  
21 between the court's inherent power and the rights of litigants by requiring notice  
22 and a hearing before the court may grant summary judgment for a nonmovant, grant  
23 a motion on grounds not raised by a party, or otherwise consider summary  
24 judgment on the court's own initiative.

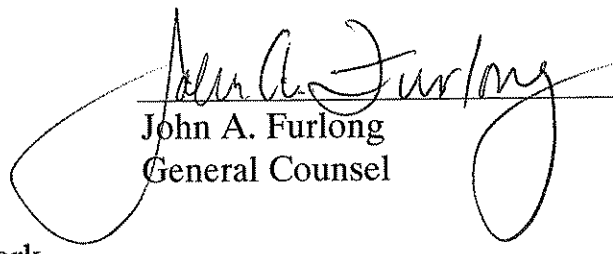
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**III. CONCLUSION**

The State Bar of Arizona respectfully requests that the Court amend Rule 56 of the Arizona Rules of Civil Procedure as shown in Appendix A.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
John A. Furlong  
General Counsel

Electronic copy filed with the Clerk of the Supreme Court of Arizona this 20<sup>th</sup> day of November, 2011.

By: Kathleen A. Lundgren

## **APPENDIX A**

**State Bar's Proposed Changes to Rule 56**

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by "~~strike-through~~").*

**Proposed Revisions to Arizona Rule of Civil Procedure 56**

Rule 56: Summary Judgment

**Rule 56(a). ~~For claimant~~ Motion for Summary Judgment or Partial Summary Judgment.**

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the request.

**Rule 56(b). ~~For defending party~~**  
**Rule 56(b). Time to File a Motion.**

(1) A claimant may move for summary judgment with or without supporting affidavits:

~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, (A) after the expiration of twenty 20 days from the service of process upon the adverse party, but no sooner than the date on which the answer is due; or~~

~~\_\_\_\_\_ (B) after service of a Rule 12(b)(6) motion to dismiss or a motion for summary judgment by the adverse party, ~~move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. Any such motion shall be filed no later than 90 days prior to the date set for trial.~~~~

(2) Any other party may move for summary judgment, with or without supporting affidavits, at any time after the action is commenced.

(3) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. Any such motion by any party shall be filed no later than 90 days prior to the dispositive motion deadline set by the court or local rule, or in the absence of such a deadline, 90 days before the date set for trial.

## State Bar's Proposed Changes to Rule 56

(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).

### Rule 56(c). Motion and proceedings thereon

#### Rule 56(c). Motion and Proceedings.

(1) Upon timely request by any party, the court shall set a time for hearing on the motion, provided, however, that the court need not conduct a hearing if it determines that the motion should be denied or if the motion is uncontested. If no request for a hearing is made, the court may, in its discretion, set a time for such hearing.

~~(2) (1) Upon timely request by any party, the court shall set a time for hearing of the motion. If no request is made, the court may, in its discretion, set a time for such hearing. A party opposing the motion must file affidavits, memoranda or both its response and any supporting materials within 30 days after service of the motion. The moving party shall have 15 days thereafter after service of the response in which to serve a reply memoranda and affidavits. The foregoing memorandum and any supporting materials. These time periods may be shortened or enlarged by the court or by agreement a filed stipulation of the parties or by court order. The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

(3) ~~(2)~~ Any party filing a motion for summary judgment shall set forth, separately in a statement separate from the memorandum of law, the specific facts relied upon in support of the motion. The facts shall be stated in concise, numbered paragraphs. As to each fact, the statement shall refer to the specific portion of the record where the fact may be found. Any party opposing a motion for summary judgment shall file a statement in the form prescribed by this Rule, specifying those paragraphs in the moving party's statement of facts which are disputed, and also setting forth those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. In the alternative, the movant and the party opposing the motion shall file a joint statement in the form prescribed by this Rule, setting forth those material facts as to which there is no genuine dispute. The joint statement may provide that any stipulation of fact is not intended to be binding for any purpose other than the motion for summary judgment.

**State Bar's Proposed Changes to Rule 56**

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~“strike-through”~~).*

**Rule 56(d). Case not fully adjudicated on motion**

**Rule 56(d). Declining to Grant All the Requested Relief.**

~~If on motion under~~the court does not grant all the relief requested by the motion, or if on independent consideration pursuant to section (h) of this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount, the court may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed dispute and treating the fact as established, and in the trial shall be conducted accordinglycase.

**Rule 56(e). Form of Affidavits and Depositions; Further Testimony; Defense Required**

**Rule 56(e). Form of Affidavits and Depositions; Further Testimony; Defense Required.**

(1) An affidavit used to support or oppose a motion shall be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a properly authenticated copy shall be attached to or served with the affidavit.

(2) Affidavits may be supplemented or opposed by depositions, answers to interrogatories, additional affidavits or other materials that would be admissible in evidence.

(3) If all or part of a deposition is submitted in support of or in opposition to a motion for summary judgment, the offering party must submit a written transcript of the testimony. An electronic recording of the testimony may be submitted only if the offering party contends that the written transcript is erroneous.

~~(4) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show~~

## State Bar's Proposed Changes to Rule 56

(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by "~~strike-through~~").

~~affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. Only a written transcript of a deposition or portion thereof and not any electronic recording thereof may be submitted in support of or opposition to a motion for summary judgment except where a party contends that the written transcript is erroneous. When a motion for summary judgment is made and supported as provided in this Rule, an adverse opposing party may not rest upon the merely merely on allegations or denials of the adverse party's own pleading, but the adverse party's; rather, its response must, by affidavits or as otherwise provided in this rule, must Rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse opposing party does not so respond, summary judgment, if appropriate, shall be entered against the adversethat party.~~

### **Rule 56(f). When affidavits are unavailable**

~~Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. Rule 56(g). Affidavits made in bad faith~~

### **Rule 56(f). When Facts are Unavailable to the Nonmovant; Request for Rule 56(f) Relief and Expedited Hearing.**

(1) If a party opposing summary judgment files a request for relief and expedited hearing under this Rule, along with a supporting affidavit showing that, for specified reasons, it cannot present evidence essential to justify its opposition, the court may, after holding a hearing:

(A) defer considering the motion for summary judgment and allow time to obtain affidavits or to take discovery before a response to the motion is required;

(B) deny the requested relief and require a response to the motion for summary judgment by a date certain; or

(C) issue any other appropriate order.

**State Bar's Proposed Changes to Rule 56**

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).*

(2) Unless otherwise ordered by the court, the filing of a request for relief and affidavit under this section does not by itself extend the date by which the party opposing summary judgment must file a memorandum and separate statement of facts as prescribed in section (c) of this Rule.

(3) No request for relief will be considered and no hearing will be scheduled unless the request for relief is accompanied by a separate statement of counsel seeking the relief certifying that, after personal consultation and good-faith efforts to do so, the parties have been unable to satisfactorily resolve the matter.

(4) The party moving for summary judgment is not required to file a response to the request for relief or affidavit unless otherwise ordered by the court. If such a party elects to file a response, it must be filed no later than two days before the hearing scheduled to consider the requested relief.

(5) Except as provided in subsection (3), the court shall hold an expedited hearing concerning the requested relief, in person or by telephone, within seven days after the filing of a request for hearing by the party seeking the relief.

**Rule 56(g). Affidavits Made in Bad Faith.**

If satisfied that an affidavit under this Rule is submitted in bad faith or solely for delay, the court may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result, or may impose other appropriate sanctions. The court shall allow notice and a reasonable time to respond before imposing any sanctions pursuant to this section.

**Rule 56(h). Judgment Independent of the Motion or Based on Materials Not Cited in the Motion.**

After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment after identifying for the parties material facts that may not be genuinely in dispute.

~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the~~

**State Bar's Proposed Changes to Rule 56**

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by "~~strike-through~~").*

~~purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.~~

## **APPENDIX B**

## **Proposed Revisions to Arizona Rule of Civil Procedure 56**

### **Rule 56: Summary Judgment**

#### **Rule 56(a). Motion for Summary Judgment or Partial Summary Judgment.**

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the request.

#### **Rule 56(b). Time to File a Motion.**

(1) A claimant may move for summary judgment, with or without supporting affidavits:

(A) after the expiration of 20 days from the service of process upon the adverse party, but no sooner than the date on which the answer is due; or;

(B) after service of a Rule 12(b)(6) motion to dismiss or a motion for summary judgment by the adverse party.

(2) Any other party may move for summary judgment, with or without supporting affidavits, at any time after the action is commenced.

(3) A motion by any party shall be filed no later than the dispositive motion deadline set by the court or local rule, or in the absence of such a deadline, 90 days before the date set for trial.

#### **Rule 56(c). Motion and Proceedings.**

(1) Upon timely request by any party, the court shall set a time for hearing of the motion, provided, however, that the court need not conduct a hearing if it determines that the motion should be denied or if the motion is uncontested. If no request for a hearing is made, the court may, in its discretion, set a time for such hearing.

(2) A party opposing the motion must file its response and any supporting materials within 30 days after service of the motion. The moving party shall have 15 days after service of the response in which to serve a reply memorandum and any supporting materials. These time periods may be shortened or enlarged by a filed stipulation of the parties or by court order.

(3) Any party filing a motion for summary judgment shall set forth, in a statement separate from the memorandum of law, the specific facts relied upon in support of the motion. The facts shall be stated in concise, numbered paragraphs. As to each fact, the statement shall refer to the specific portion of the record where the fact may be found. Any party opposing a motion for summary judgment shall file a statement in the form prescribed by this Rule, specifying those paragraphs in the moving party's statement of facts which are disputed, and also setting forth those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. In the alternative, the movant and the party opposing the motion shall file a joint statement in the form prescribed by this Rule, setting forth those material facts as to which there is no genuine dispute. The joint statement may provide that any stipulation of fact is not intended to be binding for any purpose other than the motion for summary judgment.

**Rule 56(d). Declining to Grant All the Requested Relief.**

If the court does not grant all the relief requested by the motion, or if on independent consideration pursuant to section (h) of this Rule judgment is not rendered on the whole case, the court may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

**Rule 56(e). Form of Affidavits and Depositions; Further Testimony; Defense Required.**

(1) An affidavit used to support or oppose a motion shall be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a properly authenticated copy shall be attached to or served with the affidavit.

(2) Affidavits may be supplemented or opposed by depositions, answers to interrogatories, additional affidavits or other materials that would be admissible in evidence.

(3) If all or part of a deposition is submitted in support of or in opposition to a motion for summary judgment, the offering party must submit a written transcript of the testimony. An electronic recording of the testimony may be submitted only if the offering party contends that the written transcript is erroneous.

(4) When a motion for summary judgment is made and supported as provided in this Rule, an opposing party may not rely merely on allegations or denials of its own pleading; rather, its response must, by affidavits or as otherwise provided in this Rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party.

**Rule 56(f). When Facts are Unavailable to the Nonmovant; Request for Rule 56(f) Relief and Expedited Hearing.**

(1) If a party opposing summary judgment files a request for relief and expedited hearing under this Rule, along with a supporting affidavit showing that, for specified reasons, it cannot present evidence essential to justify its opposition, the court may, after holding a hearing:

(A) defer considering the motion for summary judgment and allow time to obtain affidavits or to take discovery before a response to the motion is required;

(B) deny the requested relief and require a response to the motion for summary judgment by a date certain; or

(C) issue any other appropriate order.

(2) Unless otherwise ordered by the court, the filing of a request for relief and affidavit under this section does not by itself extend the date by which the party opposing summary judgment must file a memorandum and separate statement of facts as prescribed in section (c) of this Rule.

(3) No request for relief will be considered and no hearing will be scheduled unless the request for relief is accompanied by a separate statement of counsel seeking the relief certifying that, after personal consultation and good-faith efforts to do so, the parties have been unable to satisfactorily resolve the matter.

(4) The party moving for summary judgment is not required to file a response to the request for relief or affidavit unless otherwise ordered by the court. If such a party elects to file a response, it must be filed no later than two days before the hearing scheduled to consider the requested relief.

(5) Except as provided in subsection (3), the court shall hold an expedited hearing concerning the requested relief, in person or by telephone, within seven days after the filing of a request for hearing by the party seeking the relief.

**Rule 56(g). Affidavits Made in Bad Faith.**

If satisfied that an affidavit under this Rule is submitted in bad faith or solely for delay, the court may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result, or may impose other appropriate sanctions. The court shall allow notice and a reasonable time to respond before imposing any sanctions pursuant to this section.

**Rule 56(h). Judgment Independent of the Motion or Based on Materials Not Cited in the Motion.**

After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment after identifying for the parties material facts that may not be genuinely in dispute.

## **APPENDIX C**

## Proposed Comments for Rule 56 Revisions

### STATE BAR COMMITTEE NOTE

#### 201[2] Amendment

Rule 56 is revised in several respects. The language of some sections is updated and simplified to conform to the 2010 restyling of Rule 56 of the Federal Rules of Civil Procedure, with no intended substantive change to Arizona's rule or summary judgment procedure. These revisions are selective and reflect a determination that fundamental differences between Arizona's rule and the counterpart federal rule weigh against wholesale adoption of the federal rule amendments. In addition, a number of other changes have been made to improve or clarify Arizona's summary judgment practice.

**Section (a).** The standard for granting summary judgment has been moved from section (c) to section (a). In addition, the language of new section (a) has been modified to conform to the language of Federal Rule of Civil Procedure 56(a). These changes are stylistic and are not intended to alter the substantive requirements for obtaining summary judgment as developed in Arizona case law, including *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990), and its progeny. Likewise, the new language, which recognizes the availability of partial summary judgment, is not intended to change existing Arizona law.

**Section (b).** Section (b) incorporates aspects of former sections (a) and (b), governing when a claimant and defending party, respectively, may move for summary judgment. Former section (a) restricted a claimant's ability to move for summary judgment until after the answer was due or the adverse party moved for summary judgment, while section (b) allowed a defending party to move for summary judgment at any time. The amendment additionally authorizes a claimant to move for summary judgment after an opposing party moves to dismiss under Rule 12(b)(6). Subsection (3) is modified to clarify that any dispositive motion cut-off established by the court will control over the 90-day period provided in the rule.

**Section (c).** Section (c)(1) is modified to clarify certain hearing and briefing requirements. The standard for granting summary judgment has been moved to section (a).

**Section (d).** Section (d) is modified to conform to the stylistic revisions to Federal Rule of Civil Procedure 56(g), which simplified the language of this section and made it more concise. No substantive change is intended. Section (d) cross-references new section (h), which allows the court to grant summary judgment on independent consideration in appropriate circumstances.

**Section (e).** The first sentence of section (e) is modified to conform to the stylistic revisions to similar language contained in Federal Rule of Civil Procedure 56(c)(4). Other stylistic revisions were made to the remainder of the section to make it easier to understand. No substantive change is intended.

**Section (f).** Section (f) is modified in several significant respects. Subsection (1) has been modified to set forth a uniform procedure requiring the filing of a request for Rule 56(f) relief and expedited hearing, along with a supporting Rule 56(f) affidavit. Subsection (1) also requires a hearing before relief can be granted. Subsection (2) clarifies that absent a court order extending the time for response, filing a request for Rule 56(f) relief does not extend the date for opposing a motion for summary judgment. Subsection (3), modeled after Arizona Rule of Civil Procedure 26(g), requires a party seeking relief to attempt to resolve the issue by good-faith personal consultation with the opposing party and to submit a separate certification regarding such consultation with its Rule 56(f) affidavit. Subsection (4) provides that the party moving for summary judgment is generally not required to file a response to the request for Rule 56(f) relief; but, if it chooses to do so, it must file the response within two days of the scheduled hearing. Finally, subsection (5) adopts an expedited hearing procedure, requiring courts to hold a telephonic or in-person hearing within seven days after any hearing request filed by the party seeking the relief. These procedures are intended to facilitate resolution of section (f) disputes and minimize the need for court intervention. Section (f) affidavits must continue to satisfy the specificity requirements set forth in existing Arizona case law. *E.g., Simon v. Safeway, Inc.*, 217 Ariz. 330, 173 P.3d 1031 (Ct. App. 2007).

**Section (g).** Section (g) is modified to conform to the stylistic revisions to counterpart Federal Rule of Civil Procedure 56(h), which simplified the language of this section and made it more concise. Additionally, section (g)'s reference to the sanction of "contempt" has been eliminated. The rule allows "other appropriate sanctions," leaving it to the court to determine whether a sanction of contempt is warranted by the applicable substantive law. The language of section

(g) also has been modified to make clear that notice and an opportunity to respond are required before the court may impose any sanctions.

**Section (h).** New section (h) is based on counterpart Federal Rule of Civil Procedure 56(f). The section recognizes the court's inherent authority to dispose of matters on summary judgment on the court's own initiative, where appropriate. The section (h) procedure strikes a balance between the court's inherent power and the rights of litigants, by requiring notice and a hearing before the court may grant summary judgment for a nonmovant, grant a motion on grounds not raised by a party, or otherwise consider summary judgment on the court's own initiative.