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

10 PETITION TO ABROGATE
11 RULE 16(g)(2) AND RULE 84,
12 FORM 3 OF THE ARIZONA
13 RULES OF CIVIL PROCEDURE

Supreme Court No. _____

**Petition to Abrogate Rule 16(g)(2) and
Rule 84, Form 3 of the Arizona Rules of
Civil Procedure**

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15 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar
16 of Arizona respectfully petitions the Court to: (1) abrogate Rule 16(g)(2) of the
17 Arizona Rules of Civil Procedure and renumber Rule 16(g)(1) as Rule 16(g); and
18 (2) abrogate Rule 84, Form 3 of the Arizona Rules of Civil Procedure.

19 Rule 16(g)(2) requires parties to a civil lawsuit to jointly submit an
20 Alternative Dispute Resolution (“ADR”) report to the court within 120 days of a
21 defendant’s appearance in the litigation. The requirement is widely ignored and has
22 failed to accomplish its intended purpose of encouraging early consideration of
23 ADR. As other procedural mechanisms currently exist to foster the use of ADR,
24 Rule 16(g)(2) (and the accompanying form in Rule 84) should be abrogated. The
25 proposed deletions and amendments in the rules are shown in Appendices A and B.
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1 Discussion

2 Rule 16(g)(2), which was adopted in 2001, requires that the parties to a civil
3 lawsuit confer regarding ADR no later than ninety days following the first
4 appearance of a defendant, and then within thirty days file a report with the court
5 regarding ADR. The laudable purpose of the rule is to promote early consideration
6 of ADR. Almost since its adoption, however, lawyers have tended to ignore the
7 requirement because the rule imposes an inflexible deadline that is frequently well
8 before litigants are ready to give ADR serious consideration.

9 As a practical matter, few lawyers will advise a client to engage in ADR until
10 they have a basic understanding of the parties' respective claims and defenses. In
11 most cases, ninety days after the appearance of a defendant is too early to reach
12 such an understanding. At that early juncture in a case, all of the defendants may
13 not have been served, and disclosure statements may not have been exchanged.
14 Even after those initial steps, it is usually necessary to undertake at least some
15 discovery before the settlement value of a matter can be adequately assessed.
16 Given those facts, it is unrealistic to expect (as Rule 16(g)(2) apparently does) that
17 parties in *all* cases will be in a position to seriously evaluate ADR within ninety
18 days of a defendant's appearance or that any rule-mandated deadline will be
19 suitable in *all* matters.

20 Rule 16(g)(2) also has been of questionable value to the courts. The judges
21 who were consulted in this regard indicated that when they do receive Rule 16(g)(2)
22 reports, they do not find them useful. The form itself does not give a judge enough
23 information to tell if a case is ripe for ADR; and, in any event, the mere receipt of
24 the report does not trigger further action by a court such as holding a status hearing
25 or deciding whether ADR should be ordered. As a practical matter, courts typically
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1 reserve judgment on the possible usefulness of ADR until after a Rule 16 pretrial
2 scheduling conference or later status hearing is held, at which time a judge is likely
3 to be more familiar with the issues in the case.

4 While the State Bar certainly sees value in ADR, Rule 16(g)(2) does not
5 appear to promote its use and therefore should be abrogated. *See* Appendix A. The
6 State Bar believes that ADR can continue to be adequately promoted without
7 Rule 16(g)(2)'s "one size fits all" ADR schedule that is often unrealistically
8 stringent and is apparently honored only in the breach. Eliminating Rule 16(g)(2)
9 will not undercut the policy of encouraging and, indeed, requiring ADR. For
10 example, Rule 16(g)(1), which authorizes a court to direct the parties to proceed to
11 ADR, will remain in effect. Likewise unaffected will be Rule 16(b)(11) (which
12 authorizes the court to consider ADR at any comprehensive pretrial conference in a
13 non-medical malpractice case) and Rule 16(c)(7) (which authorizes the court to
14 consider ADR at any comprehensive pretrial conference in a medical malpractice
15 case). Unlike Rule 16(g)(2), these rules actually do foster ADR. Indeed, under the
16 authority of these rules, trial courts in Maricopa County are increasingly refusing to
17 set trial dates until the parties have participated in ADR.

18 Moreover, the State Bar's Civil Practice and Procedure Committee ("CPPC")
19 is currently undertaking a review of case management procedures under Rule 16
20 and trial-setting procedures under Rule 38.1. The CPPC anticipates proposing
21 substantial revisions to each rule, including provisions expressly requiring
22 consideration of ADR at an appropriate juncture, encouraging participation in some
23 form thereof, and ensuring communication with the court concerning ADR in
24 connection with the adoption of scheduling orders.

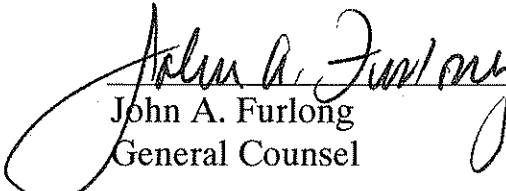
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1 The State Bar also proposes as a conforming amendment that the ADR report
2 form (Form 3 of Rule 84) be abrogated, as is shown in Appendix B.

3 **Conclusion**

4 The State Bar understands the importance of ADR and is open to ways of
5 better promoting its use as part of a comprehensive evaluation of how civil cases
6 are currently managed through Rules 16 and 38.1. Until such a review can be
7 accomplished, however, there is no point in requiring parties to follow the
8 unhelpful paperwork requirements of Rule 16(g)(2). The State Bar respectfully
9 requests that this Court: (1) abrogate the rule and renumber current Rule 16(g)(1) as
10 Rule 16(g); and (2) abrogate Form 3 of Rule 84, Arizona Rules of Civil Procedure.

11 RESPECTFULLY SUBMITTED this 22nd day of December, 2011.

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15 John A. Furlong
16 General Counsel

16 Electronic copy filed with the Clerk of
17 the Supreme Court this 22nd day of
18 December, 2011.

19 By: Kathleen A. Lundgren
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APPENDIX A

Rule 16(g). Alternative Dispute Resolution

~~(1) Upon motion of any party, or upon its own initiative after consultation with the parties, the court may direct the parties in any action to submit the dispute which is the subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.~~

~~(2) The Parties' Duty to Consider ADR, and to Confer and Report.~~

~~(A) No later than 90 days following the first appearance of a defendant, the parties shall confer, either in person or by telephone, about:~~

- ~~(1) the possibilities for a prompt settlement or resolution of the case; and~~
- ~~(2) whether they might benefit from participating in some alternative dispute resolution ("ADR") process, the type of process that would be most appropriate in their case, the selection of an ADR service provider and the scheduling of the proceedings.~~

~~(B) The attorneys of record and all unrepresented parties who have appeared in the case are jointly responsible for attempting in good faith to settle the case or agree on an ADR process and for reporting the outcome of their conference to the court. Within 30 days after their conference, the parties shall inform the court by means of a text prescribed in an official form promulgated pursuant to Rule 84 of the following:~~

- ~~(1) if the parties have agreed to use a specific ADR process, the type of ADR process to be used, the name and address of the ADR service provider they will use and the date by which the ADR proceedings will be completed;~~
- ~~(2) if the parties have not agreed to use a specific ADR process the position of each party as to the type of ADR process that is appropriate~~

~~for their circumstances or, in the alternative, why ADR is not appropriate; and~~

~~(3) whether any party requests that the court conduct a conference to consider ADR.~~

~~(C) Unless the parties have agreed to use a specific ADR process, the court may direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to discuss with a court-appointed ADR specialist, either in person or by telephone, whether ADR is appropriate and the type of ADR processes that might benefit their case.~~

APPENDIX B

Rule 84. Forms.

Form 3. Reserved. ~~Joint Alternative Dispute Resolution Statement to the Court~~

Name:
Address:
City:
State:
Telephone:
Fax:

~~IN THE SUPERIOR COURT OF THE STATE OF ARIZONA~~
~~IN AND FOR THE COUNTY OF _____~~

<p>§</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>§</p> <p style="text-align: center;">Defendant.</p>	<p>Case No.</p> <p>JOINT ALTERNATIVE DISPUTE RESOLUTION STATEMENT TO THE COURT</p>
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~~Pursuant to the Arizona Rules of Civil Procedure, I hereby state the following,
under penalty of perjury:~~

1. ~~The parties have conferred as required by Rule 16(g)(2).~~ Yes ~~_____~~ No

2. ~~Is this case subject to compulsory arbitration under Rule 72(b)?~~ Yes ~~_____~~ No

~~{Note: Pursuant to Rule 72(d), the court shall waive the compulsory arbitration requirement if the parties agree to participate in a different ADR process approved by the court.}~~

3. ~~If the case is subject to compulsory arbitration have the parties agreed to participate in an ADR process other than compulsory arbitration?~~ Yes ~~_____~~ No

4. ~~If the case is not subject to compulsory arbitration have the parties agreed to participate in an ADR process?~~ Yes ~~_____~~ No

5. ~~If the answer to three or four is yes, the parties agree to participate in the following ADR process:~~

A. mediation binding arbitration early neutral evaluation
 short trial summary jury trial judge pro tem
 other _____

B. The parties will use a private provider
 the parties request a program provided through the court [Note: not all programs are available through the court.]

C. ~~If known, the name and address of the person or company providing the ADR service is:~~

D. ~~The parties expect to complete the ADR process by: _____ / /~~

6. ~~The parties have been unable to agree on an ADR process. The plaintiff / defendant believes that the following ADR process would be appropriate:~~

7. ~~The plaintiff / defendant requests a conference to discuss ADR.~~

8. ~~The plaintiff / defendant believes that an ADR process would not be appropriate for the following reason:~~

Date

Plaintiff

Date

Defendant