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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**
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PETITION TO AMEND RULE 56,
ARIZONA RULES OF CIVIL
PROCEDURE

Supreme Court No. R-11-0034

**Response of State Bar of Arizona to
Comment from Pima County
Bench re Petition to Amend Rule 56**

The State Bar of Arizona submits this response to the comment of the Civil Bench of the Arizona Superior Court in Pima County (“Comment”) regarding the State Bar’s Petition to Amend Rule 56 of the Arizona Rules of Civil Procedure (“Petition”). In a number of instances, the Comment raises issues that the State Bar (through its Civil Practice & Procedure Committee) carefully considered when the proposed amendments to Rule 56 were developed. Although a number of these issues are subject to reasonable debate, after considering all of the arguments, the State Bar believes that the Petition adequately addresses the competing concerns and that the amendments should be adopted as proposed. On the two issues noted below, however, the State Bar would not oppose additional wording modifications to address concerns presented by the Comment. This response is organized in the same order as the issues were presented in the Comment.

1 **A. Section 56(a). Motion for Summary Judgment or Partial**
2 **Summary Judgment.**

3 The Petition proposes to amend Arizona Rule 56(a) to track, verbatim, the
4 language of Federal Rule 56(a) as adopted in December 2010. The Comment
5 proposes to modify the language in the last sentence to replace the word “should”
6 with the word “may,” noting a concern that the use of “should” is “aspirational” and
7 the word “may” is more appropriate to reflect the Court’s discretion. The specific
8 change proposed by the Comment is as follows: “The court ~~should~~may state on
9 the record the reasons for granting or denying the request.”

10 The State Bar respectfully disagrees with this proposal for two reasons. First,
11 the proposed amendment to Arizona Rule 56(a) was intended to bring Arizona’s
12 rule largely into conformity with Federal Rule 56(a). This portion of the state and
13 federal rules (containing the standard for granting summary judgment) has
14 historically been the same, and the State Bar believes that any departures might
15 introduce unnecessary confusion. Second, the proposed wording change appears to
16 be unnecessary, as the word “should” adequately reflects the discretionary nature of
17 this requirement and, in addition, signals that it is preferable for a court to state the
18 reasons for granting or denying summary judgment to inform the parties and, if
19 appealable, the appellate court of the basis for the decision.

20 **B. Section 56(b)(1)(a). Time to File a Motion.**

21 As the Petition explained, Arizona’s Rule 56 has historically been more
22 restrictive than the corresponding federal rule as to when a summary judgment
23 motion may be filed. Federal Rule 56 allows any party to move for summary
24 judgment at any time. The current Arizona Rule 56 restricts a claimant’s ability to
25 move for summary judgment until after the answer is due or the adverse party has
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1 moved for summary judgment, but allows a defending party to move for summary
2 judgment at any time. The State Bar's proposed amendment to section 56(a)(1)(a)
3 maintains Arizona's existing rule with one exception: a claimant may also move for
4 summary judgment after the adverse party files a motion to dismiss.

5 The Comment does not appear to take issue with the Petition's proposed
6 amendment allowing a claimant to move for summary judgment after an opposing
7 party moves to dismiss. Instead, it recommends that section 56(b)(1)(a) be amended
8 to preclude a claimant from filing a motion for summary judgment until after an
9 answer has been *filed*; the current rule, which is not changed by the Petition, allows
10 the claimant to move for summary judgment after the answer is *due*. The Comment
11 notes that in cases where an answer is due but has not been filed, a claimant may
12 pursue Rule 55's default judgment procedures, making a summary judgment
13 remedy unnecessary.

14 The State Bar opposes the proposed modification, which would impose
15 another restriction on summary judgment practice and also would depart from the
16 current Arizona rule as it has existed for some time. A claimant should not be
17 precluded from moving for summary judgment simply because a party has delayed
18 filing its answer. While the delay would usually result in application for entry of
19 default to force the filing of an answer, there may be circumstances where a
20 claimant might still prefer to proceed by summary judgment, depending on the
21 nature and scope of the relief requested. The State Bar is reluctant to deprive a
22 claimant of this procedural option, particularly where doing so would be a departure
23 from current Arizona and federal practice. The State Bar also notes that in its study
24 of Rule 56, no concerns were raised that practitioners were filing motions for
25 summary judgment in circumstances where it would be more appropriate or
26 efficient to simply file an application for default judgment under Rule 55.

1 **C. Section 56(c)(2): Modifying Deadlines for Response and Reply.**

2 Arizona's current Rule 56(c)(2) provides that the time period for filing a
3 response or reply memorandum may be "shortened or enlarged by the court or by
4 agreement of the parties." Based on comments of judges and practitioners that
5 parties sometimes fail to notify the court of changes in the briefing schedule, the
6 proposed amendment adds a requirement that the parties must file a stipulation with
7 respect to any changes made by agreement.

8 The Comment notes that this change still leaves a number of concerns,
9 including that the parties may agree to extensions that give a court insufficient time
10 to read the briefs before a scheduled hearing date or result in a motion being heard
11 too close to trial. These are valid concerns.¹ The State Bar believes that a court has
12 inherent authority to reject a party's stipulation or to impose other restrictions by
13 scheduling order or local rule. Nonetheless, for the sake of clarity and uniformity,
14 the State Bar supports adding the following language at the end of Rule 56(c)(2):

15 *; provided, however, that court approval is required for any stipulated*
16 *extensions to a briefing schedule that would purport to make a reply*
17 *or other final memorandum due less than five days before a hearing*
18 *date previously set by the court, or would require postponement of a*
19 *scheduled hearing date or other modifications to an existing case*
20 *scheduling order.*

21 **D. Section 56(e)(3): Filing Written Deposition Excerpts.**

22 The Petition proposed minor stylistic revisions to Rule 56(e)(3). The
23 Comment states that the provision of this section requiring deposition transcripts to
24 be submitted in writing is inconsistent with (and will be prohibited by) the new

25 ¹ The State Bar's Civil Practice & Procedure Committee is currently reviewing proposed
26 changes to Rule 7.1 of the Arizona Rules of Civil Procedure which would adopt specific
procedures and limitations on the parties' ability to stipulate to briefing extensions on all types of
motions, including motions for summary judgment. Such changes, if implemented, would make
it unnecessary to address this concern within the text of Rule 56.

1 electronic filing rules. Based on the State Bar's review of those procedures,
2 however, parties will be able to electronically file all documents offered in support
3 of or in opposition to motions for summary judgment, including written transcripts
4 of deposition testimony. Therefore, the State Bar does not believe that any
5 additional changes are necessary in light of the new electronic filing requirements.

6 **E. Rule 56(f): When Facts are Unavailable to the Nonmovant;**
7 **Request for Rule 56(f) Relief.**

8 The Petition proposed significant revisions to Rule 56(f) to address concerns
9 identified by both judges and practitioners. The Comment raises several issues,
10 which are addressed below:

11 First, the Comment proposes that the requirements for Rule 56(f) relief, as
12 developed in Arizona case law, should be set forth in the Rule. *See, e.g., Simon v.*
13 *Safeway, Inc.*, 217 Ariz. 330, 173 P.3d 1031 (Ct. App. 2007) (party seeking
14 Rule 56(f) relief must set forth the “reasons justifying delay,” which includes the
15 evidence outside the party’s control, its location, what the party believes the
16 evidence will show, the discovery method the party wishes to use, and an estimate
17 of the time required to complete the discovery”).

18 In developing the proposed Rule 56 amendments, the State Bar considered
19 whether the case law requirements for Rule 56(f) affidavits should be set forth in
20 the rule’s text. The State Bar ultimately concluded that it was preferable to address
21 those requirements in a comment to the rule, rather than writing them into the rule’s
22 text. The proposed comment to the rule states: “Section (f) affidavits must continue
23 to satisfy the specificity requirements set forth in existing Arizona case law. *E.g.,*
24 *Simon v. Safeway, Inc.*, 217 Ariz. 330, 173 P.3d 1031 (Ct. App. 2007).” [Petition,
25 Appendix C, p. 2 (section (f))].
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1 The State Bar believes that the comment reference is sufficient to inform
2 practitioners of the law in this area. Notably, the factors identified in the case law
3 have not been rigidly applied by the courts. As recognized in *Simon v. Safeway*, the
4 requirements for obtaining Rule 56(f) relief are somewhat “flexible”; and the
5 overriding objective is “to insure that a diligent party is given a reasonable
6 opportunity to prepare his case.” Applying that flexible standard, the *Simon* court
7 noted that the Rule 56(f) affidavit at issue failed to address one of the five factors
8 (an estimate of the time needed to complete discovery). Nonetheless, the court
9 found that this deficiency was not “fatal” to the request. 217 Ariz. at 333 n. 2, 173
10 P.3d at 1034 n. 2.

11 Second, the Comment suggests that the expedited hearing procedure
12 proposed in Rule 56(f)(5) is “unnecessary” and is “effectively dealt with” under
13 current practice by having parties simply include their Rule 56(f) request as part of
14 their opposition to the motion for summary judgment.

15 The State Bar believes that the expedited hearing procedure is necessary and
16 should be adopted by the Court as proposed. The proposed amendments were
17 prompted by the expressed concerns of judges and practitioners that Rule 56(f) was
18 subject to abuse for purposes of delay, and failed to set out a clear or uniform
19 procedure for resolving requests without delaying the summary judgment process.
20 It is correct, as the Comment notes, that Rule 56(f) requests are sometimes included
21 in a party’s opposing memorandum, where a party may state that additional
22 discovery is needed while still responding to the motion on its merits. As the
23 Petition notes, however, this practice is not uniform, nor is it desirable in all cases.
24 The current rule provides no guidance or defined procedure for a party who desires
25 to have a Rule 56(f) request addressed *before* time and money are spent fully
26 briefing a motion for summary judgment that may be premature. Thus, with the

1 exception of one change proposed below, the State Bar asks that the Court adopt the
2 amendment as set out in the Petition.

3 Third, the Comment expresses concern that it may in some cases be difficult
4 for the court to hold a hearing in seven days, as the amendments propose. The State
5 Bar considered allowing a longer period of time; however, it determined that
6 allowing a longer period of time for hearing would simply contribute to the delay
7 that the new procedure is attempting to avoid. The State Bar also believes that the
8 expedited briefing and hearing requirements, combined with the new meet-and-
9 confer requirement, should provide a strong incentive for the parties to cooperate
10 and reach agreement, thereby reducing Rule 56(f) requests for relief.

11 Nonetheless, the State Bar does not intend for the new procedure to present
12 more burdens on an already overloaded judiciary, and would support adding the
13 following language at the end of section (f)(5): *“If the Court’s calendar does not*
14 *allow hearing within seven days, a later hearing date may be set.”* This allows
15 flexibility for the court, while still preserving the rule’s intent to expeditiously
16 resolve Rule 56(f) disputes so that parties can have certainty on the briefing
17 schedule for the underlying motion.

18 Fourth, the Comment proposes that the party seeking Rule 56(f) relief should
19 be required to obtain a hearing date and give notice to all parties. The State Bar
20 believes that the mechanics of how a hearing date is obtained and noticed are best
21 left to local rule or the individual judges.

22 **F. Rule 56(g): Affidavits Filed in Bad Faith.**

23 The Petition proposed amendments to section (g) to conform to the stylistic
24 revisions to the counterpart Federal Rule 56(h), but with two minor substantive
25 changes: (i) a sanction of contempt was eliminated; and (ii) language was added to
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1 make clear that notice and an opportunity to respond are required before sanctions
2 may be imposed.

3 The Comment suggests that this section be expanded so that it also allows
4 sanctions for a party who opposes a Rule 56(f) request in bad faith. The State Bar
5 believes that such a change is unnecessary.

6 Rule 56(g) has historically tracked the counterpart federal rule, and has
7 always been limited to affidavits submitted in bad faith. If the scope of this section
8 is now expanded to add other summary judgment filings (such as oppositions to
9 Rule 56(f) requests), it will raise an issue about why some filings are specifically
10 referenced, while other filings are not. Moreover, existing rules and statutes, such
11 as Rule 11 and A.R.S. § 12-349, already provide adequate remedies for filings that
12 lack a good-faith basis or are made for purposes of delay. *See, e.g.*, A.R.S.
13 §§12-349(A)(1), (3) (fees and expenses shall be awarded if the attorney or party
14 “unreasonably expands or delays the proceeding” or “brings or defends a claim
15 without substantial justification”). Accordingly, the proposed addition is
16 unnecessary.

17 **G. Rule 56(h): Judgment Independent of the Motion.**

18 The Petition’s proposed amendment to Rule 56(h) incorporates the 2010
19 amendments to Federal Rule 56(f). The sentence addressed by the Comment is
20 taken verbatim from the federal rule, which provides that after giving notice and a
21 reasonable time to respond, the court may “grant the motion on grounds not raised
22 by a party.”

23 The Comment expresses concern that this language would require notice and
24 a hearing when an argument has been raised in the briefs (such as in an opposition
25 and reply) but not in the original motion. The State Bar believes that the proposed
26 language of the amendment already adequately addresses and resolves this concern.

1 As proposed, notice and an opportunity for hearing are only required if the court
2 intends to grant the motion on "grounds not raised by a party," without restriction
3 to any particular brief or filing.

4 **CONCLUSION**

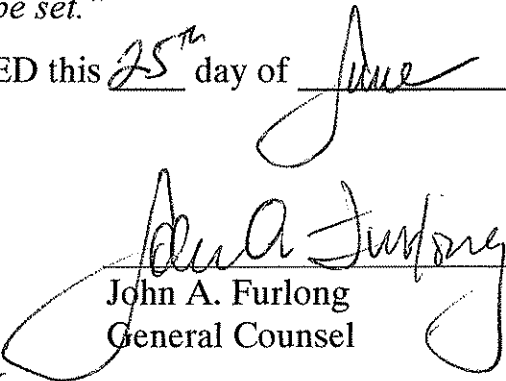
5 The State Bar of Arizona respectfully requests that the Court amend Rule 56
6 of the Arizona Rules of Civil Procedure as proposed in the Petition, with the two
7 modifications addressed above and restated below:

8 (1) The State Bar supports adding the following language to the end of
9 proposed Rule 56(c)(2):

10 *; provided, however, that court approval is required for any stipulated*
11 *extensions to a briefing schedule that would purport to make a reply*
12 *or other final memorandum due less than five days before a hearing*
13 *date previously set by the court, or would require postponement of a*
14 *scheduled hearing date or other modifications to an existing case*
15 *scheduling order.*

16 (2) The State Bar supports adding the following language to the end of
17 proposed Rule 56(f)(5): "If the Court's calendar does not allow hearing within
18 seven days, a later hearing date may be set."

19 RESPECTFULLY SUBMITTED this 25th day of June, 2012.

20 
21 John A. Furlong
22 General Counsel

23 Electronic copy filed with the Clerk
24 of the Supreme Court of Arizona this
25 _____ day of _____, 2012.

26 By: _____