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

10 PETITION TO AMEND RULES 7.1  
11 AND 56 OF THE ARIZONA RULES  
12 OF CIVIL PROCEDURE

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

**Petition to Amend Rules 7.1 and  
56, Ariz. R. Civ. P.**

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14 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar  
15 of Arizona petitions the Court to amend Rule 7.1 and Rule 56 of the Arizona Rules  
16 of Civil Procedure (hereinafter “Rule 7.1” and “Rule 56”), imposing certain limits  
17 on the filing of motions to strike and adopting procedures for objecting to evidence  
18 submitted in connection with motions.

19 The proposed amendments to Rule 7.1 add new section (f)(1), barring  
20 motions to strike except where they are either expressly authorized by statute or  
21 rule or where they seek to strike any part of a filing or submission on the ground  
22 that it is prohibited, or not authorized, by a specific statute, rule, or court order. As  
23 a corollary to this limitation, new section (f)(2) provides that a party objecting to  
24 evidence offered on a written motion must do so in their responsive or reply brief  
25 rather than in a separate filing (such as a motion to strike or a separate objection).  
26 An exception is made for new evidence presented for the first time in the reply,

1 which may be challenged by a separate objection, provided that the objection is  
2 filed within five days after service of the reply and does not exceed three pages in  
3 length.

4 The proposed amendment to Rule 56 adds new section (c)(4),<sup>1</sup> providing that  
5 objections to the admissibility of evidence submitted in connection with a motion  
6 for summary judgment also may be included in the responding party's statement of  
7 material facts, provided they are stated "concisely." This amendment is intended to  
8 discourage a party from including lengthy argument and briefing on objections in  
9 its separate statement of facts, which is not subject to any rule-imposed page  
10 limitation.

11 The proposed amendments to both rules are intended primarily to address  
12 concerns expressed by the judiciary and practitioners that motions to strike are  
13 often misused and contribute to delay and inefficiency. *See Engel v. Landman*, 221  
14 Ariz. 504, 509, 212 P.3d 842, 847 (Ct. App. 2009) (noting that motions to strike are  
15 "regrettably common in practice," "generally viewed with disfavor," and "often  
16 sought by the movant simply as a dilatory tactic") (citation omitted).

17 Appendix A provides a redlined version of the proposed amendment to  
18 Rule 7.1, and Appendix B is a redlined version of the proposed amendment to  
19 Rule 56(c).

## 20 I. INTRODUCTION AND BACKGROUND

21 Over the past ten years, Arizona federal and state courts have expressed  
22 frustration in their decisions with the excessive use of motions to strike, particularly  
23 in the context of motions for summary judgment. Some of this abuse may have  
24 been caused by language in the case law suggesting that motions to strike not only  
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26 <sup>1</sup> The proposed amendment to Rule 56 is designated as section (c)(4) to take into account the  
amendments to Rule 56 that will take effect on January 1, 2013.

1 were permissible, but might be required to preserve evidentiary objections on a  
2 motion for summary judgment. *See, e.g., Johnson v. Svidergol*, 157 Ariz. 333, 335,  
3 757 P.2d 609, 611 (Ct. App. 1988) (in finding that a party's objection to evidence  
4 was waived, the court observed that "[w]hen insufficient supporting documents are  
5 submitted, a motion to strike is appropriate") (citation omitted); *Florez v. Sargeant*,  
6 185 Ariz. 521, 536, 917 P.2d 250, 265 (1996) (in finding that objection was waived,  
7 the Court noted: "If the affidavits in this case were deficient, the parties should  
8 have made a motion to strike at the time they were filed") (citation omitted); *In the*  
9 *Matter of 1996 Sentra*, 201 Ariz. 114, 117, 32 P.3d 39, 42 (Ct. App. 2001) (party  
10 "waived her right to object to any deficiencies in [the summary judgment  
11 documents] by failing to file a motion to strike").

12 Over the past decade, however, Arizona courts have clarified that a motion to  
13 strike is not required to preserve an evidentiary objection on a motion for summary  
14 judgment, and that an objection will suffice. *E.g., Airfreight Express Ltd. v.*  
15 *Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 112, 158 P.2d 232, 241 (Ct. App. 2007)  
16 (citing *Svidergol*, court notes that deficiencies can be waived "by the failure to  
17 move to strike *or object*" (emphasis added)). Nevertheless, motions to strike  
18 remain common, both in and outside of the summary judgment context. The  
19 growing frustration of the courts is illustrated in *Engel, supra*, where the court  
20 noted that "[t]he use of motions to strike beyond the narrow purpose articulated in  
21 the rules frequently has the consequence of impeding the efficient resolution of  
22 cases and increasing the cost of litigation." 221 Ariz. at 509 n.2, 212 P.3d at 847  
23 n.2.

24 The United States District Court for the District of Arizona has also grown  
25 increasingly disenchanted with motions to strike, emphasizing in recent decisions  
26 that "[m]otions to strike are generally viewed with disfavor." *See, e.g., Triquint*

1 *Semiconductor, Inc. v. Avago Techs., Ltd.*, No. CV-09-01531-PHX-JAT, 2010 WL  
2 3034880, \*3 (D. Ariz. Aug. 3, 2010); *see also Ogundele v. Girl Scouts – Ariz.*  
3 *Cactus Pine Council, Inc.*, No. CV-10-1013-PHX-GMS, 2011 WL 1770784, \*9 (D.  
4 Ariz. May 10, 2011) (court grants motion under Rule 12(f) while noting that such  
5 motions are “generally disfavored”). This concern was formally addressed in 2008  
6 when the District of Arizona adopted new Local Rule of Civil Procedure LRCiv  
7 7.2(m). Similar to the amendment proposed in this petition, LRCiv 7.2(m) bars  
8 motions to strike except in limited circumstances and sets forth a defined procedure  
9 for presenting evidentiary objections on motions.<sup>2</sup>

## 10 **II. OVERVIEW OF PROPOSED AMENDMENTS**

### 11 **A. New Rule 7.1(f)(1)**

12 The proposed amendment to Rule 7.1 adds new section (f)(1), which  
13 explicitly bars motions to strike except in three limited circumstances: (i) at a trial  
14 or an evidentiary hearing; (ii) where expressly authorized by statute or rule; and (iii)  
15 where the motion seeks to strike a filing or submission that is prohibited or not  
16 authorized by a specific statute, rule, or court order. The language of the new  
17 section provides: “Unless made at trial or an evidentiary hearing, a motion to strike  
18 may be filed only if it is expressly authorized by statute or other rule, or if it seeks  
19 to strike any part of a filing or submission on the ground that it is prohibited, or not  
20 authorized, by a specific statute, rule, or court order.” *See* Appendix A.

21 The proposed amendment thus would not change the common practice of  
22 oral or written motions to strike during trials or other evidentiary hearings. It also  
23 would permit motions to strike where they are expressly allowed by another rule or  
24 by statute. One example of such a rule is Rule 12(f), Ariz. R. Civ. P., which

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26 <sup>2</sup> The full text of LRCiv 7.2(m) appears in Appendix C. Although the amendments proposed  
in this petition are similar to those adopted by the District of Arizona in LRCiv 7.2(m), they  
depart from the federal approach in several respects, as discussed in the following sections.

1 explicitly allows a motion to strike from a pleading “any insufficient defense or any  
2 redundant, immaterial, impertinent, or scandalous matter.” Finally, the proposed  
3 amendment contains a “catch-all” exception, similar to what LRCiv 7.2(m)  
4 provides, allowing motions to strike “any part of a filing or submission on the  
5 ground that it is prohibited, or not authorized, by a specific statute, rule, or court  
6 order.”

7 The State Bar considered eliminating the “catch-all” exception, based on a  
8 concern that it could have the unintended consequence of encouraging motions to  
9 strike. It ultimately determined, however, that some flexibility should be allowed  
10 for situations where a motion to strike may be the best remedy, even though it is not  
11 explicitly allowed by statute or rule. To curb potential abuse, however, any such  
12 motion to strike is limited to two pages in length. Any responsive memorandum  
13 must be filed within five days of service of the motion and is likewise limited to  
14 two pages in length. Replies are prohibited unless authorized by the court. These  
15 proposed briefing limitations, which depart from the language of LRCiv. 7.2(m),  
16 balance the competing interests of curbing abusive motions to strike while still  
17 allowing such a remedy where appropriate.

18 **B. Rule 7.1(f)(2)**

19 The proposed amendments to Rule 7.1 also add a new section (f)(2),  
20 clarifying the requirements and procedures for objecting to evidence offered in  
21 support of or opposition to a written motion:

22 (i) the objection must be presented in the objecting party’s  
23 responsive or reply memorandum and may *not* be presented in a  
24 separate filing;

25 (ii) any response to an objection must be included in a party’s  
26 reply memorandum and may *not* be presented in a separate filing; and

1 (iii) if evidence is offered for the first time in reply, the  
2 objecting party may file a separate objection limited to addressing the  
3 new evidence and not exceeding three (3) pages in length, within five  
4 (5) days after service of the reply. No further briefing is allowed  
5 unless authorized by the court.

6 These proposed amendments address ambiguities in current practice by  
7 making clear that an objection may be preserved by including it in the party's briefs  
8 on the underlying motion. Separate filings—whether in the form of a motion to  
9 strike or an objection—are neither required nor permitted. In the case of motions  
10 for summary judgment, objections to evidence also may be included in a party's  
11 response to the opposing party's separate statement of material facts, "in lieu of (or  
12 in addition to) including it in the responsive memorandum." (See Section C below  
13 and Appendix B, Proposed Addition to Rule 56(c).)

14 New section (f)(2) also provides a defined procedure for handling new  
15 evidence submitted for the first time in a reply brief. Currently, there is no uniform  
16 practice for addressing such evidence; and parties sometimes file motions to strike  
17 or separate objections. While the new rule allows a separate objection to be filed in  
18 this narrow circumstance, it must be timely (within five days of service of the reply)  
19 and short (no more than three pages). No further briefing (such as a response to the  
20 objection) is allowed without court authorization. The State Bar believes that this  
21 new procedure will provide useful guidance for practitioners that will minimize  
22 delay and unnecessary filings.

23 Finally, section 7.1(f)(2) cross-references new Rule 56(c)(4) (discussed  
24 below), which allows objections to evidence offered on summary judgment to also  
25 be made in the separate statement of facts document.  
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1           **C.    Rule 56(c)(4)**

2           The State Bar also proposes a corresponding amendment to Rule 56(c), Ariz.  
3 R. Civ. P., by adding a new subsection (4), which (i) makes clear that Rule 7.1(f)(2)  
4 also applies to evidentiary objections on motions for summary judgment; and  
5 (ii) allows a party the option of including an objection in that party's response to  
6 the opposing party's separate statement of material facts, so long as that objection is  
7 stated "concisely." This proposed amendment recognizes that, in current practice,  
8 parties sometimes include evidentiary objections in their responding statement of  
9 facts. Because the rules do not impose a page limitation on the separate statements  
10 of fact, however, the proposed amendment specifies that any objections must be  
11 stated "concisely."

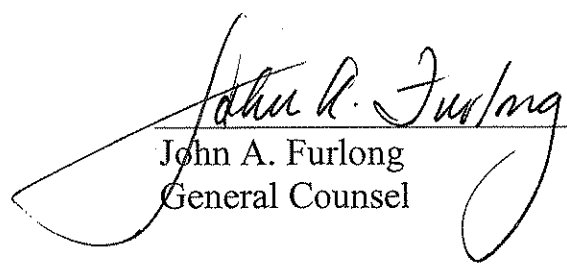
12           The State Bar considered whether the limitation of "concisely" could be  
13 better defined or more specific, such as by specifying a limited number of words or  
14 lines. It also considered a similar provision in LRCiv 7.2(m), requiring objections  
15 presented in a statement of facts to be "stated summarily without argument." The  
16 State Bar felt that the word "concisely" was sufficient to make clear that such  
17 objections must be short. Moreover, because such objections serve the necessary  
18 purpose of preserving a party's objections for appeal, the State Bar was concerned  
19 that barring "argument" or imposing an inflexible limit on the length of the  
20 objection might deprive parties of a fair opportunity to explain to the court the basis  
21 for an objection or impair their ability to adequately preserve objections for appeal.

22           **III.   CONCLUSION**

23           The State Bar of Arizona respectfully requests that the Court amend  
24 Rules 7.1 and 56 of the Arizona Rule of Civil Procedure, as indicated in  
25 Appendices A and B.  
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RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of December, 2012.

  
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John A. Furlong  
General Counsel

Electronic copy filed with the Clerk  
of the Supreme Court of Arizona this  
20<sup>th</sup> day of December, 2012.

By: Kathleen A. Lundgren

## **APPENDIX A**

State Bar's proposed amendment to Rule 7.1 to add new subsections (f)(1) and (2):  
(Petitioner's proposed additions are shown by underscoring)

Proposed Revisions to Arizona Rule of Civil Procedure 7.1

→→ Rule 7.1. Civil Motion Practice

(f) Limitations on Motions to Strike.

(1) Generally. Unless made at trial or an evidentiary hearing, a motion to strike may be filed only if it is expressly authorized by statute or other rule, or if it seeks to strike any part of a filing or submission on the ground that it is prohibited, or not authorized, by a specific statute, rule, or court order. Unless the motion to strike is expressly authorized by statute or rule: (a) it may not exceed two (2) pages in length, including any supporting memorandum; (b) any responsive memorandum must be filed within five (5) days of service of the motion and may not exceed two (2) pages in length; and (c) no reply memorandum may be filed unless authorized by the court.

(2) Objections to Admission of Evidence on Written Motions. Subject to Rule 56(c)(4), governing motions for summary judgment, any objections to, and any arguments regarding the admissibility of, evidence offered in support of or in opposition to a motion must be presented in the objecting party's responsive or reply memorandum and may not be presented in a separate motion to strike or other separate filing. Any response to an objection must be included in the responding party's reply memorandum for the underlying motion and may not be presented in a separate responsive memorandum. If the evidence is offered for the first time in connection with a reply memorandum, the objecting party may file a separate objection limited to addressing the new evidence and not exceeding three (3) pages in length, within five (5) days after service of the reply memorandum. No responsive memorandum may be filed unless authorized by the court.

## **APPENDIX B**

**State Bar's proposed amendment to Rule 56 to add new subsection (c)(4):**  
*(Petitioner's proposed additions are shown by underscoring)*

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

[Subsections (c)(1) through (c)(3), as amended by the Supreme Court by its Order filed on 8/30/2012, effective January 1, 2013, are omitted]

(4) Objections to the admissibility of evidence on motions for summary judgment shall be governed by Rule 7.1(f)(2), except that an objection may be included in a party's response to another party's separate statement of material facts in lieu of (or in addition to) including it in the party's responsive memorandum. Any objection presented in the party's response to the separate statement of material facts must be stated concisely.

## APPENDIX C

**Arizona District Court Local Rule 7.2(m), as adopted in 2008 and amended in 2011:**

Rule 7.2

**(m) Motions to Strike.**

(1) *Generally.* Unless made at trial, a motion to strike may be filed only if it is authorized by statute or rule, such as Federal Rules of Civil Procedure 12(f), 26(g)(2) or 37(b)(2)(A)(iii), or if it seeks to strike any part of a filing or submission on the ground that it is prohibited (or not authorized) by a statute, rule, or court order.

(2) *Objections to Admission of Evidence on Written Motions.* An objection to (and any argument regarding) the admissibility of evidence offered in support of or opposition to a motion must be presented in the objecting party's responsive or reply memorandum and not in a separate motion to strike or other separate filing. If the underlying motion is a motion for summary judgment, an objection may be included in a party's response to another party's separate statement of material facts in lieu of (or in addition to) including it in the party's responsive memorandum, but any objection in the party's response to the separate statement of material facts must be stated summarily without argument. Any response to an objection must be included in the responding party's reply memorandum for the underlying motion and may not be presented in a separate responsive memorandum.