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**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO AMEND RULES 16,  
16.1, 26, 37, 38, 38.1, 72, 73, 74 AND  
77, ARIZONA RULES OF CIVIL  
PROCEDURE

Supreme Court No. R-13- \_\_\_\_\_

**Petition to Amend Rules 16, 16.1, 26,  
37, 38, 38.1, 72, 73, 74 and 77, Ariz.  
R. Civ. P.**

**(Modified comment period requested)**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona hereby petitions the Court to amend Rules 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74 and 77 of the Arizona Rules of Civil Procedure. These proposed amendments are intended to (1) alter the default rule for case management from one based on Motions to Set and Certificates of Readiness to one based on scheduling orders, and (2) alter the default trial-setting system from one based on an "Active Calendar" kept by court administration to trial settings made by assigned judges.

A redlined version of the relevant rules showing the proposed amendments described herein is attached hereto as Appendix A. A version of the relevant rules incorporating the proposed amendments is attached as Appendix B.

1     **1.     Case Management**

2             **A.     Current Rules and Practice**

3             Under the current rules, neither scheduling conferences nor scheduling orders  
4 are required in most cases, the exceptions being medical malpractice actions (*see*  
5 *Ariz. R. Civ. P. 16(c)*) and cases assigned to the complex civil litigation program  
6 (*see Ariz. R. Civ. P. 16.3*). Instead, the default rule is that a case is to progress  
7 through discovery and toward trial without any involvement from the court. The  
8 plaintiff's counsel is then required to file a Motion to Set and Certificate of  
9 Readiness in which he or she certifies that the parties have completed or will have  
10 had a reasonable opportunity to complete all disclosures and discovery either by the  
11 time of filing the Motion to Set, within sixty days thereafter, or prior to ten days  
12 before trial, depending upon local rule. *Ariz. R. Civ. P. 38.1(a)*. The Motion to Set  
13 and Certificate of Readiness must be filed within nine months of the filing of the  
14 action or the case is placed on the Inactive Calendar, where it is subject to dismissal  
15 without prejudice after two months. *Ariz. R. Civ. P. 38.1(d)*. In practice, these  
16 certifications are oftentimes meaningless when discovery is nowhere near  
17 completion when the Motion to Set is filed.

18             Besides Rules 16(c) and 16.3, the only exception to this default rule of case  
19 management is when a scheduling order is entered following a "comprehensive  
20 pretrial conference" pursuant to *Ariz. R. Civ. P. 16(b)*.

21             In practice, in many cases "comprehensive pretrial conferences" (sometimes  
22 also referred to as scheduling or case management conferences) are held, but often  
23 not until the case has been pending for a significant period of time. For example,  
24 many judges will as a matter of practice set a scheduling conference upon receipt of  
25 a Motion to Set and Certificate of Readiness; but that does not always happen until  
26 the case has already been placed on, or is nearing placement on, the Inactive

1 Calendar. In other words, the case may be nearly a year old before a schedule gets  
2 put into place. While in many cases this delay is avoided because either the court  
3 or one or more of the parties is proactive and sets or requests a scheduling  
4 conference earlier in the case, the period of delay is unfortunately not an  
5 uncommon occurrence.

### 6 **B. Proposed Changes**

7 The State Bar believes that a default procedure whereby case management  
8 occurs earlier in cases would be beneficial and lead to improvements over the  
9 current default practice of Motions to Set and Certificates of Readiness. *See, e.g.,*  
10 Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11,  
11 27 (1993) (superior court judges in experimental program “agree[d] that pretrial  
12 management conferences were productive” because they “forced attorneys to  
13 prepare pretrial management schedules and discuss with each other the timing of  
14 the events leading to trial”). Possible alternative procedures can be found in both  
15 Arizona’s complex civil litigation program and the federal courts in Arizona.

16 In cases assigned to the complex civil litigation program, the rules require the  
17 court to hold an initial case management conference “at the earliest practical date”  
18 with a “Case Management Order issued by the court promptly thereafter.” Ariz. R.  
19 Civ. P. 16.1(a). In advance of that conference, the parties are required to “meet and  
20 confer concerning the matters to be raised at the conference,” to “attempt in good  
21 faith to reach agreement on as many case management issues as possible,” and to  
22 “submit a joint report to the court no later than seven (7) days before the initial case  
23 management conference.” Ariz. R. Civ. P. 16.1(b).

24 In the U.S. District Court for the District of Arizona, civil cases are assigned  
25 to different tracks (expedited track, prisoner *pro se* track, standard track, and  
26 complex track). *See* LRCiv 16.2, Rules of Practice of the U.S. District Ct. for the

1 District of Ariz. In cases assigned to the standard track, a preliminary scheduling  
2 conference with the court is to take place within 180 days of the commencement of  
3 the action, with a scheduling order issued afterward. *Id.* At least twenty-one days  
4 in advance of that scheduling conference, the parties must confer regarding case  
5 management issues and “develop a proposed discovery plan.” Within fourteen days  
6 of their conference, the parties must jointly submit to the court a written report  
7 outlining their discovery plan. *See* Fed. R. Civ. P. 26(f). *See also* Steven S.  
8 Gensler, *Some Thoughts on the Lawyer’s E-volving Duties in Discovery*, 36 N. KY.  
9 L. REV. 521, 530 (2009) (“The amendments to Rule 26(f) have cemented its central  
10 role in discovery planning and case management. In 2000, the local opt-out option  
11 was eliminated. The Advisory Committee explained that it ‘ha[d] been informed  
12 that the addition of the conference was one of the most successful changes made in  
13 the 1993 amendments, and it therefore ha[d] determined to apply the conference  
14 requirement nationwide.’”)

15 While the State Bar sees merit to both of these systems of case management,  
16 it understands that requiring case management conferences to be held in the early  
17 stages of all civil cases in our state courts could overburden our superior court  
18 judges. The State Bar, however, believes that the benefits of the case management  
19 systems employed by our federal courts and our complex civil litigation program  
20 can be realized without requiring case management conferences with the court in all  
21 cases. This is because in most cases the parties can reach agreement on case  
22 management and scheduling issues when they meet and confer in advance of a  
23 scheduling conference with the judge. *See, e.g., Myers, supra*, at 27 (“Almost  
24 universally, the attorneys stipulated to the management schedule, and the judge  
25 merely ‘rubber stamped’ it. The major benefits of the conferences are that the  
26 conferences streamline the pretrial process, reduce procedural disputes, and force

1 the two sides to work together to arrive at agreeable procedures. These benefits  
2 make case processing more efficient and promote professional courtesy.”) The  
3 State Bar accordingly proposes replacement of the current default case management  
4 system of Motions to Set and Certificates of Readiness with a system whereby the  
5 parties are required in the early stages of a case to meet and confer regarding case  
6 management and then to propose a scheduling order for the court’s consideration  
7 and entry. If the parties can reach agreement on a schedule and neither they nor the  
8 court sees a particular need for a scheduling conference, no such conference need  
9 be held. *See also* COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL  
10 CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 14 (2d ed.  
11 2010) (noting “several approaches to setting a case schedule, including automatic  
12 issuance of a standard schedule for all cases of a certain type, review and approval  
13 of a schedule submitted by the lawyers, and preparation of a schedule in  
14 consultation with the lawyers at a Rule 16 conference”).

15 The State Bar thus proposes adding two new subsections to Rule 16: (1) a  
16 new Rule 16(b) entitled “Conference and Joint Report of the Parties Regarding  
17 Scheduling and Case Management”; and (2) a new Rule 16(c) entitled “Scheduling  
18 Orders.” Under the new proposed Rule 16(b), the parties would be required to meet  
19 and confer regarding case management issues “no later than 14 days after the  
20 deadline for serving initial disclosures under Rule 26.1(b) or 180 days after  
21 commencement of the action, whichever occurs first.”<sup>1</sup> By tying the deadline for  
22 the parties to meet and confer regarding case management to the deadline for initial  
23 disclosures, the parties should have a grasp on the scope of the case and the time  
24 needed for pretrial disclosure and discovery. On the other hand, the 180-day

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26 <sup>1</sup> The proposed timing requirement in medical malpractice cases would be slightly  
different and would instead be tied to the date of the comprehensive pretrial conference which is  
required to be held in medical malpractice cases.

1 outside limit will ensure that scheduling does not slip too far if for some reason  
2 initial disclosures are not yet due (e.g., the pendency of a motion to dismiss has  
3 pushed back the deadline for initial disclosures).

4       Within fourteen days of holding their “meet and confer,” the parties would  
5 then be required to file a joint report with the court stating their position on case  
6 management issues and proposing a scheduling order that specifies by calendar date  
7 deadlines for the following: “(A) service of initial disclosures under Rule 26.1 if  
8 they have not already been served; (B) identification of areas of expert testimony;  
9 (C) identification of and disclosure of expert witnesses and their opinions in  
10 accordance with Rule 26.1(a)(6); (D) propounding of written discovery;  
11 (E) disclosure of non-expert witnesses; (F) completion of non-expert depositions;  
12 (G) completion of expert depositions; (H) completion of all discovery; (I) final  
13 supplementation of Rule 26.1 disclosures; (J) holding a Rule 16.1 settlement  
14 conference or private mediation; and (K) filing dispositive motions.” As with the  
15 meet and confer and joint case management report requirements in both our  
16 complex case management program and federal courts, all parties would be jointly  
17 responsible for arranging and participating in the meet and confer and for filing the  
18 joint report.

19       Under the new proposed Rule 16(c), “the court shall issue a scheduling order  
20 as soon as practicable after receiving the parties’ joint report under Rule 16(b) or  
21 after holding a comprehensive pretrial conference.” Thus, if the parties reach  
22 agreement on a schedule that appears reasonable to the court, the scheduling order  
23 can be entered without any need for holding a scheduling conference. As under the  
24 current rules, such a conference with the court would only be held if requested by  
25 one of the parties or if scheduled *sua sponte* by the court. The scheduling order  
26 entered by the court would include deadlines for the same items noted above that

1 are to be included in the parties' proposed scheduling order, along with any "other  
2 appropriate matters." As is discussed in greater detail in Section 3.B, *infra*, the  
3 scheduling order would set either (1) a trial date or (2) a date for a trial-setting  
4 status conference to be held later in the case.

5 To prevent this new case management scheme from leading to any  
6 unintended increases in the length of cases, the proposed Rule 16(b) includes the  
7 following directive: "Unless otherwise ordered by the court for good cause shown,  
8 the parties' proposed schedule shall set the deadline for completing discovery and  
9 for holding a Rule 16.1 settlement conference or private mediation to occur no  
10 more than 13 months after the commencement of the action." This deadline  
11 equates to approximately the same length of time as if, under the current Rule 38.1,  
12 a Motion to Set and Certificate of Readiness gets filed eleven months after the  
13 commencement of the action (the nine months after which the case gets placed on  
14 the Inactive Calendar, plus the two months a case can remain on the Inactive  
15 Calendar before being dismissed) and includes a certification that discovery will be  
16 completed within sixty days. In addition, this presumptive deadline should allow a  
17 case to be concluded within the Arizona Supreme Court's goal of eighteen months  
18 for 95 percent of all civil cases.

19 To go along with these changes to Rule 16, Rules 38.1(a) ("Motion to Set  
20 and Certificate of Readiness: Identification of Nonparty at Fault") and 38.1(b)  
21 ("Controverting Certificate: Identification of Nonparty at Fault") are eliminated as  
22 unnecessary. Case management would now be governed entirely by Rule 16. And,  
23 as further discussed in Section 3, *infra*, trial settings would now also be handled  
24 through the court's Rule 16 case management activities.

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1     **2.     Subject Matters for Case Management Conferences**

2             **A.     Current Rules and Practice**

3             Current Rules 16(b) (non-medical malpractice cases) and 16(c) (medical  
4 malpractice cases) set forth the subjects that may be discussed at a comprehensive  
5 pretrial conference. Those subjects include, among others, the scheduling of pretrial  
6 discovery and disclosure, alternative dispute resolution, elimination of non-  
7 meritorious claims or defenses, resolution of any discovery disputes, amendment of  
8 the pleadings, identification of the facts at issue, stipulations regarding evidence,  
9 and a trial date.

10            **B.     Proposed Changes**

11            The State Bar believes that a number of changes to the subjects set forth in  
12 current Rules 16(b) and (c) (which would be Rules 16(d) and (e) under the  
13 proposed amended rules) are appropriate to account for current practice, to avoid  
14 conflicts in the rules, and to account for the proposed change to the trial-setting  
15 system whereby trials are scheduled at a later trial-setting status conference. In  
16 summary, the State Bar proposes the following amendments:

17            •     Current Rule 16(b)(1) states that at a comprehensive pretrial conference  
18 the court may “[d]etermine the additional disclosures, discovery and related  
19 activities to be undertaken and a schedule therefor,” and then Rule 16(b)(1)(A) goes  
20 on to state that any such schedule “shall include depositions to be taken and the  
21 time for taking same; production of documents or electronically stored information;  
22 non-uniform interrogatories; admissions; inspections or physical or mental  
23 examinations; and any other discovery pursuant to these rules.” In practice, at the  
24 time of a comprehensive pretrial conference, the parties do not know precisely what  
25 depositions (or the time needed) or other discovery they will need; and this topic is  
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1 thus not generally discussed despite the use of the word “shall.” The State Bar  
2 accordingly proposes deletion of the language found in Rule 16(b)(1)(A).

3 • Current Rule 16(b)(2) provides for discussion of “a schedule for the  
4 disclosure of expert witnesses” and states that such “disclosures shall be within 90  
5 days after the conference except upon good cause shown.” In practice, the ninety-  
6 day requirement is rarely followed; and thus the State Bar believes it should be  
7 eliminated. In addition, the State Bar believes that it may be appropriate to discuss  
8 the method of disclosing experts, including whether reports should be required.  
9 The State Bar therefore proposes rewording this provision to allow for the  
10 discussion of “a schedule for the disclosure of expert witnesses and the method of  
11 such disclosure, including whether signed reports from the experts should be  
12 required.”

13 • Current Rules 16(b)(4) and 16(c)(3) include provisions requiring the  
14 disclosure of non-expert witnesses at least forty-five days before the completion of  
15 discovery, with any witnesses not so disclosed being precluded from testifying at  
16 trial “unless there is a showing of good cause” (Rule 16(b)(4)) or alternatively  
17 “unless there is a showing of extraordinary circumstances” (Rule 16(c)(3)). This  
18 forty-five-day timing requirement and the standards for using a witness disclosed  
19 thereafter are, however, inconsistent with Rules 26.1(b) (requiring “seasonable”  
20 disclosures and setting forth standards for using information disclosed later than  
21 sixty days before trial) and 37(c) (setting forth standards for using information  
22 disclosed later than sixty days before trial or during trial and establishing standards  
23 for excluding a witness that has not been timely disclosed). For example,  
24 Rule 37(c)(1) states, “A party who fails to timely disclose information required by  
25 Rule 26.1 shall not, unless such failure is harmless, be permitted to use as evidence  
26 at trial, at a hearing, or on a motion, the information or witness not disclosed,

1 except by leave of court for good cause shown.” Thus, an untimely disclosed  
2 witness is not excluded under Rule 37(c)(1) if either good cause is shown or the  
3 failure to disclose earlier is harmless. This standard is based on *Allstate Insurance*  
4 *v. O’Toole*, 182 Ariz. 284, 896 P.2d 254 (1995), and is inconsistent with the  
5 standards set forth in current Rules 16(b)(4) and 16(c)(3). The State Bar  
6 accordingly proposes eliminating the language in Rules 16(b)(4) and 16(c)(3)  
7 regarding the forty-five-day requirement and the standards for using a witness  
8 disclosed after that deadline.

9 • Current Rules 16(b)(5) and 16(c)(6) set forth a detailed method for  
10 resolving discovery disputes at a comprehensive pretrial conference if they have  
11 been presented to the court by way of a “motion” not less than ten days before the  
12 conference. Many judges, however, require the parties to first participate in a  
13 conference call with the judge to resolve a discovery dispute before filing a motion.  
14 The language of current Rules 16(b)(5) and 16(c)(6) is inconsistent with this  
15 approach and could invite unwanted discovery motions. The State Bar, therefore,  
16 proposes simplifying this language to simply provide that resolution of any  
17 discovery disputes can be discussed at a comprehensive pretrial conference without  
18 setting forth a detailed procedure requiring a motion and a response.

19 • Current Rules 16(b) and 16(c) do not mention the setting of a dispositive  
20 motion deadline. The State Bar believes that adding the setting of a dispositive  
21 motion deadline would be beneficial and would coincide with the current practice  
22 of many judges.

### 23 **3. Trial Settings**

#### 24 **A. Current Rules/Practice**

25 Rule 38.1 currently governs trial settings. Under that rule, cases are to be  
26 placed on the “Active Calendar” after the filing of a Motion to Set and Certificate

1 of Readiness if either no Controverting Certificate is filed or as ordered by the  
2 court. Once a case is placed on the Active Calendar, “the court or court  
3 administrator . . . shall stamp thereon a chronological list number which shall  
4 generally govern the priority of the case for trial, except as to those cases which are  
5 entitled to preference by statute or local rule, and except that short causes may be  
6 preferred for trial in accordance with local rules.” Ariz. R. Civ. P. 38.1(c). Cases  
7 placed on the Active Calendar are to “be set for trial as soon as possible,” although  
8 “[c]ounsel shall be given at least thirty days notice of the trial date.” Ariz. R. Civ.  
9 P. 38.1(g). Once a case is set for trial, there are limits on its postponement. *See*  
10 Ariz. R. Civ. P. 38.1(h), (i).

11 In practice, the provisions of Rule 38.1 regarding trial settings are largely (if  
12 not entirely) ignored. The State Bar has not found any county that actually has an  
13 existing “Active Calendar” of cases numbered for trial settings. Instead, cases are  
14 set for trial as part of the court’s case management activities, with judges generally  
15 setting trial dates either as part of a scheduling order issued after a comprehensive  
16 pretrial conference or at a status conference held later in the case (usually right after  
17 the discovery deadline or settlement conference deadline set forth in the scheduling  
18 order). *See, e.g.,* Ariz. R. Civ. P. 16(b)(16) (“At any comprehensive pretrial  
19 conference . . . the court may . . . [set] a trial date.”).

## 20 **B. Proposed Changes**

21 Given current practice, the State Bar believes that the use of Motions to Set  
22 and Certificates of Readiness and the Active Calendar system for trial settings  
23 should be eliminated from the rules. The rules should instead be amended so that,  
24 consistent with current practice, trial settings are part of the court’s case  
25 management activities under Rule 16.

1           Accordingly, the State Bar proposes the elimination of Rule 38.1(a) (“Motion  
2 to Set and Certificate of Readiness: Identification of Nonparty at Fault”),  
3 Rule 38.1(b) (“Controverting Certificate: Identification of Nonparty at Fault”), and  
4 Rule 38.1(c) (“Active Calendar”). Instead, Rule 38.1(a) would state as follows:  
5 “Civil actions shall be set for trial pursuant to Rule 16 or Rule 77. Preference shall  
6 be given to short causes and cases that by reason of statute, rule or court order are  
7 entitled to priority. The parties shall be given at least 30 days’ notice of the trial  
8 date.” This language tracks the language currently found in Rule 38.1(g) but with  
9 the additional reference to trials being set pursuant to Rule 16.

10           The State Bar also proposes the addition of a new subsection (f) to Rule 16  
11 entitled “Trial Setting Status Conference.” As mentioned in Section 1, *supra*, this  
12 trial-setting status conference would be held by the court later in the case, a practice  
13 already followed by many superior court judges. As its name suggests, the purpose  
14 of the conference would be to set a trial date, though other appropriate matters (*e.g.*,  
15 the status of discovery and dispositive motions and the imposition of time limits on  
16 trial proceedings) could also be discussed at the conference.

17           The benefits of setting the trial date later in the case are that it helps courts  
18 manage their trial calendars, the parties and court are better able to determine how  
19 many trial days will be needed, and there is less likelihood that trial dates will need  
20 to be moved. As recently explained by the federal Civil Rules Advisory  
21 Committee:

22           There was widespread agreement that it is valuable to set firm  
23 deadlines for all steps leading up to trial. The deadlines should hold  
24 firm against all but good reasons for extensions. There was some  
25 division of views, however, about the importance of setting a firm  
26 trial date at the beginning of the case. Everyone recognizes the  
compelling effect of a firm trial date as it grows closer. But some fear  
that it is difficult to set the trial date intelligently in the early stages of  
litigation, either in terms of the parties’ ability to meet the deadline or

1 the court's ability to honor it. On this view, the firm trial date should  
2 be set after discovery is concluded, and should be coordinated with  
3 disposition of any summary-judgment motions.

4 Report of the Civil Rules Advisory Comm. 8 (May 17, 2010), *available at*  
5 <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf>.

6 Though the State Bar believes there are benefits to setting trial dates later in  
7 cases, the State Bar also recognizes that some judges prefer to set trial dates earlier.  
8 To allow judges that flexibility, proposed Rule 16(c) provides that the scheduling  
9 order is to set either (1) a trial date or (2) a date later in the case for a Rule 16(f)  
10 trial-setting status conference. Thus, if the judge has already set a trial date, he or  
11 she need not hold the separate trial-setting status conference later in the case. In  
12 addition, the judge could wait and hold the trial-setting status conference after the  
13 discovery deadline (as many judges currently do), or could hold it earlier in the case  
14 if that was his or her preference.

15 With many superior court judges already waiting until later to set trial dates  
16 and with this petition proposing to formalize that procedure, the State Bar believes  
17 that some litigants may try to use the lack of an early trial setting to abuse the  
18 disclosure rules. The State Bar thus proposes additional changes to clarify that the  
19 lack of a trial date does not give parties the ability to make late disclosures without  
20 fear of consequence.

21 Under Rule 37(c)(1), "A party who fails to timely disclose information  
22 required by Rule 26.1 shall not, unless such failure is harmless, be permitted to use  
23 as evidence . . . the information or witness not disclosed, except by leave of court  
24 for good cause shown." Under *Allstate Insurance Co. v. O'Toole*, 182 Ariz. 284  
25 (1995), and the State Bar Committee Note to Rule 37(c), factors to be considered in  
26 determining whether there is good cause for a late disclosure are the reason for the

1 failure to disclose, the willfulness or inadvertence of the failure, the prejudice to  
2 either side, attempts to resolve the dispute short of exclusion, and the overall  
3 diligence of the parties. In conducting this good-cause analysis, courts have  
4 occasionally made statements suggesting that late-disclosed evidence will not be  
5 excluded if no trial date has been set. *See, e.g., Zimmerman v. Shakman*, 204 Ariz.  
6 231, 236 (App. 2003) (“there is little reason to completely bar the use of [late-  
7 disclosed] evidence when no trial . . . is pending”). While an impending trial date  
8 may be one form of prejudice that can result from a late disclosure, there are other  
9 forms of prejudice that can result; for example, the need to reopen or engage in  
10 duplicative discovery such as re-deposing individuals. *See, e.g., Czarnecki v.*  
11 *Volkswagen of Am.*, 172 Ariz. 408, 418 (App. 1991) (refusing to allow new theory  
12 of recovery after close of discovery because adding an “entirely new theory of  
13 liability at that date would have required additional research and discovery,  
14 resulting in substantial delays”). In cases like *Zimmerman* where the lack of a trial  
15 date was emphasized, other such forms of prejudice were not raised or considered.

16 To clarify that the lack of an impending trial date does not give a party free  
17 rein to make late disclosures without consequence, and to ensure that the new trial-  
18 setting system is not used to abuse the disclosure rules, the State Bar proposes the  
19 following: (1) inclusion in scheduling orders under proposed Rules 16(b) and 16(c)  
20 of a deadline for final supplementation of Rule 26.1 disclosures; (2) amendment of  
21 Rule 37(c)(2) to require a party to obtain leave of court to use information  
22 “disclosed later than (a) the deadline set in a scheduling order, or (b) in the absence  
23 of such a deadline, sixty (60) days before trial” rather than the current deadline of  
24 sixty days before trial; and (3) amendment of current Rule 16(f) (what would be  
25 Rule 16(i) under the proposed amended rules) to make more explicit that the failure  
26 to meet discovery, disclosure, and other deadlines set forth in a scheduling order

1 may expose a party to sanctions and to include a sentence that, “The fact that a trial  
2 date has not been set does not preclude sanctions under this Rule, including the  
3 exclusion from evidence of untimely disclosed information.” While the good-cause  
4 analysis discussed above looks at the prejudice to both sides in the context of late  
5 disclosures, such prejudice to an opponent can result even in the absence of a  
6 pending trial date. These proposed amendments recognize that fact and will help  
7 prevent abuse of the disclosure rules.

8 Finally, while there already exist provisions in the rules encouraging the use  
9 of alternative dispute resolution, the State Bar believes that participation in a  
10 Rule 16.1 settlement conference or private mediation should generally be required  
11 before the court sets a trial date. Therefore, proposed Rule 16(f) also states: “Absent  
12 good cause, a trial date shall not be set unless and until the parties certify that they  
13 have engaged in good faith in a settlement conference or private mediation.” Most  
14 litigants will benefit from participation in a settlement conference/mediation before  
15 trial, and such participation is already required by many superior court judges in  
16 Maricopa County. Through the good-cause exception, courts would have some  
17 discretion to waive the requirement in unusual cases where a settlement conference  
18 or mediation is not appropriate.

#### 19 **4. Dismissal Calendar**

##### 20 **A. Current Rules and Practice**

21 Under Rule 38.1, cases are placed on the Inactive Calendar if a Motion to Set  
22 and Certificate of Readiness has not been filed within nine months after the filing of  
23 a case. The case is then to be dismissed without prejudice for lack of prosecution if  
24 it remains on the Inactive Calendar for two months without the filing of a Motion to  
25 Set and Certificate of Readiness or a court order allowing continuance on the  
26 Inactive Calendar. Ariz. R. Civ. P. 38.1(d). The clerk of the court or court

1 administrator is to “promptly notify counsel in writing of the placing of cases on the  
2 Inactive Calendar.” Ariz. R. Civ. P. 38.1(e).

3 The general practice in the Superior Court for Maricopa County has been to  
4 issue what is known as “the 150-Day Order,” providing notice of the deadline by  
5 which the case will be placed on the Inactive Calendar if no Motion to Set and  
6 Certificate of Readiness is filed. The Arizona Supreme Court, however, recently  
7 held this procedure alone to be insufficient under Rule 38.1(e) because the rule’s  
8 requirement of prompt notification means “contemporaneous (or nearly  
9 contemporaneous) notice when a case is placed on the Inactive Calendar.”  
10 *American Asphalt & Grading Co. v. CMX, L.L.C.*, 227 Ariz. 117, 118 ¶ 8, 253 P.3d  
11 1240, 1241 (2010).

12 Courts in at least some counties also use the Inactive Calendar for other  
13 purposes; for example, placing cases on the Inactive Calendar for dismissal when a  
14 notice of bankruptcy is filed and/or when a notice of settlement is filed. *See, e.g.*,  
15 Cochise County Superior Court Local Rule 25(c) (providing for placement of cases  
16 on Inactive Calendar after “parties have announced settlement without presenting a  
17 final judgment to the court”); Graham County Local Rule 5 (providing for  
18 placement of cases on Inactive Calendar when bankruptcy is filed).

### 19 **B. Proposed Changes**

20 The State Bar believes that the Inactive Calendar system should be kept in  
21 place, albeit in a modified format, because it can still serve the purpose of clearing  
22 cases off a court’s docket that might otherwise have fallen through the cracks (*e.g.*,  
23 the parties failed to follow the procedures for getting a scheduling order in place, or  
24 a notice of bankruptcy or settlement is filed in the case).

25 With the elimination of the “Active Calendar,” as discussed in Section 3.B,  
26 *supra*, the State Bar believes that the “Inactive Calendar” would be more aptly

1 named the "Dismissal Calendar." Rather than tying the placement of cases on the  
2 Dismissal Calendar to the failure to file a Motion to Set and Certificate of  
3 Readiness, the State Bar proposes tying it to the failure of the parties to file the joint  
4 case management report required under the proposed amended Rule 16(b). The  
5 State Bar believes that the nine-month period from the filing of the action remains  
6 the appropriate deadline for placing cases on the Dismissal Calendar, but suggests  
7 changing it from nine months to 270 days for greater precision (along with  
8 changing two months to sixty days with respect to the time a case will remain on  
9 the Dismissal Calendar). The State Bar thus proposes revising current Rule 38.1(d)  
10 (what would be Rule 38.1(f) under the proposed amended rule) as follows:

11 **Inaetive Dismissal Calendar.** The clerk of the court or court  
12 administration shall place on the Inaetive Dismissal Calendar every  
13 case in which ~~a Motion to Set and Certificate of Readiness has not~~  
14 ~~been served joint report under Rule 16 or Rule 16.3 or an arbitrator's~~  
15 ~~notice of decision under Rule 76 has not been filed with the court~~  
16 ~~within nine months~~ 270 days after the commencement thereof. All  
17 cases remaining on the Inaetive Dismissal Calendar for ~~two months~~ 60  
18 ~~days~~ shall be dismissed without prejudice for lack of prosecution and  
19 the court shall make an appropriate order as to any bond or other  
20 security filed therein, unless prior to the expiration of such ~~two month~~  
21 60 day period;

19 (1) ~~a proper Motion to Set and Certificate of Readiness is served a~~  
20 ~~joint report under Rule 16(b) or Rule 16.3 of these Rules is filed with~~  
21 ~~the court;~~

22 (2) the court, on motion for good cause shown, orders the case to be  
23 continued on the Inaetive Dismissal Calendar for a specified period of  
24 time without dismissal; or

25 (3) a notice of decision has been filed with the clerk of court in a case  
26 assigned to arbitration.

In addition, to expressly provide for contemporaneous notice of the  
placement of a case on the Inactive/Dismissal Calendar, as required by *American*

1 *Asphalt*, the State Bar proposes amending current Rule 38.1(e) (what would be  
2 Rule 38.1(g) under the proposed amended rule) as follows:

3 **Notification.** The clerk of the court or court administrator, whoever  
4 is designated by the presiding judge, shall promptly notify counsel in  
5 writing ~~of the placing of cases~~ when a case is placed on the ~~Inactive~~  
6 Dismissal Calendar, and no further notice shall be required prior to  
7 dismissal.

### 8 **5. Other Rules Affected by Proposed Amendments to Rule 38.1**

9 Rules 16.1(a), 26(b)(5), 38, 72, 73, 74, and 77 reference Rule 38.1 and  
10 Motions to Set and Certificates of Readiness, and will need to be amended with the  
11 elimination of that case management and trial-setting system. The proposed  
12 amendments to these rules can found in Appendix A; but, in summary:

13 • Rule 16.1(a) currently provides a mechanism for the court to direct  
14 parties to engage in a settlement conference “in any action in which a motion to set  
15 and certificate of readiness is filed.” With the proposed changes to the default rule  
16 for case management, the State Bar proposes amending Rule 16.1(a) to provide for  
17 the setting of settlement conferences “after the parties have met and conferred  
18 regarding case management under Rule 16(b), or as set forth in the scheduling  
19 order.” The State Bar also proposes a handful of stylistic changes to make  
20 Rule 16.1(a) read more clearly.

21 • Rule 26(b)(5) states that a party is to designate non-parties at fault “at the  
22 time of compliance with the requirements of Rule 38.1(b)(2) of the Rules  
23 [Controverting Certificates], or within one hundred fifty (150) days after the filing  
24 of that party’s answer, whichever is earlier.” With the elimination of the Motion to  
25 Set scheme, the State Bar proposes amending Rule 26(b)(5) to simply require a  
26 party to designate non-parties at fault “within one hundred fifty (150) days after the  
filing of that party’s answer.”

1           • Rule 38(b) states that a jury trial “demand may be made by any party  
2 by serving upon the other party a demand therefor in writing at any time after the  
3 commencement of the action, but not later than the date of setting the case for trial  
4 or ten days after a motion to set the case for trial is served, whichever first occurs.”  
5 Given the elimination of Motions to Set and to make the language clearer, the State  
6 Bar proposes amending Rule 38(b) to state that a jury trial “demand may be made  
7 by any party by filing and serving a demand therefor in writing at any time after the  
8 commencement of the action, but not later than the date on which the court sets a  
9 trial date or ten days after the date a joint report under Rule 16(b) or Rule 16.3 is  
10 filed, whichever first occurs.” The State Bar further recommends stylistic changes  
11 to Rules 38(c) and (d) to clarify the language concerning jury trial demands and  
12 waivers and to more closely conform to the language of federal Rule 38. For  
13 example, Rule 38(d) currently states that a party’s failure “to serve a demand as  
14 required by this Rule and to file it as required by Rule 5(b) constitutes a waiver,”  
15 but Rule 5(b) does not discuss the filing of papers. And service of the demand is  
16 governed not only by Rule 38, but also by Rule 5. The proposed changes simplify  
17 these provisions and simply provide (as does the federal rule) that a party waives its  
18 right to a jury trial “unless its demand is properly served and filed.”

19           • Rule 72(d) discusses alternative dispute resolution and provides that if it  
20 fails, “the case shall be set for trial in accordance with Rule 38.1 of these Rules.”  
21 The rule should be amended to read that if alternative dispute resolution fails, “the  
22 case shall be set for trial in accordance with Rule 16 of these Rules.”

23           • Rule 73(c)(3) states that the clerk shall advise the parties entering into  
24 compulsory arbitration “that the time period specified for placing a case on the  
25 inactive calendar in Rule 38.1(d) of these rules shall apply.” Given the proposed  
26 amendments to Rule 38.1, this reference in Rule 73(c)(3) should be revised to read

1 “that the time periods specified in Rule 38.1(f) of these Rules for placing a case on  
2 the Dismissal Calendar shall apply.” In addition, the State Bar proposes a number  
3 of other stylistic changes to Rule 73.

4 • Rule 74(c) states that an arbitrator is not to rule on “motions to continue  
5 on the inactive calendar or otherwise extend time allowed under Rule 38.1 of these  
6 rules.” This rule should be amended to read that an arbitrator is not to rule on  
7 “motions to continue on the Dismissal Calendar or otherwise extend time allowed  
8 under Rule 38.1 of these Rules.”

9 • Rule 77(a) discusses *de novo* appeals from compulsory arbitration and  
10 states, “The Appeal from Arbitration and Motion to Set for Trial shall serve in place  
11 of a Motion to Set and Certificate of Readiness under Rule 38.1(a) of these rules.”  
12 To account for the elimination of Motions to Set, the State Bar proposes eliminating  
13 this sentence from Rule 77(a). In addition, the State Bar proposes a handful of  
14 stylistic changes to Rules 77(a) and (b).

## 15 **6. Transition from Current Case Management/Trial Setting System** 16 **to Proposed System**

17 The general rule with respect to amendments of procedural rules is that the  
18 procedural change applies retroactively to pending cases depending on the “posture  
19 of the particular case” and whether retroactive application would be practicable.  
20 *See, e.g., State v. Carver*, 258 P.3d 256 (Ariz. Ct. App. 2011); *Landgraf v. USI Film*  
21 *Prods.*, 511 U.S. 244, 275 & n.29 (1994). The amendments proposed by this  
22 petition, however, will alter which cases court clerks/administrators are to place on  
23 the Inactive/Dismissal calendar; namely, cases in which no Motion to Set and  
24 Certificate of Readiness has been filed versus cases in which no joint report under  
25 Rule 16 or Rule 16.3 has been filed. To provide clarity for litigants, the courts, and  
26 court clerks/administrators, a clearer line of demarcation should thus be drawn here

1 as to which cases will be governed by the current case management/trial setting  
2 system versus the new system. The State Bar would thus suggest that the order  
3 adopting the amendments proposed by this petition provide that the amendments be  
4 applicable to all cases filed on or after January 1, 2014 (the date the amendments  
5 would go into effect). This is how the change to the active/inactive calendar system  
6 in the mid-1980s was handled. *See* Historical Note to Rule V of the Uniform Rules  
7 of Practice of the Superior Court (“The August 7, 1984 order approving the  
8 amendment of this rule which is effective January 3, 1985 provides that the order is  
9 to be applicable to all cases filed on or after August 3, 1984.”).

10 **Conclusion and Request for Modified Comment Period**

11 The State Bar of Arizona respectfully requests that the Court amend the  
12 Arizona Rules of Civil Procedure to amend Rules 16, 16.1, 26, 37, 38, 38.1, 72, 73,  
13 74, and 77 as shown in Appendix A. The State Bar also recognizes that  
14 improvements might be made to the proposed amendments with additional public  
15 comments. The State Bar accordingly requests a “staggered” comment period and,  
16 after the initial comment period, would like the opportunity to address issues raised  
17 by the comments and file an amended petition thereafter, if appropriate.

18 The State Bar therefore requests a modification to the usual rule petition  
19 schedule with an Order setting the following deadlines:

20 March 15, 2013: Comments to this initial petition are due.

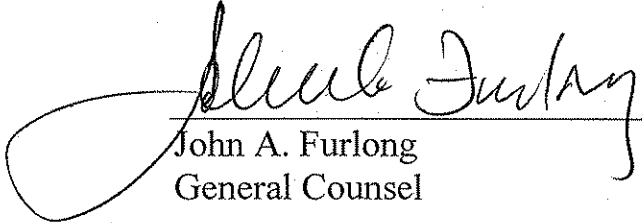
21 April 26, 2013: The State Bar may file an amended petition.

22 May 31, 2013: Comments to any amended petition are due.

23 June 28, 2013: The State Bar may reply to comments to its  
24 amended petition.  
25  
26

1 The proposed schedule will allow the Court to act upon this petition in September  
2 2013, as provided by Supreme Court Rule 28(f).

3 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of JANUARY 2013.  
4

5  
6  
7   
8 John A. Furlong  
General Counsel

9 Electronic copy filed with the Clerk  
10 of the Supreme Court of Arizona this  
11 10<sup>th</sup> day of January, 2013.

12 By: Kathleen A. Lundgren  
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## **APPENDIX A**

**State Bar's Proposed Changes to Rules 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74, and 77 of the Arizona Rules of Civil Procedure (proposed additions are shown by underscoring and deletions are shown by "strike-through")**

**Rule 16. Pre-Trial Conferences; Scheduling; Management**

**Rule 16(a). Pretrial conferences; objectives**

In any action, the court may ~~in its discretion~~ direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate, either in person or, with leave of court, by telephone, in a conference or conferences before trial for such purposes as:

- ~~1.~~ (1) expediting the disposition of the action;
- ~~2.~~ (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- ~~3.~~ (3) discouraging wasteful pretrial activities; and
- ~~4.~~ (4) improving the quality of the trial through more thorough preparation; and  
(5) facilitating settlement.

**Rule 16(b). Conference and joint report of the parties regarding scheduling and case management**

(1) Except in medical malpractice cases and cases subject to compulsory arbitration under Rule 72(b), no later than 14 days after the deadline for serving initial disclosures under Rule 26.1(b) or 180 days after commencement of the action, whichever occurs first, the parties shall meet and confer regarding the subjects set forth in Rule 16(d). No later than 14 days after the parties meet and confer, they shall file a joint report with the court stating, to the extent practicable, their positions on the subjects set forth in Rule 16(d) and proposing a scheduling order that specifies by calendar date, month, and year deadlines for the following:

- (A) service of initial disclosures under Rule 26.1 if they have not already been served;
- (B) identification of areas of expert testimony;

- (C) identification of and disclosure of expert witnesses and their opinions in accordance with Rule 26.1(a)(6);
- (D) propounding of written discovery;
- (E) disclosure of non-expert witnesses;
- (F) completion of non-expert depositions;
- (G) completion of expert depositions;
- (H) completion of all discovery;
- (I) final supplementation of Rule 26.1 disclosures;
- (J) holding a Rule 16.1 settlement conference or private mediation; and
- (K) filing dispositive motions.

Unless otherwise ordered by the court for good cause shown, the parties' proposed schedule shall set the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 13 months after the commencement of the action. The joint report shall certify that the parties met and conferred regarding the subjects set forth in Rule 16(d). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a proposed schedule, and for filing the joint report with the court.

(2) In medical malpractice cases, no later than 21 days before the comprehensive pretrial conference required by Rule 16(e), the parties shall meet and confer regarding the subjects set forth in Rule 16(e). No later than 14 days after the parties meet and confer, they shall file a joint report with the court stating, to the extent practicable, their positions on the subjects set forth in Rule 16(e) and proposing a scheduling order that specifies by calendar date, month, and year deadlines for the following:

- (A) service of initial disclosures under Rule 26.1 if they have not already been served;
- (B) identification of areas of expert testimony;
- (C) identification of and disclosure of expert witnesses and their opinions in accordance with Rule 26.1(a)(6);
- (D) propounding of written discovery;
- (E) disclosure of non-expert witnesses;

- (F) completion of non-expert depositions;
- (G) completion of expert depositions;
- (H) completion of all discovery;
- (I) final supplementation of Rule 26.1 disclosures;
- (J) holding a Rule 16.1 settlement conference or private mediation; and
- (K) filing dispositive motions.

Unless otherwise ordered by the Court for good cause shown, the parties' proposed schedule shall set the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 13 months after the commencement of the action. The joint report shall certify that the parties met and conferred regarding the subjects set forth in Rule 16(e). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a proposed schedule, and for filing the joint report with the court.

#### **Rule 16(c). Scheduling Orders**

Except in cases subject to compulsory arbitration under Rule 72(b), the court shall issue a scheduling order as soon as practicable after receiving the parties' joint report under Rule 16(b) or after holding a comprehensive pretrial conference. The scheduling order shall establish calendar deadlines specifying the month, date, and year for each of the items included in the proposed scheduling order submitted pursuant to Rule 16(b). The scheduling order shall also set either (1) a trial date or (2) a date for a trial-setting status conference under Rule 16(f) at which a trial date may be set. Absent good cause, a trial date shall not be set unless and until the parties certify that they have engaged in good faith in a settlement conference or private mediation. The scheduling order may include other appropriate matters. The dates established in a scheduling order may be modified only for good cause and with the court's consent. Once a trial date is set, it may be modified only pursuant to Rule 38.1.

**Rule 16(b)Rule—16(d). Scheduling and Subjects to Be Discussed at Comprehensive Pretrial Conference in Non-Medical Malpractice Cases**

Except in medical malpractice cases, upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference. At any comprehensive pretrial conference under this rule, except for conferences conducted in medical malpractice cases, the court may:

(1) Determine the additional disclosures, discovery and related activities to be undertaken and a schedule therefor.

~~(A) The schedule shall include depositions to be taken and the time for taking same; production of documents or electronically stored information; non-uniform, interrogatories; admissions; inspections or physical or mental examinations; and any other discovery pursuant to these rules.~~

~~(B) Among other orders~~ (2) Determine whether the court may enter under this rule, the court may should enter orders addressing one or more of the following:

(iA) setting forth any requirements or limitations for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced;

(iiB) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and

(iiiC) adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production.

~~(23) Determine a schedule for the disclosure of expert witnesses. Such disclosure shall be within 90 days after the conference except upon good cause shown, and the method of such disclosure, including whether signed reports from the experts should be required.~~

~~(3)(4) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(D).~~

(4(5) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure; ~~provided, however, that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the completion of discovery.~~

~~Any witnesses not so disclosed shall not be allowed to testify at trial unless there is a showing of good cause. (5) Resolve any discovery disputes which have been presented to the court by way of motion not less than 10 days before the conference. The moving party shall set forth the requested discovery to which objection is made and the basis for the objection. The responding party may file a response not less than 3 days before the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including those permitted under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.~~

(6) Determine a deadline for the filing of dispositive motions.

(7) Resolve any discovery disputes.

~~(6)(8) Eliminate non-meritorious claims or defenses.~~

~~(79) Permit the amendment of the pleadings.~~

~~(810) Assist in identifying those issues of fact which are still at issue.~~

~~(911) Obtain stipulations as to the foundation or admissibility of evidence.~~

~~(10)(12) Determine the desirability of special procedures for management of the case.~~

~~(11)(13) Consider alternative dispute resolution.~~

~~(12)(14) Determine whether any time limits or procedures set forth in the discovery rules or set forth in these rules or Local Rules of Practice should be modified or suspended.~~

~~(13)(15) Determine whether Rule 26.1 has been appropriately complied with by the parties.~~

~~(14) Determine a date for a settlement conference if such a conference is requested by a party or deemed advisable by the court.~~

~~(15)(16) Determine a date for filing the joint pretrial statement required by subpart (dg) of these Rules.~~

(16)(17) Determine a ~~trial date~~ deadline for the parties to hold a settlement conference or private mediation.

(17) Discuss the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary jury instructions, and the effective management of documents and exhibits.

~~(18) Make such other orders as the court deems appropriate.~~

(19) Determine how verbatim record of future proceedings in the case will be made.

(20) Discuss such other matters and make such other orders as the court deems appropriate.

**Rule 16(e)(e). Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Cases**

In medical malpractice cases, within five days of receiving answers or motions from all defendants who have been served, plaintiff shall notify the court to whom the case has been assigned so that a comprehensive pretrial conference can be set. Within 60 days of receiving the notice, the court shall conduct a comprehensive pretrial conference. At that conference, the court and the parties shall:

(1) Determine the discovery to be undertaken and a schedule therefor. The schedule shall include the depositions to be taken, any medical examination which defendant desires to be made of plaintiff and what additional documents, electronically stored information, and other materials are to be exchanged. Only those depositions specifically authorized in the comprehensive pretrial conference shall be allowed except upon stipulation of the parties or upon motion and a showing of good cause. The court, upon request of any defendant, shall require an authorization to allow the parties to obtain copies of records previously produced under Rule 26.2(A)(2) of these Rules or records ordered to be produced by the court. If records are obtained pursuant to such authorization, the party obtaining the records shall furnish complete copies to all other parties at the sole expense of the party obtaining the records.

(2) Determine a schedule for the disclosure of standard of care and causation expert witnesses. Except upon good cause shown, such disclosure shall be simultaneous and within 30 to 90 days after the conference, depending upon the number and complexity of the issues. No motion for summary judgment based

upon the lack of expert testimony will be filed prior to the expiration of the date set for the simultaneous disclosure of expert witnesses except upon a showing of good cause.

(3) Determine the order of and dates for the disclosure of all other expert and non-expert witnesses, provided that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the close of discovery. Any witnesses not appropriately disclosed shall be precluded from testifying at trial unless there is a showing of extraordinary circumstances.

(4) Limit the number of experts as provided in Rule 26(b)(4)(D) of these Rules.

(5) Determine whether additional non-uniform interrogatories and/or requests for admission or production are necessary and, if so, limit the number.

~~(6) Resolve any discovery disputes, which have been presented to the court by way of motion within 10 days before the conference. The moving party shall set forth the question or answer to which objection is made and the basis for the objection. The responding party may file a response within 3 days of the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including any order under Rule 37(b)(2) of these Rules, against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.~~

(7) Discuss alternative dispute resolution, including mediation, and binding and non-binding arbitration.

(8) Assure compliance with A.R.S. § 12-570.

(9) Set a date for a mandatory settlement conference.

(10) Set a date for filing the joint pretrial statement required by subpart (dg) of this Rule.

(11) Set a trial date.

~~(12) Make such other orders as the court deems appropriate.~~

~~(13)~~(12) Determine how verbatim record of future proceedings in the case will be made.

(13) Discuss such other matters and make such other orders as the court deems appropriate.

**Rule 16(d). Joint Pretrial Statement: Preparation; Final Pretrial Conference**

~~(1) Counsel or the parties who will try the case and who are authorized to make binding stipulations shall confer and prepare a written joint pretrial statement, signed by each counsel or party, that shall be filed five days before the date of the final pretrial conference, or if no conference is scheduled, five days before trial. Plaintiffs shall submit their portion of the joint pretrial statement to all parties no later than twenty days before the statement is due. All other parties shall submit their portion of the joint pretrial statement to all parties no later than fifteen days before the statement is due.~~

~~(2) The joint pretrial statement shall contain the following:~~

~~(A) Stipulations of material fact and law;~~

~~(B) Such contested issues of fact and law as counsel can agree are material or applicable;~~

~~(C) A separate statement by each party of other issues of fact and law believed by that party to be material;~~

~~(D) A list of witnesses intended to be used by each party during trial. Each party shall list any objections to a witness and the basis for that objection. No witness shall be used at the trial other than those listed, except for good cause shown. Witnesses whose testimony will be received by deposition testimony only will be so indicated;~~

~~(E) Each party's final list of exhibits to be used at trial for any purpose, including impeachment. Plaintiffs shall deliver copies of all of their exhibits to all parties twenty days before the final pretrial conference. All other parties shall deliver copies of all their exhibits to all parties fifteen days before the final pretrial conference. Any exhibit that cannot be reproduced must be made available for inspection to all parties on or before the deadlines stated above. Each party shall list any objections to an exhibit and the basis for that objection. No exhibit shall be used at the trial other than those listed, except for good cause shown. The parties shall indicate any exhibits which the parties stipulate can be admitted into evidence, such stipulations being subject to court approval;~~

~~(F) A statement by each party indicating any proposed deposition summaries or designating portions of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. Deposition testimony shall be designated by transcript page and line numbers. A copy of any proposed deposition summary and written transcript of designated deposition testimony should be filed with the Joint Pretrial Statement. Each party shall list any objections to the proposed deposition summaries and designated deposition testimony and the basis for any objections. Except for good cause shown, no deposition testimony shall be used at trial other than that designated or counter-designated or for impeachment purposes;~~

~~(G) A brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party shall submit a separate statement to the judge who will decide the contents of the statement to be read to the jury;~~

~~(H) Technical equipment needed or interpreters requested;~~

~~(I) The number of jurors and alternates agreed upon, whether the alternates may deliberate, and the number of jurors required to reach a verdict;~~

~~(J) Whether any party will be invoking Rule 615 of the Arizona Rules of Evidence regarding exclusion of witnesses from the courtroom; and~~

~~(K) A brief description of settlement efforts.~~

~~(3) At the time of the filing of the joint pretrial statement, the parties shall file (A) an agreed-upon set of jury instructions, verdict forms, and voir dire questions and (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon (C) a statement by each party on how a verbatim record of the trial will be made.~~

~~(4) Each party intending to submit a jury notebook to the jurors shall submit a copy of the notebook to opposing counsel five days before the final pretrial conference, or if no conference is scheduled, five days before the trial.~~

~~(5) Each party who will be submitting a trial memorandum shall file such memorandum five days before the final pretrial conference, or if no conference is scheduled, five days before the trial.~~

~~(6) Any final pretrial conference scheduled by the court shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.~~

~~(7) The provisions of this rule may be modified by order of the court.~~

### **Rule 16(e). Pretrial Orders**

~~After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.~~

### **Rule 16(f). Trial-Setting Status Conference**

(1) If the Court has not already set a trial date in a scheduling order or otherwise, the court shall hold a trial-setting status conference, as set by the scheduling order, for the purpose of setting a trial date. The conference shall be attended in person or telephonically (as permitted by the court) by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(2) In addition to setting a trial date, the court may at the trial-setting status conference discuss:

(A) The status of discovery and any dispositive motions that have been or will be filed.

(B) A date for holding a final pretrial conference under Rule 16(g).

(C) The imposition of time limits on trial proceedings or portions thereof.

(D) The use of juror questionnaires.

(E) The use of juror notebooks.

(F) The giving of brief pre-voir dire opening statements and preliminary jury instructions.

(G) The effective management of documents and exhibits.

(H) Such other matters as the court deems appropriate.

(3) If for any reason a trial date is not set at the trial-setting status conference, the court shall schedule another trial-setting status conference as soon as practicable for the setting of a trial date.

**Rule 16(g). Joint Pretrial Statement: Preparation; Final Pretrial Conference**

(1) Counsel or the unrepresented parties who will try the case and who are authorized to make binding stipulations shall confer and prepare a written joint pretrial statement, signed by each counsel or party, that shall be filed five days before the date of the final pretrial conference, or if no conference is scheduled, five days before trial. Plaintiffs shall submit their portion of the joint pretrial statement to all parties no later than twenty days before the statement is due. All other parties shall submit their portion of the joint pretrial statement to all parties no later than fifteen days before the statement is due.

(2) The joint pretrial statement shall contain the following:

(A) Stipulations of material fact and law;

(B) Such contested issues of fact and law as counsel can agree are material or applicable;

(C) A separate statement by each party of other issues of fact and law believed by that party to be material;

(D) A list of witnesses intended to be used by each party during trial. Each party shall list any objections to a witness and the basis for that objection. No witness shall be used at the trial other than those listed, except for good cause shown. Witnesses whose testimony will be received by deposition testimony only will be so indicated;

(E) Each party's final list of exhibits to be used at trial for any purpose, including impeachment. Plaintiffs shall deliver copies of all of their exhibits to all parties twenty days before the final pretrial conference. All other parties shall deliver copies of all their exhibits to all parties fifteen days before the final pretrial conference. Any exhibit that cannot be reproduced must be made available for inspection to all parties on or before the deadlines stated above. Each party shall list any objections to an exhibit and the basis for that objection. No exhibit shall be used at the trial other than

those listed, except for good cause shown. The parties shall indicate any exhibits which the parties stipulate can be admitted into evidence, such stipulations being subject to court approval;

(F) A statement by each party indicating any proposed deposition summaries or designating portions of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. Deposition testimony shall be designated by transcript page and line numbers. A copy of any proposed deposition summary and written transcript of designated deposition testimony should be filed with the Joint Pretrial Statement. Each party shall list any objections to the proposed deposition summaries and designated deposition testimony and the basis for any objections. Except for good cause shown, no deposition testimony shall be used at trial other than that designated or counter-designated or for impeachment purposes;

(G) A brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party shall submit a separate statement to the judge who will decide the contents of the statement to be read to the jury;

(H) Technical equipment needed or interpreters requested;

(I) The number of jurors and alternates agreed upon, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(J) Whether any party will be invoking Rule 615 of the Arizona Rules of Evidence regarding exclusion of witnesses from the courtroom; and

(K) A brief description of settlement efforts.

(3) At the time of the filing of the joint pretrial statement, the parties shall file (A) an agreed-upon set of jury instructions, verdict forms, and voir dire questions, (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon, and (C) a statement by each party on how a verbatim record of the trial will be made.

(4) A party intending to submit a jury notebook to the jurors shall serve a copy of the notebook on the other parties five days before the final pretrial conference, or, if no conference is scheduled, five days before the trial.

(5) Any trial memoranda shall be filed five days before the final pretrial conference, or, if no conference is scheduled, five days before the trial.

(6) Any final pretrial conference scheduled by the court shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(7) The provisions of this rule may be modified by order of the court.

#### **Rule 16(h). Pretrial Orders**

After any conference held pursuant to this Rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference under Rule 16(gf) shall be modified only to prevent manifest injustice.

#### **Rule 16(f)(i). Sanctions**

If a party or attorney fails to obey a scheduling or pretrial order or fails to meet the discovery, disclosure and other deadlines set forth therein, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith in a scheduling or pretrial conference or in the preparation of the joint report or joint pretrial statement, the judge, upon motion or the judge's own initiative, shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D). The fact that a trial date has not been set does not preclude sanctions under this Rule, including the exclusion from evidence of untimely disclosed information. In lieu of or in addition to any other sanction, the judge shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred ~~because~~ as the result of any noncompliance with this rule Rule, including attorneys' fees, or payment of an assessment to the clerk of the court, or both, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust.

**Rule 16(g)(16)(j). 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.

**Rule 16(h)(16)(k). Time Limitations**

The court may impose reasonable time limits on the trial proceedings or portions thereof.

**Rule 16.1 Settlement Conferences: Objectives**

(a) **Mandatory Settlement Conferences.** Except as to in appeals from a lower court—appeals, medical malpractice cases, and cases subject to compulsory arbitration under A.R.S. § 12-133, in any action in which a motion to set and certificate of readiness is filed, ~~the court~~Rule 72(b), at the request of any party made after the parties have met and conferred regarding case management under Rule 16(b), or as set forth in the scheduling order, the court shall, except for good cause shown, direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate either in person or, with leave of court, by telephone, in a conference or conferences before trial for the purpose of facilitating settlement. Unless otherwise ordered by the court, all requests for settlement conferences shall be made not later than 60 days prior to trial. The court may also schedule a settlement conference upon its own motion.

In medical malpractice cases, the court shall conduct a mandatory settlement conference no earlier than four (4) months after the ~~conduct of the comprehensive pretrial~~Rule 16(e) conference and no later than thirty (30) days before trial.

**Rule 26. General provisions governing discovery**

....

**Rule 26(b). Discovery Scope and Limits**

....

(5) *Non-party at Fault.* Any party who alleges, pursuant to A.R.S. § 12-2506(B) ~~(as amended)~~, that a person or entity not currently or formerly named as a party was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such ~~nonparty at the time of compliance with the requirements of Rule 38.1(b)(2) of these Rules, or non-party~~ non-party within one hundred fifty (150) days after the filing of that party's answer, ~~whichever is earlier~~. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any ~~nonparty non-party~~ non-party whose identity is not disclosed in accordance with the requirements of this ~~subpart 5~~ paragraph except upon written agreement of the parties or upon motion establishing good cause, reasonable diligence, and lack of unfair prejudice to other parties.

**Rule 37. Failure to make disclosure or discovery; Sanctions**

....

**Rule 37(c). Failure to Disclose; False or Misleading Disclosure; Untimely Disclosure**

....

(2) A party seeking to use information which that party first disclosed later than (A) the deadline set in a scheduling order, or (B) in the absence of such a deadline, sixty (60) days before trial, must obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. Such information shall not be used unless the motion establishes and the court finds:

- (i) that the information would be allowed under the standards of subsection (c)(1) ~~notwithstanding the short time remaining before trial~~; and
- (ii) that the information was disclosed as soon as practicable after its discovery.

**Rule 38. Right to a Jury Trial of Right; Demand; Waiver**

**Rule 38(a). Right preserved**

The right of trial by jury shall be preserved inviolate to the parties.

### **Rule 38(b). Demand**

Any person may demand a trial by jury of any issue triable of right by jury. The demand may be made by any party by filing and serving upon the other party a demand therefor in writing at any time after the commencement of the action, but not later than the date of setting on which the case for court sets a trial date or ten days after a motion to set the case for trial is served the date a joint report under Rule 16(b) or Rule 16.3 is filed, whichever first occurs. The demand for trial by jury ~~may be endorsed on or be combined with the motion to set,~~ but shall not be endorsed on or be combined with any other motion or pleading filed with the court.

### **Rule 38(c). Demand; specification of issues**

In the demand, a party may specify the issues which the party wishes ~~so to have tried, by a jury;~~ otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party may, within ten days after service of the demand or such lesser time as the court may order, ~~may serve~~ a demand for trial by jury of any other or all the issues of fact in the action triable by jury.

### **Rule 38(d). Waiver**

~~The failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5(b) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.~~

A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

### **Rule 38.1. Setting of Civil Cases for Trial; Postponements; Scheduling Conflicts; Dismissal Calendar**

~~(a) **Motion to Set and Certificate of Readiness; Identification of Nonparty at Fault.** In every civil case, counsel for plaintiff shall, or counsel for any other party may, file a Motion to Set and Certificate of Readiness. Service shall be in the manner prescribed by Rule 5 of these Rules. The form and contents of the Certificate of Readiness shall be as follows:~~

~~The undersigned attorney hereby certifies:~~

- ~~(1) That the issues in the above captioned case have actually been joined;~~
- ~~(2) The largest award sought by any party, including punitive damages, but excluding interest, attorneys' fees, and costs, is \$\_\_\_\_\_. This case [is] [is not] subject to the mandatory arbitration provisions of Rules 72 through 76 of these Rules.~~
- ~~(3) That the status of discovery is as follows:~~
- ~~(i) In a court which requires such certification by local rule, the parties have completed, or will have had a reasonable opportunity to complete, the procedures under Rules 26 to 37 of these Rules within 60 days after the filing of the Certificate of Readiness; or~~
- ~~(ii) In a court which requires such certification by local rule, the parties have completed, or have had a reasonable opportunity to complete, the procedures under Rules 26 to 37 of these Rules at the time of filing of the Certificate of Readiness; or~~
- ~~(iii) In all other cases, the parties have completed, or will have had a reasonable opportunity to complete, the procedures under Rules 26 to 37 of these Rules prior to ten days before trial.~~
- ~~(4) That this case will be ready for trial on or after [DATE].~~
- ~~(5) That a trial by jury is [not] demanded (strike out the word "not" if a jury trial is demanded);~~
- ~~(6) That this cause may [not] be heard as a short cause within one hour [strike out the word "not" if the time required for trial will not exceed one hour];~~
- ~~(7) That the names, addresses and telephone numbers of the parties or their individual attorneys who are responsible for the conduct of the litigation are: \_\_\_\_\_ [insert the appropriate information]; and~~
- ~~(8) That this cause is entitled to a preference for trial by reason of the following statute or rule: \_\_\_\_\_ [insert statutory section or rule number if a preference is applicable].~~

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Signature of Attorney

~~If the Motion to Set and Certificate of Readiness is filed by a defending party in a court which does not require the certification set forth in (a)(3)(i) or (ii) of this Rule, then the Certificate of Readiness shall also identify any nonparty who is alleged, pursuant to A.R.S. § 12-2506(B) (as amended), to be wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action.~~

~~(b) **Controverting Certificate; Identification of Nonparty at Fault.** Within ten days after a Motion to Set and Certificate of Readiness has been served:~~

~~(1) Counsel for any other party may file a Controverting Certificate which specifies the particular statements contained in the Certificate of Readiness to which objection is made, and the reasons therefor.~~

~~(2) In those courts which do not require the certification set forth in either subpart (a)(3)(i) or (ii) of this Rule, counsel for a defending party must, in a Controverting Certificate or separately, identify any nonparty who is alleged, pursuant to A.R.S. § 12-2506(B) (as amended), to be wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action.~~

~~The court shall thereupon enter an order, without oral argument, placing the case on the Active Calendar either immediately or, where good cause is shown, at a specified later date. No case shall be heard as a short cause if objection is made thereto in the Controverting Certificate.~~

~~(c) **Active Calendar.** Ten days after a Motion to Set and Certificate of Readiness has been served, if a Controverting Certificate has not been served, or otherwise by order of the court, the clerk of the court or court administrator shall place the case on the Active Calendar and shall stamp thereon a chronological list number which shall generally govern the priority of the case for trial, except as to those cases which are entitled to preference by statute or local rule, and except that short causes may be preferred for trial in accordance with local rules.~~

~~(d) **Inactive Calendar.** The clerk of the court or court administrator shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof. All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such two-months period:~~

~~(1) a proper Motion to Set and Certificate of Readiness is served;~~

~~(2) the court, on motion for good cause shown, orders the case to be continued on the Inactive Calendar for a specified period of time without dismissal; or~~

~~(3) a notice of decision has been filed with the clerk of court in a case assigned to arbitration.~~

~~(e) **Notification.** The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing of the placing of cases on the Inactive Calendar, and no further notice shall be required prior to dismissal.~~

~~(f) **Additional Discovery.** In those cases in which the certification set forth in subpart (a)(3)(i) is required by local rule, all pretrial procedures under Rules 26 to 37 of these Rules shall be completed within 60 days after service of the Motion to Set and Certificate of Readiness. In those cases in which the certification set forth in subpart (a)(3)(ii) is required by local rule, all pretrial procedures under Rules 26 to 37 of these Rules shall be completed at the time of service of the Motion to Set and Certificate of Readiness. In all other cases, all pretrial procedures under Rules 26 to 37 of these Rules shall be completed prior to ten days before trial. Notwithstanding the foregoing, for good cause shown, the court may permit or the parties may stipulate that additional discovery procedures may be undertaken anytime prior to trial.~~

~~(g) **Setting for Trial.** Cases on the Active Calendar Rule 38.1(a). Setting for Trial~~

~~Civil actions shall be set for trial as soon as possible pursuant to Rule 16 or Rule 77. Preference shall be given to short causes and cases which that by reason of statute, rule or court order are entitled to priority. ~~Counsel~~ The parties shall be given at least thirty days notice of the trial date.~~

**Rule 38.1(hb). Postponements**

Unless otherwise provided by local rule, when an action has been set for trial on a specified date by order of the court, no postponement of the trial shall be granted except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law.

**Rule 38.1(i)(c). Application for Postponement; Grounds; Effect of Admission of Truth of Affidavit by Adverse Party**

On an application for a postponement of the trial, if the ground for the application is the want of testimony, the party applying therefor shall ~~make~~ provide an affidavit that such testimony is material showing the materiality thereof, of the testimony and that the party has used due diligence to procure such testimony, stating such diligence and the cause of failure to procure such testimony, if known, and that such testimony cannot be obtained from any other source. If the ground for the application is the absence of a witness, the party applying shall state the name and residence of the witness, and what the party expects to prove by the witness. The application in either case shall also state that the postponement is not sought for delay only, but that justice may be done. If the adverse party admits that such testimony would be given and that it will be considered as actually given ~~on~~ at the trial, or offered and overruled as improper, the trial shall not be postponed. Such testimony may be controverted as if the witness were personally present.

**Rule 38.1(jd). Deposition of Witness or Party; Consent**

The party obtaining a postponement shall, if required by the adverse party, consent that the testimony of any witness or adverse party in attendance be taken by deposition, ~~without notice~~. The testimony so taken may be read ~~on~~ at the trial by either party as if the witnesses were present.

**Rule 38.1(ke). Scheduling conflicts between courts**

(1) *Notice to the court.* Upon learning of a scheduling conflict between a case in Superior Court and a case in United States District Court, or between cases in the Superior Courts of different counties, or between cases in different courts within a county, counsel ~~has a duty to~~ shall promptly notify the judges and other counsel involved in order that the conflict may be resolved.

(2) *Resolution of conflicts.* Upon being advised of a scheduling conflict, the judges involved shall, if necessary, confer personally or by telephone in an effort to resolve the conflict. While neither federal nor state court cases have priority in scheduling, the following factors may be considered in resolving the conflict:

(A) the nature of the cases as civil or criminal, and the presence of any speedy trial problems;

(B) the length, urgency, or relative importance of the matters;

- (C) a case which involves out-of-town witnesses, parties or counsel;
- (D) the age of the cases;
- (E) the matter which was set first;
- (F) any priority granted by rule or statute; and
- (G) any other pertinent factor.

(3) *Inter-division Conflicts.* Conflicts in scheduling between divisions of the same court may be governed by local rule or general order.

**Rule 38.1(f). Dismissal Calendar**

The clerk of the court or court administration shall place on the Dismissal Calendar every civil action in which a joint report under Rule 16 or Rule 16.3 or an arbitrator's notice of decision under Rule 76 has not been filed with the court within 270 days after the commencement thereof. A case remaining on the Dismissal Calendar for 60 days shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such 60-day period:

- (1) a joint report under Rule 16(b) or Rule 16.3 is filed with the court;
- (2) the court, on motion for good cause shown, orders the case to be continued on the Dismissal Calendar for a specified period of time without dismissal; or
- (3) a notice of decision has been filed with the clerk of the court in a case assigned to arbitration.

**Rule 38.1(g) Notification**

The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing when a case is placed on the Dismissal Calendar, and no further notice shall be required prior to dismissal.

**Rule 72. Compulsory Arbitration; Arbitration by Reference; Alternative Dispute Resolution; Determination of Suitability for Arbitration**

....

**(d) Alternative Dispute Resolution.**

(1) Compulsory arbitration under A.R.S. § 12-133 and these rules is not binding. Any party may appeal and all appeals are *de novo* on the law and facts. Therefore, before a hearing in accordance with Rule 75 of these rules is held, counsel for the parties, or the parties if not represented by counsel, shall confer regarding the feasibility of resolving their dispute through another form of alternative dispute resolution, including but not limited to private mediation or binding arbitration with a mediator or arbitrator agreed to by the parties.

(2) The court shall waive the arbitration requirement if the parties file a written stipulation to participate in good faith in an alternative dispute resolution proceeding, and the court approves the method selected by the parties. The stipulation shall identify the specific alternative dispute resolution method selected. The court may waive the arbitration requirement for other good cause upon stipulation of all parties. If the alternative dispute resolution method selected under this Rule fails, the case shall be set for trial in accordance with Rule ~~38.4~~ 16 of these Rules and shall not be subject to the rules governing compulsory arbitration.

**Rule 73. Appointment of Arbitrators**

(a) **Lawyer or Non-Lawyer Arbitrators.** The parties, by written stipulation and by written consent of the proposed arbitrator filed with the ~~clerk~~Clerk of the ~~Superior Court~~ court with conformed copies to the ~~Superior Court Administrator~~court administrator, may agree that the case be assigned to a single lawyer or non-lawyer arbitrator named in the stipulation. All other cases subject to arbitration shall be heard by an arbitrator selected as provided below.

(b) **List of Arbitrators.** Except as the parties may stipulate under the provisions of subdivision (a) of this ~~Rule~~, the arbitrator shall be appointed by the ~~Court Administrator or Superior Court Clerk~~ clerk of the court or court administrator from a list of persons, as provided by local rule, which shall include the following:

(1) all residents of the county in which the court is located who, for at least four years, have been active members of the State Bar of Arizona.

(2) other active and inactive members of the State Bar of Arizona residing anywhere in Arizona, and members of any other federal court or state bar, who

have agreed to serve as arbitrators in the county where the action court is pending located.

**(c) Appointment of Arbitrators; Timing of ~~Assignment~~ Appointment;  
Notice of Appointment; Right to Peremptory Strike**

(1) *Appointment of arbitrator from list.* ~~The Superior Court Administrator or Superior Court Clerk~~ clerk of the court or court administrator, under the supervision of the ~~Presiding Judge~~ presiding judge or that judge's designee, shall prepare a list of arbitrators who may be designated as ~~to the~~ by their area of concentration, specialty or expertise. ~~By means of a method of selecting names at random from the list of arbitrators, the Superior Court Administrator or Superior Court Clerk shall~~ The clerk of the court or court administrator shall randomly select and then assign to each case one name-arbitrator from the list of arbitrators.

~~(2) Timing of assignment. Assignment to arbitration shall take place as soon as is feasible after the answer and controverting certificate are filed and in any event no later than 120 days thereafter.~~

(2) Timing of appointment. Appointment of an arbitrator to a case shall occur no later than 120 days after an answer is filed.

(3) *Notice of appointment of arbitrator.* ~~The Superior Court Administrator or Superior Court Clerk~~ clerk of the court or court administrator shall promptly ~~notify the parties of the name~~ mail written notice of the arbitrator ~~by mailing written notice selected~~ to the parties and the arbitrator. ~~The written notice from the Superior Court Administrator or Superior Court Clerk shall advise the parties that the time periods specified in Rule 38.1(f) of these Rules for placing a case on the inactive calendar in Rule 38.1(d) of these rules~~ Dismissal Calendar shall apply.

(4) *Right to peremptory strike.* Within ten days after the mailing of ~~such the~~ notice of appointment of arbitrator, or within ten days after the appearance of a party if the arbitrator was appointed before that party appeared, either side may peremptorily strike the assigned arbitrator and request that a new arbitrator be appointed. Each side shall have the right to only one peremptory strike in any one case. A motion for recusal or motion to strike for cause shall toll the time to exercise a peremptory strike.

**(d) Disqualifications and Excuses.**

(1) Upon written motion and a finding of good cause therefore, the ~~Presiding Judge~~ presiding judge or that judge's designee may excuse a lawyer from the list of arbitrators.

(2) An arbitrator, after ~~selection~~ appointment, may be disqualified from serving in a particular assigned case upon motion of either party to the judge assigned to the case, for an ethical conflict of interest or other good cause shown as defined in A.R.S. §§ 12-409 or 21-211, submitted in accord with the procedure set out in Rule 42(f)(2) of these Rules.

(3) An arbitrator may be excused by the presiding judge or that judge's designee from serving in a particular assigned case upon a showing by the arbitrator that such individual has completed contested hearings and ruled as an arbitrator pursuant to these Rules in two or more cases assigned during the current calendar year ~~or~~ and shall be excused on a detailed showing that such individual has an ethical conflict of interest or other good cause shown as defined in A.R.S. §§ 12-409 or 21-211, submitted in accord with the procedure set out in Rule 42(f)(2) of these Rules.

(4) After an arbitrator has been disqualified or excused from a particular case under ~~these rules~~ this subdivision (d), a new arbitrator shall be appointed in accordance with the procedure set forth in subdivision (c) of this Rule.

**Rule 74. Powers of Arbitrator; Scheduling of Arbitration Hearing; Permitted Rulings by Arbitrator; Time for Filing Summary Judgment Motion; Receipt of Court File; Settlement of Cases; Offer of Judgment**

....

**(c) Rulings by Arbitrator.**

(1) *Authorized rulings.* After a case has been assigned to an arbitrator, the arbitrator shall make all legal rulings, including rulings on motions, except:

(A) motions to continue on the ~~inactive calendar~~ Dismissal Calendar or otherwise extend time allowed under Rule 38.1 of these ~~rules~~ Rules;

(B) motions to consolidate cases under Rule 42 of these ~~rules~~ Rules;

(C) motions to dismiss;

(D) motions to withdraw as attorney of record under Rule 5.1 of these ~~rules~~Rules; or

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party; ~~or.~~

~~(F) motions for sanctions under Rule 68 of these rules.~~

### **Rule 77. Right of Appeal**

- (a) **Notice of Appeal.** Any party who appears and participates in the arbitration proceedings may appeal from the award or other final disposition by filing a notice of appeal with the ~~Clerk~~clerk of the ~~Superior Court~~court within 20 days after the ~~filing of the award is filed~~ or 20 days after the date upon which the notice of decision becomes an award under Rule 76(b), whichever occurs first. The notice of appeal shall be entitled "Appeal from Arbitration and Motion to Set for Trial" and shall request that the case be set for trial in the Superior Court and state whether a jury trial is requested and the estimated length of trial. ~~The Appeal from Arbitration and Motion to Set for Trial shall serve in place of a Motion to Set and Certificate of Readiness under Rule 38.1(a) of these rules.~~
- (b) **Deposit on Appeal.** At the time of filing the notice of appeal, and as a condition of filing, the appellant shall deposit with the ~~Clerk~~clerk of the ~~Superior Court~~court a sum equal to one hearing day's compensation of the arbitrator, but not exceeding ten percent of the amount in controversy. If the court finds that the appellant is unable to make such deposit by reason of lack of funds, the court shall allow the filing of the appeal without deposit.

## **APPENDIX B**

**State Bar's Proposed Amended Rules 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74, and  
77 of the Arizona Rules of Civil Procedure**

**Rule 16. Pretrial Conferences; Scheduling; Management**

**Rule 16(a). Pretrial Conferences; objectives**

In any action, the court may direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate, either in person or, with leave of court, by telephone, in a conference or conferences before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

**Rule 16(b). Conference and Joint Report of the Parties Regarding Scheduling and Case Management**

(1) Except in medical malpractice cases and cases subject to compulsory arbitration under Rule 72(b), no later than 14 days after the deadline for serving initial disclosures under Rule 26.1(b) or 180 days after commencement of the action, whichever occurs first, the parties shall meet and confer regarding the subjects set forth in Rule 16(d). No later than 14 days after the parties meet and confer, they shall file a joint report with the court stating, to the extent practicable, their positions on the subjects set forth in Rule 16(d) and proposing a scheduling order that specifies by calendar date, month, and year deadlines for the following:

- (A) service of initial disclosures under Rule 26.1 if they have not already been served;
- (B) identification of areas of expert testimony;

- (C) identification of and disclosure of expert witnesses and their opinions in accordance with Rule 26.1(a)(6);
- (D) propounding of written discovery;
- (E) disclosure of non-expert witnesses;
- (F) completion of non-expert depositions;
- (G) completion of expert depositions;
- (H) completion of all discovery;
- (I) final supplementation of Rule 26.1 disclosures;
- (J) holding a Rule 16.1 settlement conference or private mediation; and
- (K) filing dispositive motions.

Unless otherwise ordered by the Court for good cause shown, the parties' proposed schedule shall set the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 13 months after the commencement of the action. The joint report shall certify that the parties met and conferred regarding the subjects set forth in Rule 16(d). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a proposed schedule, and for filing the joint report with the court.

(2) In medical malpractice cases, no later than 21 days before the comprehensive pretrial conference required by Rule 16(e), the parties shall meet and confer regarding the subjects set forth in Rule 16(e). No later than 14 days after the parties meet and confer, they shall file a joint report with the court stating, to the extent practicable, their positions on the subjects set forth in Rule 16(e) and proposing a scheduling order that specifies by calendar date, month, and year deadlines for the following:

- (A) service of initial disclosures under Rule 26.1 if they have not already been served;
- (B) identification of areas of expert testimony;
- (C) identification of and disclosure of expert witnesses and their opinions in accordance with Rule 26.1(a)(6);
- (D) propounding of written discovery;
- (E) disclosure of non-expert witnesses;

- (F) completion of non-expert depositions;
- (G) completion of expert depositions;
- (H) completion of all discovery;
- (I) final supplementation of Rule 26.1 disclosures;
- (J) holding a Rule 16.1 settlement conference or private mediation; and
- (K) filing dispositive motions.

Unless otherwise ordered by the Court for good cause shown, the parties' proposed schedule shall set the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 13 months after the commencement of the action. The joint report shall certify that the parties met and conferred regarding the subjects set forth in Rule 16(e). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a proposed schedule, and for filing the joint report with the court.

#### **Rule 16(c). Scheduling Orders**

Except in cases subject to compulsory arbitration under Rule 72(b), the court shall issue a scheduling order as soon as practicable after receiving the parties' joint report under Rule 16(b) or after holding a comprehensive pretrial conference. The scheduling order shall establish calendar deadlines specifying the month, date and year for each of the items included in the proposed scheduling order submitted pursuant to Rule 16(b). The scheduling order shall also set either (1) a trial date or (2) a date for a trial-setting status conference under Rule 16(f) at which a trial date may be set. Absent good cause, a trial date shall not be set unless and until the parties certify that they have engaged in good faith in a settlement conference or private mediation. The scheduling order may include other appropriate matters. The dates established in a scheduling order may be modified only for good cause and with the court's consent. Once a trial date is set, it may be modified only pursuant to Rule 38.1.

#### **Rule 16(d). Scheduling and Subjects to Be Discussed at Comprehensive Pretrial Conference in Non-Medical Malpractice Cases**

Except in medical malpractice cases, upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive

pretrial conference. At any comprehensive pretrial conference under this rule, except for conferences conducted in medical malpractice cases, the court may:

- (1) Determine the additional disclosures, discovery and related activities to be undertaken and a schedule therefor.
- (2) Determine whether the court should enter orders addressing one or more of the following:
  - (A) setting forth any requirements or limitations for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced;
  - (B) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and
  - (C) adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production.
- (3) Determine a schedule for the disclosure of expert witnesses and the method of such disclosure, including whether signed reports from the experts should be required.
- (4) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(D).
- (5) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure.
- (6) Determine a deadline for the filing of dispositive motions.
- (7) Resolve any discovery disputes.
- (8) Eliminate non-meritorious claims or defenses.
- (9) Permit the amendment of the pleadings.
- (10) Assist in identifying those issues of fact which are still at issue.
- (11) Obtain stipulations as to the foundation or admissibility of evidence.

- (12) Determine the desirability of special procedures for management of the case.
- (13) Consider alternative dispute resolution.
- (14) Determine whether any time limits or procedures set forth in the discovery rules or set forth in these rules or Local Rules of Practice should be modified or suspended.
- (15) Determine whether Rule 26.1 has been appropriately complied with by the parties.
- (16) Determine a date for filing the joint pretrial statement required by subpart (g) of these Rules.
- (17) Determine a deadline for the parties to hold a settlement conference or private mediation.
- (18) Discuss the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary jury instructions, and the effective management of documents and exhibits.
- (19) Determine how verbatim record of future proceedings in the case will be made.
- (20) Discuss such other matters and make such other orders as the court deems appropriate.

**Rule 16(e). Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Cases**

In medical malpractice cases, within five days of receiving answers or motions from all defendants who have been served, plaintiff shall notify the court to whom the case has been assigned so that a comprehensive pretrial conference can be set. Within 60 days of receiving that notice, the court shall conduct a comprehensive pretrial conference. At that conference, the court and the parties shall:

- (1) Determine the discovery to be undertaken and a schedule therefor. The schedule shall include the depositions to be taken, any medical examination

which defendant desires to be made of plaintiff and what additional documents, electronically stored information, and other materials are to be exchanged. Only those depositions specifically authorized in the comprehensive pretrial conference shall be allowed except upon stipulation of the parties or upon motion and a showing of good cause. The court, upon request of any defendant, shall require an authorization to allow the parties to obtain copies of records previously produced under Rule 26.2(A)(2) of these Rules or records ordered to be produced by the court. If records are obtained pursuant to such authorization, the party obtaining the records shall furnish complete copies to all other parties at the sole expense of the party obtaining the records.

- (2) Determine a schedule for the disclosure of standard of care and causation expert witnesses. Except upon good cause shown, such disclosure shall be simultaneous and within 30 to 90 days after the conference, depending upon the number and complexity of the issues. No motion for summary judgment based upon the lack of expert testimony will be filed prior to the expiration of the date set for the simultaneous disclosure of expert witnesses except upon a showing of good cause.
- (3) Determine the order of and dates for the disclosure of all other expert and non-expert witnesses, provided that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the close of discovery. Any witnesses not appropriately disclosed shall be precluded from testifying at trial unless there is a showing of extraordinary circumstances.
- (4) Limit the number of experts as provided in Rule 26(b)(4)(D) of these Rules.
- (5) Determine whether additional non-uniform interrogatories and/or requests for admission or production are necessary and, if so, limit the number.
- (6) Resolve any discovery disputes.
- (7) Discuss alternative dispute resolution, including mediation, and binding and non-binding arbitration.
- (8) Assure compliance with A.R.S. § 12-570.
- (9) Set a date for a mandatory settlement conference.

(10) Set a date for filing the joint pretrial statement required by subpart (g) of this Rule.

(11) Set a trial date.

(12) Determine how verbatim record of future proceedings in the case will be made.

(13) Discuss such other matters and make such other orders as the court deems appropriate.

#### **Rule 16(f). Trial-Setting Status Conference**

(1) If the Court has not already set a trial date in a scheduling order or otherwise, the court shall hold a trial setting status conference, as set by the scheduling order, for the purpose of setting a trial date. The conference shall be attended in person or telephonically (as permitted by the court) by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(2) In addition to setting a trial date, the court may at the trial-setting status conference discuss:

(A) The status of discovery and any dispositive motions that have been or will be filed.

(B) A date for holding a final pretrial conference under Rule 16(g).//

(C) The imposition of time limits on trial proceedings or portions thereof.

(D) The use of juror questionnaires.

(E) The use of juror notebooks.

(F) The giving of brief pre-voir dire opening statements and preliminary jury instructions.

(G) The effective management of documents and exhibits.

(H) Such other matters as the court deems appropriate.

(3) If for any reason a trial date is not set at the trial-setting status conference, the court shall schedule another trial-setting status conference as soon as practicable for the setting of a trial date.

**Rule 16(g). Joint Pretrial Statement: Preparation; Final Pretrial Conference**

(1) Counsel or the unrepresented parties who will try the case and who are authorized to make binding stipulations shall confer and prepare a written joint pretrial statement, signed by each counsel or party, that shall be filed five days before the date of the final pretrial conference, or if no conference is scheduled, five days before trial. Plaintiffs shall submit their portion of the joint pretrial statement to all parties no later than twenty days before the statement is due. All other parties shall submit their portion of the joint pretrial statement to all parties no later than fifteen days before the statement is due.

(2) The joint pretrial statement shall contain the following:

(A) Stipulations of material fact and law;

(B) Such contested issues of fact and law as counsel can agree are material or applicable;

(C) A separate statement by each party of other issues of fact and law believed by that party to be material;

(D) A list of witnesses intended to be used by each party during trial. Each party shall list any objections to a witness and the basis for that objection. No witness shall be used at the trial other than those listed, except for good cause shown. Witnesses whose testimony will be received by deposition testimony only will be so indicated;

(E) Each party's final list of exhibits to be used at trial for any purpose, including impeachment. Plaintiffs shall deliver copies of all of their exhibits to all parties twenty days before the final pretrial conference. All other parties shall deliver copies of all their exhibits to all parties fifteen days before the final pretrial conference. Any exhibit that cannot be reproduced must be made available for inspection to all parties on or before the deadlines stated above. Each party shall list any objections to an exhibit and the basis for that objection. No exhibit shall be used at the trial other than those listed, except for good cause shown. The parties shall

indicate any exhibits which the parties stipulate can be admitted into evidence, such stipulations being subject to court approval;

(F) A statement by each party indicating any proposed deposition summaries or designating portions of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. Deposition testimony shall be designated by transcript page and line numbers. A copy of any proposed deposition summary and written transcript of designated deposition testimony should be filed with the Joint Pretrial Statement. Each party shall list any objections to the proposed deposition summaries and designated deposition testimony and the basis for any objections. Except for good cause shown, no deposition testimony shall be used at trial other than that designated or counter-designated or for impeachment purposes;

(G) A brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party shall submit a separate statement to the judge who will decide the contents of the statement to be read to the jury;

(H) Technical equipment needed or interpreters requested;

(I) The number of jurors and alternates agreed upon, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(J) Whether any party will be invoking Rule 615 of the Arizona Rules of Evidence regarding exclusion of witnesses from the courtroom; and

(K) A brief description of settlement efforts.

(3) At the time of the filing of the joint pretrial statement, the parties shall file (A) an agreed-upon set of jury instructions, verdict forms, and voir dire questions, (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon, and (C) a statement by each party on how a verbatim record of the trial will be made.

(4) A party intending to submit a jury notebook to the jurors shall serve a copy of the notebook on the other parties five days before the final pretrial conference, or, if no conference is scheduled, five days before the trial.

(5) Any trial memoranda shall be filed five days before the final pretrial conference, or, if no conference is scheduled, five days before the trial.

(6) Any final pretrial conference scheduled by the court shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(7) The provisions of this Rule may be modified by order of the court.

#### **Rule 16(h). Pretrial Orders**

After any conference held pursuant to this Rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference under Rule 16(g) shall be modified only to prevent manifest injustice.

#### **Rule 16(i). Sanctions**

If a party or attorney fails to obey a scheduling or pretrial order or fails to meet the discovery, disclosure and other deadlines set forth therein, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith in a scheduling or pretrial conference or in the preparation of the joint report or joint pretrial statement, the judge, upon motion or the judge's own initiative, shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D). The fact that a trial date has not been set does not preclude sanctions under this Rule, including the exclusion from evidence of untimely disclosed information. In lieu of or in addition to any other sanction, the judge shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred as the result of any noncompliance with this Rule, including attorneys' fees or payment of an assessment to the clerk of the court, or both, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust.

**Rule 16(j). Alternative Dispute Resolution**

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.

**Rule 16(k). Time Limitations**

The court may impose reasonable time limits on the trial proceedings or portions thereof.

**Rule 16.1 Settlement Conferences: Objectives**

**(a) Mandatory Settlement Conferences.** Except in appeals from a lower court, medical malpractice cases, and cases subject to compulsory arbitration under Rule 72(b), at the request of any party made after the parties have met and conferred regarding case management under Rule 16(b), or as set forth in the scheduling order, the court shall, except for good cause shown, direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate either in person or, with leave of court, by telephone, in a conference or conferences before trial for the purpose of facilitating settlement. Unless otherwise ordered by the court, all requests for settlement conferences shall be made not later than 60 days prior to trial. The court may also schedule a settlement conference upon its own motion.

In medical malpractice cases, the court shall conduct a mandatory settlement conference no earlier than four (4) months after the Rule 16(e) conference and no later than thirty (30) days before trial.

**Rule 26. General Provisions Governing Discovery**

....

**Rule 26(b). Discovery Scope and Limits**

....

(5) *Non-party at Fault.* Any party who alleges, pursuant to A.R.S. § 12-2506(B), that a person or entity not currently or formerly named as a party was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such non-party within one hundred fifty (150) days after the filing of that party's answer. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any non-party whose identity is not disclosed in accordance with the requirements of this paragraph except upon written agreement of the parties or upon motion establishing good cause, reasonable diligence, and lack of unfair prejudice to other parties.

**Rule 37. Failure to Make Disclosure or Discovery; Sanctions**

....

**Rule 37(c). Failure to Disclose; False or Misleading Disclosure; Untimely Disclosure**

....

(2) A party seeking to use information which that party first disclosed later than (A) the deadline set in a scheduling order, or (B) in the absence of such a deadline, sixty (60) days before trial, must obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. Such information shall not be used unless the motion establishes and the court finds:

- (i) that the information would be allowed under the standards of subsection (c)(1); and
- (ii) that the information was disclosed as soon as practicable after its discovery.

**Rule 38. Right to a Jury Trial; Demand; Waiver**

**Rule 38(a). Right Preserved**

The right of trial by jury shall be preserved inviolate to the parties.

**Rule 38(b). Demand**

Any person may demand a trial by jury of any issue triable of right by jury. The demand may be made by any party by filing and serving a demand therefor in writing at any time after the commencement of the action, but not later than the date on which the court sets a trial date or ten days after the date a joint report under Rule 16(b) or Rule 16.3 is filed, whichever first occurs. The demand for trial by jury shall not be endorsed on or be combined with any other motion or pleading filed with the court.

**Rule 38(c). Demand; Specification of Issues**

In the demand a party may specify the issues which the party wishes to have tried by a jury; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party may, within ten days after service of the demand or such lesser time as the court may order, serve a demand for trial by jury of any other or all issues of fact in the action triable by jury.

**Rule 38(d). Waiver**

A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

**Rule 38.1. Setting of Civil Cases for Trial; Postponements; Scheduling Conflicts; Dismissal Calendar****Rule 38.1(a). Setting for Trial**

Civil actions shall be set for trial pursuant to Rule 16 or Rule 77. Preference shall be given to short causes and cases that by reason of statute, rule or court order are entitled to priority. The parties shall be given at least thirty days notice of the trial date.

**Rule 38.1(b). Postponements**

Unless otherwise provided by local rule, when an action has been set for trial on a specified date by order of the court, no postponement of the trial shall be granted except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law.

**Rule 38.1(c). Application for Postponement; Grounds; Effect of Admission of Truth of Affidavit by Adverse Party**

On an application for a postponement of the trial, if the ground for the application is the want of testimony, the party applying therefor shall provide an affidavit showing the materiality of the testimony and that the party has used due diligence to procure such testimony, stating such diligence and the cause of failure to procure such testimony, if known, and that such testimony cannot be obtained from any other source. If the ground for the application is the absence of a witness, the party applying shall state the name and residence of the witness and what the party expects to prove by the witness. The application in either case shall also state that the postponement is not sought for delay only, but that justice may be done. If the adverse party admits that such testimony would be given and that it will be considered as actually given at the trial, or offered and overruled as improper, the trial shall not be postponed. Such testimony may be controverted as if the witness were personally present.

**Rule 38.1(d). Deposition of Witness or Party; Consent**

The party obtaining a postponement shall, if required by the adverse party, consent that the testimony of any witness or adverse party in attendance be taken by deposition. The testimony so taken may be read at the trial by either party as if the witnesses were present.

**Rule 38.1(e). Scheduling Conflicts Between Courts**

(1) *Notice to the court.* Upon learning of a scheduling conflict between a case in Superior Court and a case in United States District Court, or between cases in the Superior Courts of different counties, or between cases in different courts within a county, counsel shall promptly notify the judges and other counsel involved in order that the conflict may be resolved.

(2) *Resolution of conflicts.* Upon being advised of a scheduling conflict, the judges involved shall, if necessary, confer personally or by telephone in an effort to resolve the conflict. While neither federal nor state court cases have priority in scheduling, the following factors may be considered in resolving the conflict:

- (A) the nature of the cases as civil or criminal, and the presence of any speedy trial problems;
- (B) the length, urgency, or relative importance of the matters;

- (C) a case which involves out-of-town witnesses, parties or counsel;
- (D) the age of the cases;
- (E) the matter which was set first;
- (F) any priority granted by rule or statute; and
- (G) any other pertinent factor.

(3) *Inter-division Conflicts.* Conflicts in scheduling between divisions of the same court may be governed by local rule or general order.

#### **Rule 38.1(f). Dismissal Calendar**

The clerk of the court or court administration shall place on the Dismissal Calendar every civil action in which a joint report under Rule 16 or Rule 16.3 or an arbitrator's notice of decision under Rule 76 has not been filed with the court within 270 days after the commencement thereof. A case remaining on the Dismissal Calendar for 60 days shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such 60-day period:

- (1) a joint report under Rule 16(b) or Rule 16.3 is filed with the court;
- (2) the court, on motion for good cause shown, orders the case to be continued on the Dismissal Calendar for a specified period of time without dismissal; or
- (3) a notice of decision has been filed with the clerk of the court in a case assigned to arbitration.

#### **Rule 38.1(g) Notification**

The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing when a case is placed on the Dismissal Calendar, and no further notice shall be required prior to dismissal.

#### **Rule 72. Compulsory Arbitration; Arbitration by Reference; Alternative Dispute Resolution; Determination of Suitability for Arbitration**

....

**(d) Alternative Dispute Resolution.**

(1) Compulsory arbitration under A.R.S. § 12-133 and these rules is not binding. Any party may appeal and all appeals are *de novo* on the law and facts. Therefore, before a hearing in accordance with Rule 75 of these rules is held, counsel for the parties, or the parties if not represented by counsel, shall confer regarding the feasibility of resolving their dispute through another form of alternative dispute resolution, including but not limited to private mediation or binding arbitration with a mediator or arbitrator agreed to by the parties.

(2) The court shall waive the arbitration requirement if the parties file a written stipulation to participate in good faith in an alternative dispute resolution proceeding, and the court approves the method selected by the parties. The stipulation shall identify the specific alternative dispute resolution method selected. The court may waive the arbitration requirement for other good cause upon stipulation of all parties. If the alternative dispute resolution method selected under this Rule fails, the case shall be set for trial in accordance with Rule 16 of these Rules and shall not be subject to the rules governing compulsory arbitration.

**Rule 73. Appointment of Arbitrators**

**(a) Lawyer or Non-Lawyer Arbitrators.** The parties, by written stipulation and by written consent of the proposed arbitrator filed with the clerk of the court with conformed copies to the court administrator, may agree that the case be assigned to a single lawyer or non-lawyer arbitrator named in the stipulation. All other cases subject to arbitration shall be heard by an arbitrator selected as provided below.

**(b) List of Arbitrators.** Except as the parties may stipulate under the provisions of subdivision (a) of this Rule, the arbitrator shall be appointed by the clerk of the court or court administrator from a list of persons, as provided by local rule, which shall include the following:

- (1) all residents of the county in which the court is located who, for at least four years, have been active members of the State Bar of Arizona.
- (2) other active and inactive members of the State Bar of Arizona residing anywhere in Arizona, and members of any other federal court or state bar,

who have agreed to serve as arbitrators in the county where the court is located.

**(c) Appointment of Arbitrators; Timing of Appointment; Notice of Appointment; Right to Peremptory Strike**

(1) *Appointment of arbitrator from list.* The clerk of the court or court administrator, under the supervision of the presiding judge or that judge's designee, shall prepare a list of arbitrators who may be designated by their area of concentration, specialty or expertise. The clerk of the court or court administrator shall randomly select and then assign to each case one arbitrator from the list.

(2) *Timing of appointment.* Appointment of an arbitrator to a case shall occur no later than 120 days after an answer is filed.

(3) *Notice of appointment of arbitrator.* The clerk of the court or court administrator shall promptly mail written notice of the arbitrator selected to the parties and the arbitrator. The written notice shall advise the parties that the time periods specified in Rule 38.1(f) of these Rules for placing a case on the Dismissal Calendar shall apply.

(4) *Right to peremptory strike.* Within ten days after the mailing of the notice of appointment of arbitrator, or within ten days after the appearance of a party if the arbitrator was appointed before that party appeared, either side may peremptorily strike the assigned arbitrator and request that a new arbitrator be appointed. Each side shall have the right to only one peremptory strike in any one case. A motion for recusal or motion to strike for cause shall toll the time to exercise a peremptory strike.

**(d) Disqualifications and Excuses.**

(1) Upon written motion and a finding of good cause therefor, the presiding judge or that judge's designee may excuse a lawyer from the list of arbitrators.

(2) An arbitrator, after appointment, may be disqualified from serving in a particular assigned case upon motion of either party to the judge assigned to the case, for an ethical conflict of interest or other good cause shown as defined in A.R.S. §§ 12-409 or 21-211, submitted in accord with the procedure set out in Rule 42(f)(2) of these Rules.

(3) An arbitrator may be excused by the presiding judge or that judge's designee from serving in a particular assigned case upon a showing by the arbitrator that such individual has completed contested hearings and ruled as an arbitrator pursuant to these Rules in two or more cases assigned during the current calendar year and shall be excused on a detailed showing that such individual has an ethical conflict of interest or other good cause shown as defined in A.R.S. §§ 12-409 or 21-211, submitted in accord with the procedure set out in Rule 42(f)(2) of these Rules.

(4) After an arbitrator has been disqualified or excused from a particular case under this subdivision (d), a new arbitrator shall be appointed in accordance with the procedure set forth in subdivision (c) of this Rule.

**Rule 74. Powers of Arbitrator; Scheduling of Arbitration Hearing; Permitted Rulings by Arbitrator; Time for Filing Summary Judgment Motion; Receipt of Court File; Settlement of Cases; Offer of Judgment**

....

**(c) Rulings by Arbitrator.**

(1) *Authorized rulings.* After a case has been assigned to an arbitrator, the arbitrator shall make all legal rulings, including rulings on motions, except:

(A) motions to continue on the Dismissal Calendar or otherwise extend time allowed under Rule 38.1 of these Rules;

(B) motions to consolidate cases under Rule 42 of these Rules;

(C) motions to dismiss;

(D) motions to withdraw as attorney of record under Rule 5.1 of these Rules; or

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party.

**Rule 77. Right of Appeal**

(a) **Notice of Appeal.** Any party who appears and participates in the arbitration proceedings may appeal from the award or other final disposition by filing a notice of appeal with the clerk of the court within 20 days after the award is filed or 20 days after the date upon which the notice of decision becomes an award

under Rule 76(b), whichever occurs first. The notice of appeal shall be entitled "Appeal from Arbitration and Motion to Set for Trial" and shall request that the case be set for trial in the Superior Court and state whether a jury trial is requested and the estimated length of trial.

**(b) Deposit on Appeal.** At the time of filing the notice of appeal, and as a condition of filing, the appellant shall deposit with the clerk of the court a sum equal to one hearing day's compensation of the arbitrator, but not exceeding ten percent of the amount in controversy. If the court finds that the appellant is unable to make such deposit by reason of lack of funds, the court shall allow the filing of the appeal without deposit.