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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND ARIZONA)	Supreme Court No. R-13-0017
RULES OF CIVIL PROCEDURE 16, 16.1,)	
26, 37, 38.1, 72, 73, 74 and 77)	Objection to Petition
_____)	

The Tucson Defense Bar opposes the Amended Petition to Amend Rules 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74 and 77 Ariz. R. Civ. P. The Tucson Defense Bar is a professional association of lawyers practicing in Pima County primarily in defense of civil claims. For many years, the Tucson Defense Bar has sought to promote justice, professionalism and integrity including working with the Pima County courts on preserving our jury system. Our members represent clients throughout Arizona and have experience litigating cases in both state and federal courts.

Since the Tucson Defense Bar was first formally organized in 1990, the Arizona Civil Procedural Rules have continued to grow. Many of the changes have made a positive difference in the practice of law. But, over these same years the costs of litigation have increased significantly while the number of jury trials has decreased. *See*

John H. Langvein, *The Disappearance of Civil Trial In the United States*, 122 Yale L.J. 522 (2012) (arguing that pretrial discovery and procedures have caused the demise of civil trials, and today discovery is substituted for trials). Pretrial discovery and procedures are costly, and we see in many cases a gross disconnect in proportionality between such costs and the actual value of a case. *Id.* at 551-53.

The federal courts recognize these costs of discovery, disclosure, and case management orders. One step that the federal courts take is to screen complaints under standards set forth by the Supreme Court's seminal decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This is especially true with pro se litigants. The federal courts are also more active in deciding cases on summary judgment. Thus, when the Petitioner urges the adoption of a case management rule that is similar to the tool used in federal courts, we should take a broader look at how cases in federal courts are being handled and whether the federal courts foster efficiency and the jury system. This Court has affirmed, however, that at least as to screening complaints, Arizona does not follow the direction the federal courts are taking. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344 (2008); *see also* Stephen B. Burbank and Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 Harv. C.R.-C.L.O. L. Rev. 399 (2011) (arguing that *Twombly* and *Iqbal* are an implicit attack on the jury trial and democracy).

We have reviewed the Petition, the Amended Petition, and responses. Frankly,

the proposed rule changes are based on very little empirical evidence of what works best. The Rules of Civil Procedure should not be experimental – where rules are enacted first and then we wait and see what happens. The Petitioner argues that Rule 38.1, a rule that exists in its present form only since 2000 has become “anachronistic” and argues that courts are not following it. That is a short shelf life for a rule of procedure. More should be done to understand whether changes will have the desired effect before they are made.

If uniformity is needed, empirical research could include a comprehensive survey of civil cases in each county, written questions or interviews with judges handling civil cases in each county, interviews with practitioners in each county, reviewing actual cases from each county to determine whether the case was handled timely and efficiently – and if not, why not. We agree with several of the concerns expressed by the Honorable Sarah Simmons, the Honorable Charles Harrington, and the Honorable Kenneth Lee on behalf of the Pima County Civil Bench, and the Honorable Carmine Cornelio. We agree that the majority of cases do not need a case management conference or order regardless of size, complexity, or subject matter. We agree that the system in Pima County works well, and if Pima County is not following Rule 38.1 as suggested by Petitioner, then Pima County should be able to use the process that works.

We suggest perhaps a more modest approach. Retain Rule 16 as stated. Suspend or repeal Rule 38.1. If Rule 38.1 is not being followed by courts, then it should be repealed. Under Rule 40, local courts can develop their own procedures on how cases will be managed and placed on the trial calendar.

We do not think one size fits all. If other counties believe Pima County's approach or Maricopa County's approach or something different works better, then those counties should be able to choose and adopt the procedure that fits their needs and their case loads. Federal district courts have been allowed to do this by enacting local rules. F.R.Civ.P. 83. There remains considerable debate, however, on what rules work best and what public policy is fostered under the civil rules. Rules should be drafted to facilitate cases going to trial and not creating more procedure, costs, and expenses that lead to avoiding trial. Plaintiffs, defendants, and the courts all benefit from avoiding the costs of complicated and unnecessary procedure. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013) (examining the demise of jury trials, the adoption of procedural and case management rules, and suggesting that a trans-substantive approach should be abandoned); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 Duke L.J. 669 (2010) (discussing the arguments for and against judges using their time to act as case managers).

We respectfully request that the Court not force any particular procedure on trial setting and case management until further evidence and policy discussions are more fully gathered and considered.

DATED this 5th day of June, 2013.

BY: s/Andrew Petersen
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On Behalf of the Tucson Defense Bar