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10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

12 In the Matter of:

13
14 **PETITION TO AMEND RULE 55,**
15 **ARIZONA RULES OF CIVIL**
16 **PROCEDURE**

Supreme Court No. R-

PETITION

17 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona (“State Bar”) hereby petitions this Court to amend Rule 55(a)(1)(ii), Ariz. R. Civ. P. The proposed change clarifies a party’s obligation to provide notice of an Application for Entry of Default to an attorney representing a party claimed to be in default. Specifically, the proposed change makes clear that the obligation to provide notice should be read broadly, as is consistent with the purpose of the default rule. The complete text of the proposed amended rule is shown on Appendix A, and a redlined version of the proposed change is shown on Appendix B.

1 **I. Rationale Supporting Proposed Amendment**

2 Rule 55(a), Ariz. R. Civ. P., sets forth the procedure for making an application
3 to the clerk for entry of default against a party. The rule allows for entry of default
4 only if adequate notice is provided to the defaulting party. *Champlin v. Bank of Am.,*
5 *N.A.*, 231 Ariz. 265, 267, 293 P.3d 541, 543 (App. 2013); *Ruiz v. Lopez*, 225 Ariz.
6 217, 222, 236 P.3d 444, 449 (App. 2010). The purpose of this rule is to ensure that
7 any party against whom default is sought receives notice of the proposed action, and
8 to eliminate lack of notice as a basis for setting aside entry of default. *Champlin*, 231
9 Ariz. at 267, 293 P.3d at 543. Providing for broad notice prior to entry of default
10 furthers one of the fundamental policy objectives of the Arizona Rules of Civil
11 Procedure: to provide for determination of actions on their merits. *See Hirsch v. Nat'l*
12 *Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983) (“[I]t is a highly desirable
13 legal objective that cases be decided on their merits . . .”).

14 Consistent with these purposes underlying the Arizona Rules of Civil
15 Procedure generally and Rule 55 more specifically, Rule 55(a)(1) sets forth who
16 must receive notice of an application for entry of default. Included within those who
17 must receive notice is an attorney “known by the party requesting the entry of
18 default” to be representing the defaulting party. Rule 55(a)(1)(ii), Ariz. R. Civ. P.
19 The policy of broad notice is underscored by the language in the rule that notes that
20 notice is to be provided “whether or not that attorney has formally appeared.” *Id.*

21 Notwithstanding the policy of broad notice, there is currently an ambiguity in
22 the rule about whether the application must be sent to an attorney known by the
23 defaulting party to represent the party claimed to be in default in another matter, no
24 matter the nature of the matter or when the representation may have occurred. The
25 State Bar believes that while notice should be provided broadly, consistent with the

1 preference in Arizona law that cases be litigated on their merits, the rule should be
2 amended to clarify the set of circumstances in which notice is appropriate.

3 The Arizona Supreme Court's depublication of the Court of Appeals' decision
4 in *Neeme Systems Solutions, Inc. v. Spectrum Aeronautical, LLC*, 226 Ariz. 577, 250
5 P.3d 1206 (App. 2011) called into question the breadth with which the default
6 provision under Rule 55(a)(1) should be read, and caused the State Bar to propose
7 this petition. *Neeme* involved two lawsuits – one pending in Arizona, one in Utah –
8 with similar facts. The Utah lawsuit was filed first. Both parties were represented by
9 counsel in the Utah suit. After counsel had appeared in Utah, Arizona counsel served
10 the summons and complaint on the statutory agent for the defendant. When that
11 company did not respond to the Arizona lawsuit, the Arizona plaintiff did not
12 provide notice of the application for entry of default to the company's counsel in the
13 Utah litigation, even though counsel in the Arizona litigation was aware of the
14 representation in Utah court. The Court of Appeals held that the party seeking
15 default there was obligated to send notice under Rule 55(a)(1)(ii) to the Utah
16 counsel. 226 Ariz. at 583, 250 P.3d at 1212. The Court of Appeals also held that the
17 failure to send notice under Rule 55(a)(1)(ii) rendered the default judgment entered
18 by the trial court void. *Id.*

19 Following the depublication of the *Neeme* decision, at least one commentator
20 has speculated about the reasons for depublication and the implications on the
21 underlying rule. GRANT D. WILLE, VALID, VOIDABLE OR VOID? DEFAULT
22 JUDGMENTS AND ATTORNEY NOTIFICATION UNDER RULE 55(A) OF THE ARIZONA
23 RULES OF CIVIL PROCEDURE, 53 Ariz. L. Rev. 1363 (2011). Mr. Wille's article noted
24 that "[t]wo likely, and not inconsistent, explanations emerge: (1) the Court
25 considered the notice requirement articulated in *Neeme* to be too broad; and (2)

1 regardless of that error, failure to comply with Rule 55(a)(1)(ii) renders entry of
2 default judgment voidable, not void.” *Id.* at 1365.

3 In light of this speculation, the potential ambiguity in the rule, and the policy
4 of providing notice broadly prior to entry of default, this Court should clarify the
5 potential ambiguity regarding the breadth of the attorney notification requirement.

6 **II. Specific Changes to Rule 55(a)(1)(ii)**

7 Rule 55(a)(1)(ii) should provide for broad notice to attorneys representing
8 parties against whom default is sought. To clarify the requirement, the State Bar
9 proposes adding simple language to the current rule to provide for notice to an
10 attorney who represents the defaulting party either “in the action in which default is
11 sought or in a related matter.” The proposed language is shown in the redline
12 attached to this Petition as Appendix B.

13 **III. Conclusion**

14 The State Bar of Arizona respectfully requests that the Court amend Rules
15 55(a)(1)(ii) of the Arizona Rules of Civil Procedure as shown on Appendix A.

16 RESPECTFULLY SUBMITTED this 9th day of January, 2015.

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19
20 John A. Furlong
21 John Furlong
General Counsel

22 Electronic copy filed with the
23 Clerk of the Arizona Supreme Court
24 this 9th day of January, 2015.

25 by: [Signature]

1 **Appendix A**

2 Rule 55. Default

3
4 Rule 55(a). Application and entry

5 When a party against whom a judgment for affirmative relief is sought has
6 failed to plead or otherwise defend as provided by these Rules, the clerk shall enter
7 that party's default in accordance with the procedures set forth below. All requests
8 for entry of default shall be by written application to the clerk of the court in which
the matter is pending.

9 (1) Notice.

10
11 (i) To the Party. When the whereabouts of the party claimed to be in default
12 are known by the party requesting the entry of default, a copy of the application for
entry of default shall be mailed to the party claimed to be in default.

13 (ii) Represented Party. When a party claimed to be in default is known by the
14 party requesting the entry of default to be represented by an attorney in the action in
15 which default is sought or in a related matter, whether or not that attorney has
16 formally appeared, a copy of the application shall also be sent to the attorney for the
17 party claimed to be in default. Nothing herein shall be construed to create any
obligation to undertake any affirmative effort to determine the existence or identity
of counsel representing the party claimed to be in default.

18
19 (iii) Whereabouts of Unrepresented Party Unknown. If the whereabouts of a
20 party claimed to be in default are unknown to the party requesting the entry of default
21 and the identity of counsel for that party is also not known to the requesting party,
the application for entry of default shall so state.

22 (iv) Other Parties. Nothing in this Rule relieves a party requesting entry of
23 default from the requirements of Rule 5(a) as to service on other parties.

24 (2) Entry of Default. The acceptance by the clerk of the filing of the
25 application for entry of default constitutes the entry of default.

1 (3) Effective Date of Default. A default entered by the clerk shall be effective
2 ten (10) days after the filing of the application for entry of default.

3 (4) Effect of Responsive Pleading. A default shall not become effective if the
4 party claimed to be in default pleads or otherwise defends as provided by these Rules
5 prior to the expiration of ten (10) days from the filing of the application for entry of
6 default.

7 (5) Applicability. The provisions of this rule requiring notice prior to the entry
8 of default shall apply only to a default sought and entered pursuant to this rule.

1 **Appendix B**

2 Rule 55. Default

3
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