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

10 **PETITION TO AMEND RULE 44,**  
11 **ARIZONA RULES OF PROCEDURE**  
12 **FOR THE JUVENILE COURT**

Supreme Court No. R-15-0013

13 **COMMENT OF**  
14 **THE STATE BAR OF ARIZONA**

15 Pursuant to Rule 28, Arizona Rules of the Supreme Court, the State Bar of  
16 Arizona, submits this Comment regarding the Petition to Amend Rule 44 of the  
17 Arizona Rules of Procedure for Juvenile Court filed by the Attorney General, R-  
18 15-0013.

19 The proposed amendments to Rule 44, Rules of Procedure for Juvenile  
20 Court, have been requested by the Attorney General's Office, the state agency  
21 responsible for representing the Department of Child Safety (DCS), to ease the  
22 burden of timely disclosure for DCS. The request to change Rule 44 of the Rules  
23 of Juvenile Court should be denied. Rule 44 of the Rules of Juvenile Court  
24 requires the disclosure of all evidence in a timely manner so that all parties are  
25 prepared for dependency and severance proceedings that will impact the  
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1 constitutional rights of parents to raise their children. Through its petition for a  
2 rule change, DCS is requesting that it be relieved of the burden of providing  
3 timely disclosure of documents and evidence that would substantiate or possibly  
4 negate the need for the children to be placed in state custody. The State is  
5 asking the Supreme Court to accept DCS court reports as factual without the  
6 need to provide the documentation upon which the Agency relied. In essence  
7 DCS is saying, "Just trust us."  
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10 The law has long recognized that justice cannot exist if one party, the  
11 State, controls all the evidence and has all the power. To make the system fair,  
12 the Arizona Supreme Court has created rules of procedure that require all parties  
13 to disclose all materials that may be relevant to a case. Thus, one party is not  
14 able to obtain a tactical advantage by possessing all information and evidence  
15 and then ambushing the other party in court. Timely disclosure of discovery  
16 allows all parties to adequately prepare for the court proceedings so the judge is  
17 provided with all relevant information upon which to make an informed  
18 decision.  
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21 The ability to parent one's children is a fundamental right to which we as  
22 Americans and Arizonans enjoy. Before the State is permitted to interfere with  
23 one's fundamental right to parent, parents are entitled to Due Process. Due  
24 Process requires a fair and impartial hearing. A fair and impartial hearing  
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1 occurs when the parents and DCS have timely access to the same information.  
2 DCS has the right to make allegations and the parent has a right to defend  
3 himself against the allegations, similar to the rights of a defendant in a criminal  
4 trial. For many parents, the permanent loss of their child is equivalent to the  
5 death penalty being imposed on their family.  
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8 DCS is asking to be excused from providing the necessary disclosure to  
9 the parent because its computer system is antiquated and cumbersome, and DCS  
10 employees are over worked. The answer to the issues plaguing DCS is not to  
11 destroy the parent's right to Due Process, but for DCS to meet its obligations by  
12 upgrading its computer system or maintain its files in an access-friendly manner.  
13 A parent would not be permitted to disregard their duty to disclose by claiming  
14 the rules are too difficult to follow. The State should be held to the same  
15 standard. DCS is the only party who cannot meet the requirements of Rule 44.  
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18 DCS espouses its primary concern with Rule 44 is the mandating of  
19 unrealistic timelines for disclosure, timelines that do not coincide with actual  
20 trial dates and the inability to extract information from DCS's antiquated  
21 database (CHILDS). Further, DCS implies that parents' and children's counsel  
22 do not attempt to resolve disclosure disagreements prior to requesting court  
23 involvement. The premises for the DCS request to amend Rule 44 is specious.  
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Due process requires that parties be given adequate time to prepare their

1 case against DCS allegations that impact their constitutional right to parent their  
2 children. Rule 44, Rules of Juvenile Procedure, was created to ensure that all  
3 parties would have timely access to all information prior to any hearing that  
4 could impact a parent's ability to care for their children. The first opportunity  
5 for a parent to contest the removal of their child is the Preliminary Protective  
6 Hearing, A.R.S. §8-824. At the Preliminary Protective Hearing, a parent may  
7 request a Temporary Custody Hearing, A.R.S. §8-825. The Preliminary  
8 Protective Hearing should occur, a minimum of five (5) days but not more than  
9 seven (7) days after removing the child. Prior to the filing of the petition, DCS  
10 has allegedly conducted an investigation and held a Team Decision Meeting  
11 (TDM) at which DCS obtained additional information. Thus, at the time of  
12 filing of the dependency petition, DCS has already obtained documents upon  
13 which to base their allegations. Disclosing the information within twenty-four  
14 hours of the Preliminary Protective Hearing, five days after removing the  
15 children from their home and family, is not a hardship. The documentation is  
16 the "probable cause" for the removal of the children. Without the disclosure  
17 provided to the parent, the parent is disadvantaged at the evidentiary hearing to  
18 contest "probable cause" determination.

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25 A parent's ability to contest the need for out of home care continues  
26 throughout the case. At each periodic Report and Review Hearing, the court has

1 the ability to order the child home and the petition dismissed. In order for the  
2 parent to argue for the return of the child the parents need documents that  
3 support their position or refute DCS objection. Requiring continued disclosure  
4 throughout the case ensures that all parties have timely access to full and  
5 complete information, balancing the scales of justice.  
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8 Rule 45, Rules of Juvenile Procedure, establishes the timelines for  
9 adjudication hearings. Although court calendars may require hearings to be set  
10 outside of the timelines, the goal of the court system is to adhere to Rule 45.  
11 Parents have a right to be prepared and defend themselves against DCS. In  
12 order to competently prepare, the parent's attorney need sufficient time to  
13 review the information, investigate and prepare witnesses and experts.  
14 Requiring DCS to provide all disclosure within sixty days of the Preliminary  
15 Protective Hearing (or service of the dependency petition on the parents) allows  
16 the parent to begin preparing their defense, regardless of when the adjudication  
17 is set. The ongoing requirement to provide disclosure within five days of receipt  
18 ensures that the parties will have fair notice and adequate time to prepare.  
19 Further, through disclosure, the parties may be able to resolve the matter without  
20 adjudication.  
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25 DCS alleges that the disclosure process is too cumbersome for the  
26 antiquated DCS database (CHILDS) and the need to redact personal

1 information. DCS is responsible for the database they have chosen to employ.  
2 If the database does not enable DCS to meet its obligations then DCS must find  
3 a solution. DCS's solution cannot be to further slow the process and deny  
4 parties timely access to disclosure. This is akin to a doctor involved in a  
5 medical malpractice suit stating that all of his records are strewn about the file  
6 room. The records are available, but he does not have time and resources to  
7 locate them. Further, DCS should be held to the same standard as police  
8 departments and prosecutor offices that must redact police reports prior to  
9 disclosing them. A prosecutor in a criminal matter cannot forego timely  
10 disclosure because the process is too cumbersome for existing resources. The  
11 court should expect no less of DCS.  
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## 16 **Substantive Changes to Rule 44**

### 17 **Introductory statement**

18 The proposed introductory statement limits the information that the  
19 parties are required to disclose. The proposed Rule would require parties to only  
20 disclose information that is potentially relevant to the pending action. However,  
21 this allows parties to determine what is relevant for the opposing parties. One  
22 party may believe the information is not relevant because it does not further  
23 their case, while another party believes it is necessary to support an allegation or  
24 defense. Disclosure of all material allows parties to determine what information  
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1 supports their theory of the case. The ultimate determination of relevance is for  
2 the court, not the parties.  
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4 Parties should be required to provide opponents copies of all documents.  
5 In the age of computers, electronic disclosure is an inexpensive and timely  
6 means for disclosing written and audio material. Requiring parties to only allow  
7 inspection of the materials is burdensome on opposing parties and encourages,  
8 and rewards archaic and cumbersome record keeping. With DCS case managers  
9 and attorneys frequently away from their offices, this creates a daunting task on  
10 an already clogged court system. Further, experts must see copies of reports to  
11 either perform an evaluation, provide an opinion or both. Timely copies of  
12 disclosure must be provided to all parties to ensure justice.  
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#### 16 **Subsection A – Scope of Disclosure**

17 Subsection A sets out a clear list of items and documents that must be  
18 disclosed. In addition to the items listed under 2, “transcripts of interviews of  
19 any party or witness,” the phrase “or testimony” from the current Rule 44 should  
20 be retained. A party must disclose all discovery in its possession, including  
21 prior statements made during an interview or testimony.  
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#### 24 **Subsection B – Initial Disclosure in Dependency Proceedings**

25 Proposed Subsection B violates a parent’s right to Due Process. As  
26 already discussed in this comment, the Preliminary Protection Hearing is the

1 parent's first opportunity to dispute the need for out of home care. In order for  
2 the parent to properly prepare for the hearing, the parent must have timely  
3 access to all information that DCS has amassed. Receiving limited disclosure *at*  
4 the Preliminary Protective Hearing thwarts the parent's ability to prepare for the  
5 hearing. The parent will be denied Due Process, being ambushed with  
6 documents and allegations during the hearing.  
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9 Also, the parent will not be able to meaningfully participate in the  
10 discussion regarding family-reunification services. The parent will not be aware  
11 of what services are being requested or the basis for the request, in advance.  
12 Further, the parent will not have time to consult with their counsel regarding the  
13 disclosure prior to the hearing. Parents will be unjustly disadvantaged, because  
14 their counsel will be unable to effectively represent them without the timely  
15 disclosure.  
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18 Further, ongoing disclosure is crucial in dependency matters. By law,  
19 children must be returned home once the parents are "minimally adequate."  
20 Parties are able to request return of the children any time after the Preliminary  
21 Protective Hearing, Rule 59, Rules of Procedure for Juvenile Court. In order for  
22 a party to request the children returned to the care of their parents, timely  
23 information from the family-reunification service providers is necessary. Many  
24 of the service providers will not provide the parents and their attorneys with a  
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1 copy of the providers' records because DCS contracted for the services. Thus,  
2 DCS is only required to provide disclosure every 30-45 days, depending on  
3 whether information needs to be redacted, children will remain out of the home  
4 longer than is necessary burdening an already over taxed system.  
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6         Allowing DCS to merely provide a summary of disclosure in their court  
7 reports does not provide the parent with Due Process. DCS opines that the court  
8 will be provided the necessary information it requires to make informed  
9 decisions in dependency actions based upon the information provided by DCS.  
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11 However, the parent does not have the ability to contest the information being  
12 provided by DCS because DCS is the only party in possession of the actual  
13 reports. The court is only provided one party's perspective of the case and the  
14 parent is unable to challenge the assumptions and conclusions of the Department  
15 without the actual reports the information is based upon.  
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18         Disclosure rules were created to ensure equal justice for all parties.  
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20 When one party, in this case DCS, has custody of the children and possesses the  
21 wealth of information that may allow them to be reunited with their family, it is  
22 unconstitutional and unconscionable to request a rule change for the  
23 convenience of allowing DCS to continue using its antiquated system. The  
24 government cannot remove children from the parents and then dictate what will  
25 be disclosed and when, this smacks of inequity and Due Process. A parent's  
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1 right to parent trumps the inconvenience of timely disclosure.

2 **Subsection C – Disclosure Statement Prior to Dependency Adjudication**  
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4 **Hearing.**

5 Rule 55, Rules of Juvenile Procedure, establishes the timelines for  
6 adjudication hearings. Although court calendars may require hearings to be set  
7 outside of the timelines, the goal of the court system is to adhere to Rule 55.  
8 Parents need to be prepared to defend themselves against allegations by DCS.  
9 In order to competently prepare a defense, the parent’s attorney will need  
10 sufficient time to review the information, investigate and possibly hire expert  
11 witnesses. Requiring DCS to provide all disclosure and witnesses within sixty  
12 days of the Preliminary Protective Hearing (or service of the dependency  
13 petition on the parents) allows the parent to begin preparing their defense and  
14 weigh the state’s evidence, regardless of when the adjudication is set. The  
15 ongoing requirement to provide disclosure within five days ensures that the  
16 parties will have adequate time to prepare. Further, through disclosure and  
17 witness interviews, the parties may be able to resolve the matter prior to  
18 adjudication.  
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20 Supplemental Disclosure Statements require minimal expense and time.  
21 The parties’ Due Process right to timely prepare for adjudication outweighs any  
22 additional time or expense spent on a supplemental disclosure statement.  
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1 Receiving the Disclosure Statement within sixty days of the Preliminary  
2 Protective Hearing (or service of the dependency petition on the parents) allows  
3 the parties adequate time to prepare the case, regardless of whether it takes place  
4 in 30 or 90 days.  
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6 Curiously, DCS does not call attention to its addition to section Rule  
7 44(C)(2)(d), “Witnesses whose testimony will be offered in the form of a  
8 deposition *or affidavit* shall be noted.” In a dependency, guardianship or  
9 severance hearing, parties have a Due Process right to confront and cross-exam  
10 the witnesses. Testimony by affidavit is not permitted because it cannot be  
11 cross-examined. When a party’s children are at stake, the right to Due Process  
12 requires the ability to challenge the State’s witnesses.  
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16 APDA concurs with amending Rule 44, Rules of Juvenile Court, to  
17 include providing the e-mail addresses of witnesses. E-mail may be a more  
18 efficient way to communicate with witnesses.  
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20 **Subsection D and E – Disclosure Statement Prior to Guardianship**  
21 **and Severance Adjudication Hearing.**  
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23 Guardianship and severance adjudications are final dispositions of a case.  
24 The hearings determine if the parent and child will ever be reunited. For the  
25 parents, the stakes are high. Timely disclosure of witnesses and evidence is  
26 required in order for the parents to adequately prepare for the adjudication

1 hearing. The amount of information the parties must sift through is voluminous,  
2 especially if the parents have been participating in family-reunification services  
3 for at least a year. There are parent aide reports, psychological evaluations,  
4 medical records, counseling reports, drug counseling reports, drug tests,  
5 children's services, other documents to scour and new information constantly  
6 coming in. In order to adequately prepare by interviewing witnesses and hiring  
7 experts, parties need more than thirty days before trial to review the information.  
8 The continual disclosure of information within five days of receipt will allow all  
9 parties to adequately prepare at the time of adjudication.  
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13 Severing a parent's right to care for their child is akin to the death penalty;  
14 one ends a family, the other a life. With the stakes so high, Due Process must be  
15 adhered to at every step. Thus, parents must have adequate time to present their  
16 case and challenge DCS's evidence and present their case. Allowing DCS to  
17 supply the list of witnesses and evidence a mere thirty days before a termination  
18 or guardianship hearing is tantamount to ambushing parties on the eve of trial.  
19 Witness interviews usually take weeks to arrange. Depending on statements by  
20 witnesses, parties may need to hire experts or call additional witnesses. By  
21 requiring Disclosure statements a mere 30 days before the adjudication hearing,  
22 parties will be forced to continue adjudications for good cause.  
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#### **G. Subsection G- Conclusion of Pretrial Disclosure**

1 Proposed Rule 44(G), Conclusion of Pretrial Disclosure, creates a  
2 reduction of time between final disclosure statement and day of trial that denies  
3 opposing parties a fair opportunity to prepare for adjudication. DCS is  
4 requesting the ability to amend a disclosure statement within a week of trial.  
5 The addition of new documents or witnesses will require opposing counsel to  
6 review the materials or interview new witnesses. The new disclosure may  
7 require opposing counsel to consult an expert or locate additional witnesses or  
8 evidence. Five days would not be sufficient time to prepare to address the new  
9 information at trial. To be effective, opposing counsel would need to request a  
10 continuance to adequately prepare. According to Rule 44, failure to complete  
11 timely disclosure does not constitute good cause or extraordinary circumstance  
12 for obtaining a continuance. Thus, opposing counsel would be forced to proceed  
13 ill prepared to meet the newly disclosed evidence, denying the parent Due  
14 Process and creating an appealable issue.

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20 Under current Rule 44(F), final disclosure statements are due not less than  
21 ten days before the adjudication hearing. Ten days is a more reasonable time  
22 frame to review documents, contact witnesses and consult experts. Currently,  
23 parties are required to disclose information within five days of receipt, thus there  
24 should be very little need to supplement final disclosure statements immediately  
25 before trial. All parties must be familiar with the evidence and potential  
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1 witnesses, allowing for a fair trial rather than trial by ambush.

2           **Subsection H – Supplemental Disclosure and Continuing Duty to**  
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4 **Disclose**

5           Proposed Rule 44(H), Supplemental Disclosure and Continuing Duty to  
6 Disclose, denies parents' and children's attorney fair access to information  
7 created and obtained by DCS. DCS is the agency requiring the parents to  
8 participate in specified services in order to be reunited with their families. The  
9 service providers send all information and reports exclusively to DCS.  
10 Although the information pertains to the parents or children, the only way for  
11 the parties to obtain the information is through continuous disclosure by DCS.  
12 Untimely disclosure, thirty to forty-five days as opposed to five, creates an  
13 unacceptable risk of failure to address a serious problem for forty-five to sixty  
14 days. As an example, a therapist may opine that the child needs additional  
15 therapeutic interventions. A parent who has their child's best interest at heart or  
16 a Guardian Ad Litem who represents the child's best interest would be unable to  
17 quickly address the issue due to a delay in disclosure.  
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22           The DCS's position that disclosure within five days is too cumbersome is  
23 not a valid reason to deny parties timely disclosure. As previously stated, the  
24 answer to the DCS's technology problem is not to deny timely access to  
25 information at the parent's expense, but for DCS to address its antiquated  
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1 method of storing and retrieving documents and update its system.

2 DCS's request for an additional fifteen days if redaction is required is  
3 another red herring. The court would show no sympathy for a private practitioner  
4 who claimed he was short staffed and his technology obsolete and therefore  
5 should not be expected to meet the deadlines outlined in the Rules for Juvenile  
6 Court. DCS with its multitudes of employees should be held to the same  
7 standard. Simply stated, the answer to the issues raised by DCS in the proposed  
8 rule change is for DCS to get its affairs in order. DCS would prefer to hold  
9 everyone back in the 20th century.  
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13 Moreover, proposed Rule 44(H), Rules of Juvenile Court, is not consistent  
14 with Rule 45(C)(2) which states, "Prior to, any dependency hearing, the court  
15 may review reports prepared by the child safety worker and shall admit those  
16 reports into evidence if the worker who prepared the report is available for  
17 cross-examination and the report is disclosed to the parties no later than: Ten  
18 (10) days prior to any other hearing" and Rule 58(C) which states "[t]he  
19 petitioner shall provide a report to the court and the parties at least fifteen (15)  
20 days prior to the hearing which shall address:  
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23 (1) the placement of the child; (2) the services being provided to the child and  
24 family; (3) the progress the parties have made in achieving the case plan goals;  
25 and (4) whether the child continues to be dependent." Rule 45(C) and Rule  
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1 58(C), Rules of Procedure for Juvenile Court, recognizes parents' and children's  
2 need to obtain reports timely to enable parties to adequately prepare. Justice can  
3 only exist when all parties have fair and timely access to information in order to  
4 present their own information to the court or challenge the credibility of  
5 opponents' evidence.  
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8 **Proposed Subsection I – Motion to Compel Disclosure and Sanctions**

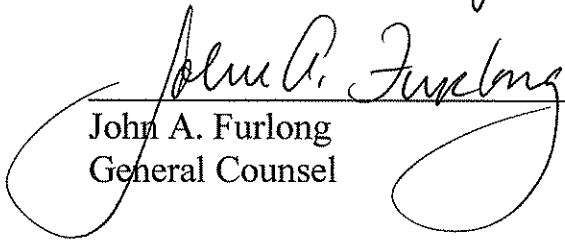
9 Proposed Subsection I – Motion to Compel Disclosure and Sanctions,  
10 should not be adopted. Before a party moves to compel disclosure or request  
11 sanctions, they must attempt to expeditiously obtain the information by  
12 contacting the other party. Having a matter resolved by the court takes time.  
13 Dependency matters can move very quickly, and having to wait for the court to  
14 order discovery can be costly to a party's case. However, when a party fails to  
15 respond to inquiries and requests, action must be taken. DCS's proposed rule  
16 requiring an affidavit attesting that after personal consultation an agreement  
17 could not be reached requires the moving party to be held hostage by one party's  
18 refusal to respond. Unlike family court and other civil matters, dependency  
19 matters move quickly. Attorneys should correspond with one another timely to  
20 resolve matters, but if one party makes itself unavailable, court intervention is  
21 needed to ensure others receive timely disclosure.  
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requests that this Court deny the Department of Child Safety's request to amend Rule 44, Rules of Procedure for Juvenile Court.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of May, 2015.

  
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John A. Furlong  
General Counsel

Electronic copy filed with the Clerk of the Arizona Supreme Court this 10<sup>th</sup> day of May, 2015.

by:  \_\_\_\_\_