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

10 In the Matter of:

11 **PETITION TO AMEND RULES 65**  
12 **and 76, ARIZONA RULES OF**  
13 **FAMILY LAW PROCEDURE**

Supreme Court No. R-

**PETITION**

14 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar  
15 of Arizona hereby petitions this Court to amend Rules 65 and 76 of the Arizona  
16 Rules of Family Law Procedure.

17 The purpose of each rule change is to encourage greater compliance with the  
18 duty to voluntarily disclose information in a family court proceeding. Despite the  
19 many years since implementation of the original disclosure requirements in the  
20 Arizona Rules of Civil Procedure 26.1, which were later substantially adopted in the  
21 Arizona Rules of Family Law Procedure 49, many parties are either unaware of their  
22 obligations for voluntary disclosure or choose to ignore them.

23 The change to Rule 76 directs the court to remind the parties of their  
24 obligations for disclosure in any Resolution Management Conference.  
25

1 Rule 65 allows the court to impose sanctions against a party who fails to  
2 comply with the rule. The amendment to Rule 65 adds a *clean hands* component  
3 which provides direction that the court should not impose sanctions at the behest of  
4 one party if that party has not themselves substantially complied with their disclosure  
5 obligations under Rule 49.


6 **CONCLUSION**

7 The State Bar of Arizona respectfully requests amendment of Rules 65 and  
8 76, Ariz. R. Fam. L. P. as stated herein.

9  
10 RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of January, 2016.

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14 John Furlong  
15 General Counsel

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17 Electronic copy filed with the  
18 Clerk of the Arizona Supreme Court  
19 this 8<sup>th</sup> day of January, 2016.

20 by:   
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**APPENDIX A**

## RULE 65

**A. Motion for Order Compelling Disclosure or Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows.

1. *Appropriate Court.* An application for an order to a party may be made to the court in the county in which the action is pending, or, in matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

2. *Motion.*

a. If a party fails to make a disclosure required by Rule 49 or 50, any other party may move to compel disclosure and for appropriate sanctions.

b. If a deponent fails to answer a question propounded or submitted under Rule 57 or 58, or a corporation or other entity fails to make a designation under Rule 57(B)(6) or 58(A), or a party fails to answer an interrogatory submitted under Rule 60, or if a party, in response to a request for inspection submitted under Rule 61, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

c. No motion brought under this rule will be considered or hearing scheduled thereon unless a statement of the moving party is included in the motion certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

3. *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this rule an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

4. *Expenses and Sanctions.*

a. If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to

obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

b. If the motion is denied, the court may enter any protective order authorized under Rule 53 and shall, after affording an opportunity to be heard, require the movant or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

c. If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 53 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**d. DESPITE SUBSECTIONS (a), (b) OR (c), THE COURT SHALL NOT AWARD FEES, EXPENSES OR OTHER SANCTIONS TO A PARTY WHO HAS ALSO FAILED TO SUBSTANTIALLY COMPLY WITH HIS OR HER DISCLOSURE DUTIES UNDER RULE 49, OR SATISFACTORILY EXPLAINED WHY DISCLOSURE OF MISSING INFORMATION IS UNNECESSARY.**

## **B. Failure to Comply with Order.**

1. *Sanctions by court in county where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

2. *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 57(B)(6) or 58(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph A or Rule 63, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

a. an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action, in accordance with the claim of the party obtaining the order;

b. an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

c. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or

proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

d. in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders, except an order to submit to a physical or mental examination;

e. a party who fails to comply with an order under Rule 63(A) requiring that party to produce another for examination is subject to the sanctions listed in subdivisions 2(a), (b), and (c), unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

### **C. Failure to Disclose; False or Misleading Disclosure; Untimely Disclosure.**

1. A party who fails to timely disclose information required by Rule 49 or 50 shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or in support of a motion, the information or the testimony of a witness not disclosed, except by leave of court for good cause shown. A party or attorney who makes a disclosure pursuant to Rule 49 or 50 that the party or attorney knew or should have known was inaccurate or incomplete and thereby causes an opposing party to engage in investigation or discovery, shall be ordered by the court to reimburse the opposing party for the cost, including attorneys' fees, of such investigation or discovery. In addition to or in lieu of these sanctions, the court on motion of a party or on the court's own motion, and after affording an opportunity to be heard, may impose other appropriate sanctions, which may include any of those authorized under subdivisions B(2)(a), (b), and (c).

2. A party seeking to use information that that party first disclosed later than thirty (30) 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:

a. that the information would be allowed under the standards of subdivision C(1), notwithstanding the short time remaining before trial; and

b. that the information was disclosed as soon as practicable after its discovery.

3. A party seeking to use information that that party first disclosed during 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:

a. that the information could not have been discovered and disclosed earlier even with due diligence; and

b. that the information was disclosed immediately upon its discovery.

**D. Failure to Disclose Unfavorable Information.** A party's or attorney's knowing failure to timely disclose damaging or unfavorable information, as required pursuant to Rules 49 and 50 or in response to discovery propounded pursuant to these rules, shall be grounds for imposition of sanctions, in the court's discretion, up to and including dismissal of the claim or defense.

**E. Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good faith operation of an electronic information system.

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**APPENDIX B**

## RULE 76

### A. Resolution Management Conference (RMC); Preparation and Matters to Be Discussed.

1. Upon written request of any party, the court shall, or upon its own motion the court may, schedule one or more Resolution Management Conferences that shall be held within sixty (60) days of receipt of written request by the court, unless extended for good cause shown.
2. Within the time set by the court in the particular case, or if no time is set then not less than five (5) judicial days prior to the date of the Resolution Management Conference, each party shall:
  - a. personally meet and confer with the opposing party or parties and their counsel to resolve as many issues as possible (if there is a current court order prohibiting contact of the parties or a significant history of domestic violence between the parties, the parties shall not be required to personally meet or contact each other in violation of the court order, but the parties and their counsel shall take all steps reasonable under the circumstances to resolve as many issues as possible);
  - b. comply with all applicable disclosure requirements set forth in Rule 49 or 50;
  - c. prepare and file a written Resolution Statement setting forth any agreements and a specific and detailed position the party proposes to resolve all disputed issues in the case, without argument in support of the position (the Resolution Statement shall be submitted in a form substantially similar to Form 4 or 5, as applicable; if child support is an issue in the case, the statement shall include a completed Child Support Worksheet prepared in accordance with the *Arizona Child Support Guidelines*); and
  - d. comply with the ADR reporting requirement of Rule 66(E).
3. At any Resolution Management Conference under this rule, the court may:
  - a. enter binding agreements on the record in accordance with Rule 69;
  - b. determine the positions of the parties on the disputed issues and explore reasonable solutions to facilitate settlement of the issues;
  - c. enter temporary orders in accordance with the stipulations of the parties or, if agreed to by the parties, based upon the discussions, avowals, and arguments presented without an evidentiary hearing on the contested issues;

- d. order evaluations, assessments, appraisals, testing, appointments, or other special procedures needed to properly manage the case and resolve the disputed issues;
- e. schedule an evidentiary hearing, a trial date and any other necessary hearings or conferences;
- f. resolve any discovery and disclosure schedules and disputes and adopt any agreements of the parties regarding discovery and disclosure;
- g. eliminate non-meritorious claims or defenses;
- h. permit the amendment of pleadings;
- i. assist in identifying those issues of fact and law that are still at issue;
- j. refer a matter for settlement conference;
- k. order other ADR processes;
- l. set a date for filing the joint pretrial statement required by paragraph D;
- m. impose time limits on trial proceedings or portions thereof, and issue orders regarding management of documents, exhibits, and testimony; and
- n. make such other orders as the court deems appropriate.

**4. AT ANY RESOLUTION MANAGEMENT CONFERENCE UNDER THIS RULE, THE COURT SHALL REMIND PARTIES OF THEIR DISCLOSURE DUTIES UNDER RULE 49.**

**B. 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.

**C. Pretrial Statement, Inventory of Property, and Financial Affidavit; Preparation; Final Pretrial Conference.**

1. The parties shall file a pretrial statement not later than twenty (20) days prior to trial, unless another date is set by the court. If not specified by the court, the statement may be joint or separate, except that if there has been domestic violence between unrepresented parties, the parties shall file separate statements. If a joint statement is to be filed, upon initiative of the petitioner or counsel for the petitioner, the parties or counsel, if the parties are represented, shall confer and prepare a written pretrial statement, signed by each party or counsel, to be filed by the petitioner. Each pretrial statement shall contain the following:

- a. the nature of the action;
- b. names and addresses, if not confidential, of the parties;
- c. names and dates of birth of all minor children;
- d. the length of the trial if shorter than that scheduled by the court;
- e. a list of the names, addresses, and phone numbers of witnesses intended to be used by each party during the trial, indicating witnesses whose testimony will be received by deposition only (no witness shall be used at the trial other than those listed, except for good cause shown). Each party shall list any objections to a witness and the basis for that objection;
- f. a list of the exhibits that each party intends to use at trial, specifying exhibits that the parties agree are admissible at trial, or if not in agreement, a list of the objections and the specific grounds for each objection that a party will make if the exhibit is offered at trial (specific objections or grounds not listed in the pretrial statement may be deemed waived at the discretion of the trial judge);
- g. stipulations or agreements of the parties;
- h. a statement of uncontested facts;
- i. detailed and concise statements of contested issues of fact and law by each party;
- j. a statement by each party that all pretrial discovery and disclosure has been completed by the trial date and that the parties have exchanged all exhibits and reports of expert witnesses who have been listed as witnesses; and
- k. a statement as to whether the parties have in good faith discussed settlement, and if not, the reasons for not discussing settlement.
- l. a statement by each party on how a verbatim record of the trial will be made.

2. The parties shall each file with the joint or separate pretrial statement(s) the following:

- a. a comprehensive statement of income and expenses substantially similar to Form 2, Affidavit of Financial Information, or such other form permitted by local rule of the Superior Court in which the matter is pending;
- b. if the case involves custody, parenting time or child support issues, a fully completed Parent's Worksheet for Child Support Amount; and

c. if the case involves an action for dissolution, legal separation or annulment, a detailed itemized inventory of property and debt, listing the community, joint tenancy, and other property and debts held in common by the parties, and the separate property and debts of each party. This inventory shall set forth the date the property was acquired, by what title the parties hold the property, the amount of encumbrance thereon, and each party's evaluation of the fair market value of the property. The inventory shall also set forth the party's proposed distribution of property and debts. The inventory shall be in a format substantially similar to Form 12, Inventory of Property and Debts.

3. No exhibits or witnesses shall be offered or presented during the trial other than those listed and exchanged, except when otherwise permitted by the court in the interest of justice and for good cause shown.

4. If there has been a failure by either or both counsel, or the parties if not represented by counsel, to meet and prepare the pre-trial statement, the court may impose any of the sanctions or penalties provided by these rules or any statute or authority of the court, and in the absence of good cause shown, the court may continue the trial, enter an interim award for relief to the requesting party based on his or her Financial Affidavit, and award the requesting party his or her attorneys' fees and expenses incurred in preparing for and attending the pretrial hearing, trial or settlement conference scheduled by the court.

5. In its discretion, the court may schedule a final pretrial conference prior to trial at which the court shall review the pretrial statement and ascertain whether the parties have complied with the requirements of this rule. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. 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. The order following a final pretrial conference shall be modified only in upon a showing of extraordinary circumstances.

6. The parties may comply with this paragraph by using the form of pretrial statement provided in Form 16.

**D. Sanctions.** If a party or attorney fails to obey a scheduling or pretrial order, or any provision of this rule, or if no appearance is made on behalf of a party at a Resolution Management Conference, a pretrial conference, an evidentiary hearing, a trial or other scheduled hearing, 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 conference, hearing, or trial, or in the preparation of a resolution statement or joint pretrial statement, the court upon motion or its own initiative, shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others:

1. an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence;
2. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment or temporary order;
3. in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders, except an order to submit to a physical or mental examination.

In lieu of or in addition to any other sanction, the court shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorneys' fees or an assessment to the clerk of the court, or both, unless the court finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust.