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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-16-0010
PETITION TO AMEND THE ARIZONA RULES OF CIVIL PROCEDURE AND RELATED RULES	**COMMENT OF THE STATE BAR OF ARIZONA**

With only two exceptions, the State Bar of Arizona ("State Bar") supports the Petition of the Task Force on the Arizona Rules of Civil Procedure ("Task Force") to amend the Arizona Rules of Civil Procedure ("ARCP") and related rules:

a. Most of the proposed amendments do not change the rules substantively, but merely incorporate, where appropriate, parallel stylistic revisions to the Federal Rules of Civil Procedure (the "Federal Rules") that were made in 2007. They are also consistent with stylistic revisions of the Arizona Rules of Evidence effective 2012 and the Arizona Rules of Civil Appellate Procedure effective 2015. The State Bar believes that the proposed stylistic changes should be adopted because they would make the ARCP easier to understand and foster uniformity with the Federal Rules.

b. With two exceptions, the State Bar also agrees with the proposed substantive changes to the ARCP. Several proposed changes would be far-reaching, such as altering the timing of certain disclosures, providing more specificity for the disclosure of electronically-stored information ("ESI"), and changing the time periods for discovery responses. Many of the proposed changes are minor, and would resolve some nagging ambiguities in the current state rules or incorporate worthwhile modifications that have already been adopted at the federal level. The State Bar also agrees with the deletion of many comments to individual rules, and with the Prefatory Comment proposed by the Task Force.

c. The two specific instances where the State Bar disagrees with petitioner are in (1) proposed Rule 11, with which the State Bar agrees except for the provision that the court "must" impose a sanction in the event of a violation; the State Bar believes that a sanction should be permissive in that instance, and proposes that "must" be replaced by "may;" and (2) proposed Rule 26(b)(2), with which the State Bar agrees except that the State Bar proposes adding a provision that the court "is authorized to shift costs, if appropriate," if the ESI production is overly burdensome to the producing party.

d. The State Bar, like the Task Force, takes no position regarding whether the ARCP should be substantively amended where stakeholders have reasonable but different perspectives on policy-driven issues. Two prime example of this are the differences between plaintiff and defense bars on whether to allow recording of medical examinations under Rule 35 and whether the current arbitration rules (Rules 72 through 77) should be amended.

e. Lastly, the State Bar supports the Task Force's request for a modified comment period.

Background of Proposed Amendments

Establishment and Purpose of the Task Force

As the Petition notes, the Task Force was established in November 2014 and was directed

> to review the Arizona Rules of Civil Procedure to identify possible changes to conform to modern usage, to clarify and simplify language, and to avoid unintended variation from language in counterpart federal rules. These changes should promote access to the courts and the resolution of cases without unnecessary cost, delay, or complexity. The Task Force shall seek input from various interested persons and entities with a goal of submitting a rules petition by January 2016 with respect to any proposed rules changes.

The Task Force consists of seventeen members, nine of whom are also on the State Bar's Civil Practice and Procedure Committee ("Committee"). In its three monthly meetings leading up to the filing of the Petition, the Committee provided input to the Task Force, including noting its agreement with or suggested revisions to drafts submitted by the Task Force.

As the Petition explains, and the State Bar agrees, the proposed amendments would be the most extensive set of revisions to the ARCP since their adoption in 1956.

General Principles Followed by the Task Force

The Petition explains the general principles adopted by the Task Force per the direction it was given when it was formed. They are:

(1) The rules should be written for fairness and clarity. They should not present traps for the unwary.

(2) Arizona courts should be accessible to civil litigants, including self-represented litigants.

(3) Where an existing comment addressed or clarified a substantive requirement of a rule, the Task Force proposal incorporates the requirement into the rule itself, where feasible. As a general matter, comments should not be necessary to interpret a rule's requirements.

(4) Where existing case law clarifies or interprets an ambiguity in a current rule, the Task Force proposal modifies the rule to remove the ambiguity and, in some cases, incorporates interpretive case law.

(5) With regard to counterpart Federal Rules:

(a) If no good reason exists to depart from the recently-restyled language of a federal rule, the Arizona rule should adopt the restyled federal wording verbatim.

(b) If there are good reasons for an Arizona rule to differ from a corresponding federal rule, the Arizona rule should maintain those differences. However, even in these circumstances, and to enhance the clarity of the Arizona rule, a rule's wording should be revised and its structure reorganized under a consistent set of restyling conventions.

(6) If an Arizona rule has recently undergone substantive revisions, the Task Force should be reluctant to revisit the substantive change. Similarly, if this Court has recently rejected a substantive change to a rule, it should not be proposed again.

(7) Rules concerning electronic information need to be modernized to meet the realities of identifying, handling and producing electronic data in a rational and cost-effective fashion, and in a manner consistent with the new commercial court's e-discovery processes.

In addition, the Task Force strove to promote Rule 1's mandate that the ARCP shall be construed to promote "the just, speedy, and inexpensive determination of every action." Thus, as explained by the Task Force:

(1) The proposed rules shorten unnecessarily long time periods whenever that was feasible.

(2) The proposed amendments also require parties to engage in early discussions and attempt to reach agreements regarding electronically stored information.

(3) Another provision proposes giving a trial court the authority to order that the parties confer with the judge before they file discovery motions, which also has the potential to save time and to reduce costs.

(4) The proposed amendments also include new rules regarding good faith consultation and joint filings, which are intended not only to improve the efficiency of litigation, but also to enhance civility among advocates.

The State Bar fully supports these principles. The two instances in which the State Bar disagrees with proposed language involve a belief that different language will better effectuate those principles.

The Proposed Amendments

The State Bar Supports the Proposed Restyling.

As the Task Force observes, the ARCP includes more than one hundred rules, with more than four hundred subparts, and dozens of those numbered subparts are no longer in use, or have been "deleted," "abrogated," "renumbered," or "re-designated." As explained by the Task Force, the proposed amendments include stylistic revisions that make the rules more comprehensible and user-friendly. The elements of restyling include:

(1) Using informative headings and subheadings;

(2) Breaking up long sentences, or collapsing them into fewer words;

(3) Converting a lengthy rule into shorter subparts, which makes it easier to find particular provisions;

(4) Using lists;

(5) Avoiding repetition;

(6) Using "plain English" and an active voice;

(7) Stating things in a positive form; and

(8) Avoiding legal jargon and ambiguous terminology, including the word "shall." (The proposed rules, with a single exception in Rule 56, replace "shall" with "must," "may," "should," or "will," depending on the context.)

This proposed restyling will bring the ARCP in line stylistically with not only the Federal Rules, but also the Arizona Rules of Evidence and the Arizona Rules of Civil Appellate Procedure, both of which were restyled recently along the same principles followed by the Task Force for the ARCP.

The State Bar supports all non-substantive restylings proposed by the Task Force. The State Bar also agrees with the deletion of many comments and, where appropriate, their incorporation into the Rules themselves, and further supports the proposed Prefatory Comment.

Two Proposed Amendments Should Be Revised.

The Task Force's proposed revisions are numerous, and are summarized in the 51-page Rule-by-Rule analysis found in Appendix C to the petition and the 11-page disposition table that is Appendix D.

As explained in the petition and summarized below (in Sections II.C.3. and II.C.8), the Task Force proposes substantial revisions to both Rule 11 and to Rule 26.1. The State Bar supports all of the proposed revisions to these Rules, with one exception for each.

(1) Proposed Rule 11(c)(1), entitled "Sanctions," provides that if a document is signed in violation of Rule 11, "the court on motion or on its own *must* impose on the person who signed it, a represented party, or both, an appropriate sanction, . . ." (emphasis added) As the Task Force discusses, this mandatory language differs that of the recently-revised Federal Rule 11, which provides that sanctions are not mandatory, and thus uses the word "may" instead of "must." The State Bar favors the federal approach, and therefore advocates use of the word "may" in this provision, as is set forth in the State Bar's comment on the Pima County Bar Association's Petition R-15-0043, submitted concurrently herewith.

(2) Proposed Rule 26.1(b)(2) governs ESI and provides, among other things, that "the parties must promptly confer and attempt to agree on matters relating to . . . disclosure and production [of ESI], including . . . if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing the information." Proposed Rule 26.1(b)(2)(A)(iii). The State Bar agrees with this provision, but believes that the following subdivision of the Rule, 26.1(b)(2)(B), entitled "Resolution of Disputes," should expressly provide that the court "is authorized to shift costs, if appropriate," in the event of a dispute regarding ESI production. While the court may have such authority under other Rules, the State Bar believes it would be sensible to include this provision in Rule 26.1(b) itself because it is possible that disputes regarding the format of ESI production could be obviated if the requesting party is aware of an express provision under which it may be liable for the cost of the format it requests.

All Other Proposed Amendments Should Be Adopted.

The State Bar supports every other amendment proposed by the Task Force. Examples of the proposed amendments include:

(1) Proposed Rule 5 is amended substantively and organizationally (becoming Rules 5, 5.1 and 5.2), to distinguish "Serving Pleadings and Other Documents" from "Filing Pleadings and Other Documents," and to modernize the filing rules to recognize electronic filings.

(2) Likewise, proposed Rule 6 is similarly amended to, among other things, locate within it all rules controlling the timing of acts in response to orders in Rule 6, and to adopt the federal computation rule governing "counting backwards" when a rule or order requires an act to be done a certain number of days before trial or another event.

(3) The proposed amendments to Rule 11 include a new subdivision governing "Electronic Filings," to clarify the requirements for signing electronically filed documents, and providing that a court may treat documents filed using a person's electronic filing registration information "as a filing that was made or authorized by that person;" adopting the expanded provisions of Federal Rule 11, which set forth four types of "certifications" that arise from a party or attorney's signature on a pleading, motion or other document; procedural limitations designed to curb Rule 11 abuses as reported by practitioners and judges; and that the trial court "must" impose sanctions for Rule 11 violations (language that the State Bar proposes changing to "may" as discussed in Section II.B.1. above).

(4) Consistent with changes proposed to Rule 26(b) to limit discovery to that appropriate to a given case (covered in Section II.C.7. below), the Task Force proposes amending Rule 16(a) to add as an objective of case management, "ensuring that discovery is appropriate to the needs of the case considering the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery, and the parties' resources." The Task

Force's word choice differs from that of the recently-revised federal rule, which now provides that discovery must be "proportional to the needs of the case." The State Bar agrees with the Task Force that the phrase "appropriate to the needs of the case" better encapsulates the overall standard that a court is to apply in determining whether to permit given discovery in the confines of a particular case, and avoids possible resort to a purely mathematical approach.

(5) The Task Force proposes amending Rule 23 to, in large part, adopt the provisions of its federal counterpart while retaining a few Arizona-specific provisions that come out of Arizona statutes.

(6) Rule 26(b)(1)(A) currently states, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." At one time, this language mirrored that of the federal rule, but the federal rule has since been amended multiple times to clarify that the information sought must still be relevant to be discoverable. Arizona case law has inconsistently applied the language of Rule 26(b)(1)(A), with some cases holding that the information sought must still meet the standard of relevancy and others indicating that the "reasonably calculated" language expands the scope of relevance for purposes of discovery.

Against this backdrop, the Task Force proposes amending the "reasonably calculated" language to clear up these inconsistencies and to more closely follow the current federal rule. The proposed amended language reads: "It is not a ground for objection that the information, though relevant, will be inadmissible at the trial if that information appears reasonably calculated to lead to the discovery of admissible evidence." The Task Force also proposes amending Rule 26.1(a)(9) to delete the "reasonably calculated" language, because that language indicates that information need not itself be relevant to the subject matter of the action to fall within the scope

of disclosure, and thus is inconsistent with the proposed change to Rule 26(b)(1)(A) requiring relevance. The State Bar agrees.

(7) Rule 26(b)(1)(C) currently states that the "frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that" certain factors are present. As amended effective December 1, 2015, Federal Rule 26(b)(1) provides that the scope of discovery is limited to that "proportional to the needs of the case," considering various factors. The State Bar agrees with the Task Force that there should be greater consistency between Arizona's rule and the federal rule regarding the factors for limiting discovery. The Task Force proposes amending the factors found in Rule 26(b)(1)(C) [proposed Rule 26(b)(1)(B)] to more closely follow the federal factors. First, the Task Force proposes adding as one of the factors "the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits." *Cf.* Fed. R. Civ. P. 26(b)(1) ("the importance of the discovery in resolving the issues"). Second, the Task Force proposes—consistent with the federal rule—mandating that the court limit discovery if it finds the factors present (as opposed to the current permissive "may"). The State Bar agrees with this. As discussed in relation to Rule 16, the Task Force proposes a different choice of words from the recent federal amendments: the phrase "appropriate to the needs of the case" to better encapsulate the factors to consider in determining whether to limit discovery than does the phrase "proportional to the needs of the case." The State Bar agrees with this.

(8) Rule 26.1 currently lumps the disclosure of ESI with hard copy documents, with parties to disclose and produce both types of information within 40 days after the answer is filed. Rule 26.1(b) would be amended to specifically account for the fact that (1) disclosure of ESI differs substantially from hard copy

documents and (2) the current rule's presumption that ESI will be disclosed within 40 days of the filing of the answer is neither feasible nor appropriate in many cases. The proposed provisions stress cooperation among the parties in determining what, if any, ESI should be produced and the format of production, provide additional time for the parties to work through these issues before they then disclose and produce ESI, and also provide an abbreviated procedure for the parties to present any ESI disputes to the court if they cannot reach agreement. The State Bar agrees with this, but as discussed in Section II.B.2. above, would expressly authorize a court to order cost-shifting where appropriate in a dispute over ESA production.

(9) The Rule currently provides that disclosed hard copy documents are to be produced unless there is good cause for not doing so. The Task Force proposes amending the rule to incorporate the factors found in amended Rule 26(b)(1)(B) for limiting discovery to that appropriate to the needs of the case. Under the proposal, production of disclosed hard copy documents is subject to the limits of Rule 26(b)(1)(B) or other good cause for not producing the documents. The State Bar agrees.

(10) Rule 26.1(d) would be amended to provide greater guidance as to when initial disclosure statements are to be served in multi-party and/or multi-pleading cases (e.g., where there is both a complaint and a counterclaim and/or a third-party claim).

(11) To be consistent with federal practice, the Task Force proposes reducing the time for responding to interrogatories, requests for production of documents, and requests for admissions from 40 days to 30 days. The State Bar

agrees with the Task Force that there is no reasoned basis for giving parties greater time to respond to discovery requests under the state rule than the federal rule.

(12) The Task Force proposes changes to Rule 54 that would clarify when a judgment is final, and clarify firm periods in which to apply for costs and attorneys' fees. The State Bar agrees.

Modified Comment Period

The amendments proposed in the Petition are voluminous and far-reaching. In view of this, and what we would expect to be many comments regarding the Petition, the State Bar agrees with petitioner that the normal comment period should be modified along the lines requested in the Petition.

CONCLUSION

The State Bar of Arizona respectfully requests that the Court adopt the petitioner's proposed rule amendments, with the two modifications noted in this comment. It also supports the request for a modified comment period.

RESPECTFULLY SUBMITTED this 1st day of April, 2016.

John A. Furlong
General Counsel

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 1st day of April, 2016.

by:

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose; Disclosure Categories. Within the times set forth in Rule 26.1(d) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

(1) the factual basis of each of the disclosing party's claims or defenses;

(2) the legal theory on which each of the disclosing party's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities;

(3) the name, address, and telephone number of each witness whom the disclosing party expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony;

(4) the name and address of each person whom the disclosing party believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess;

(5) the name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements;

(6) the name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;

(7) a computation and measure of each category of damages alleged by the disclosing party, the documents or testimony on which such computation and measure are based, and the name, address, and telephone number of each witness whom the disclosing party expects to call at trial to testify on damages;

(8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;

(9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and

(10) for any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the

judgment: (A) a copy—or if no copy is available, the existence and substance—of the insurance policy, indemnity agreement, or suretyship agreement; (B) a copy—or if no copy is available, the existence and basis—of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement; and (C) the remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement. A party need only supplement its disclosure regarding the remaining dollar limits of coverage upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial. Within 10 days after such a request is served, a party must supplement its disclosure of the remaining dollar limits of coverage. For purposes of this rule, an insurance policy means a contract of or agreement for or effecting insurance, or the certificate memorializing it—by whatever name it is called—and includes all clauses, riders, endorsements, and papers attached to, or a part of, it, but does not include an application for insurance. Information concerning an insurance policy, indemnity agreement, or suretyship agreement is not admissible in evidence merely because it is disclosed under this rule.

(b) Disclosure of Hard-Copy Documents and Electronically Stored Information.

(1) ***Hard-Copy Documents.*** Subject to the limits of Rule 26(b)(1)(B) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

(2) ***Electronically Stored Information.***

(A) *Duty to Confer*. When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

(i) requirements and limits on the disclosure and production of electronically stored information;

(ii) the form in which the information will be produced; and

(iii) if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing the information.

(B) *Resolution of Disputes.* If the parties are unable to satisfactorily resolve any dispute regarding electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and the separate certification from all counsel required under Rule 26(g). In resolving any dispute regarding

electronically stored information, the court is authorized to shift costs, if appropriate.

(C) *Production of Electronically Stored Information.* Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.

(D) *Presumptive Form of Production.* Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(E) *Limits on Disclosure of Electronically Stored Information.* Rule 26(b)(2) applies to the disclosure of electronically stored information.

(c) Purpose; Scope.

(1) ***Purpose.*** The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) ***Scope.*** A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

(d) Time for Disclosure; Continuing Duty.

(1) ***Initial Disclosures.*** Unless the parties agree or the court orders otherwise, a party seeking affirmative relief must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after the filing of the first responsive pleading to the complaint, counterclaim, crossclaim, or third-party complaint that sets forth the party's claim for affirmative relief. Unless the parties agree or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after it files its responsive pleading.

(2) ***Additional or Amended Disclosures.*** The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or

reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order—or in the absence of such a deadline, later than 60 days before trial—must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

(e) Signature Under Oath. Each disclosure must be in writing and signed under oath by the disclosing party.

(f) Claims of Privilege or Protection of Work-Product Materials.

(1) ***Information Withheld*****.** When a party withholds information, a document, or electronically stored information from disclosure on a claim that it is privileged or subject to protection as work product, the party must promptly comply with Rule 26(b)(6)(A).

(2) ***Inadvertent Production*****.** If a party contends that a document or electronically stored information subject to a claim of privilege or protection as work-product material has been inadvertently disclosed, the producing and receiving parties must comply with Rule 26(b)(6)(B).