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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE ARIZONA RULES OF CIVIL PROCEDURE AND RELATED RULES	)	Supreme Court No. R-16-0010
	)	**Amended Petition**

Pursuant to this Court's January 13, 2016 Order, the Task Force on the Arizona Rules of Civil Procedure ("the Task Force") hereby submits an amended petition to restyle and update the Arizona Rules of Civil Procedure. Since the filing of the Task Force's petition last January, a number of organizations and practitioners have filed comments suggesting various changes in the Task Force's proposed amendments. Attached as Appendix A is a revised set of proposed amendments incorporating many of those suggested changes, along with changes suggested informally by members of the State Bar Civil Practice and Procedure Committee and other practitioners.

The next section discusses the major substantive changes that the Task Force has adopted or considered. Purely stylistic changes are not discussed but are shown in redline form in Appendix A.

The Substantive Changes Adopted or Considered

Rule 5.2. Forms of Documents

A comment by Stewart Bruner, writing on behalf of the AOC's Information Technology Division, suggests deleting the preference expressed in Rule 5.2(c)(1)(A) that electronically filed documents be filed in a text-searchable pdf format. The Task Force's proposed Rule 5.2(c)(1)(A) permits the electronic filing of documents in text-searchable .pdf, .odt, or .docx formats, but states that "[a] text-searchable .pdf format is preferred." Mr. Bruner's comment argues that converting documents from their native format to .pdf will create larger files, requiring the allocation of more storage space for documents, in turn increasing the cost or burden of storing the additional data. The Task Force carefully considered the comment. It weighed the disadvantages of the preference for the .pdf format urged in the comment against advantages to the .pdf format, including ease of use and difficulty of manipulation. While concerned to give weight to the input of the AOC's Information Technology Division, the Task Force ultimately resolved to retain the questioned language.

Rule 11. Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions; Assisting Filing by Self-Represented Person

Based on comments received after the petition's filing, the Task Force proposes the following changes to its proposed amendments to Rule 11.

(1) ***Subdivision (a)(1) ("Signature").*** The Task Force revised its proposed amendments to Rule 11 to delete the requirement that the "document must state the signer's address, email address, and telephone number." The Task Force concluded that this portion of Rule 11 is unnecessary, as it duplicates some, but not all, of the requirements in proposed Rule 5.2 regarding the information that must be contained in the caption of a filed document. Rule 5.2 also addresses the information that must be provided by a self-represented litigant, which is not addressed by Rule 11. Accordingly, the Task Force has removed the reference in proposed Rule 11 to the signer's address, email address, and telephone number to avoid any inconsistency with the more complete requirements in proposed Rule 5.2.

(2) ***Subdivision (c)(1) ("Sanctions; Generally").*** In its petition last January, the Task Force's proposed Rule 11(c)(1) provided that the court "must" impose an appropriate sanction for a Rule 11 violation. The Task Force's intent was to defer to language in the State Bar's pending Petition to Amend Rule 11 (R-15-0004), which proposes mandatory sanctions for a Rule 11 violation. The State

Bar argued in favor of using "must" rather than "may" because the "heightened procedural requirements [the State Bar has] proposed in the amendments allow ample opportunity for a party or attorney in violation of the Rule to take corrective measures." After the State Bar filed its petition, other constituencies joined in the debate, including the Chamber of Commerce (which supported mandatory sanctions) and the Pima County Bar Association (which filed separate Petition R-15-0043, proposing discretionary sanctions).

The State Bar's recently-filed comment to the Task Force's petition now proposes that the word "must" should be changed to "may," making sanctions discretionary. As explained in the State Bar's comment, this approach aligns Arizona's Rule 11 with Federal Rule 11, which also provides for discretionary sanctions. While there are pros and cons to either approach, the Task Force has reconsidered this issue and now believes that the benefits of uniformity with Federal Rule 11 weigh in favor of modifying its initial Rule 11 proposal to substitute the word "may" for "must." *See* Appendix A, attached.

Rule 16. Scheduling and Management of Actions.

A comment filed by Spencer Scharff suggests that while proposed Rule 16(d)(4) allows the parties to agree to, or the court to order, an exchange of expert reports in a given case, the Task Force has "miss[ed] an opportunity to close the gap between ARCP 26.1(a)(6) disclosure requirements and the admissibility

standards of Rule 702 of the Arizona Rules of Evidence." He suggests revising Rule 26.1(a)(6) to adopt the expert report requirements of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. The Task Force previously considered such a change and ultimately concluded against it because of the differences in the types of cases filed in state versus federal court and because of the extra cost involved in obtaining a formal report from one's expert. Having considered the issue again, the Task Force continues to believe that expert reports should not presumptively be required in all cases.

Rule 26. General Provisions Governing Discovery.

On February 16, 2016, the Arizona Association for Justice ("AzAJ") filed a comment raising concerns that the proposed amendments to Rules 16 and 26 place undue emphasis on determining the appropriateness of discovery in every case based on "the amount in controversy." On February 29, 2016, however, the AzAJ filed an amended comment saying that its concerns about the rule changes are moderated by the proposed comment to Rule 16 that details the factors to consider when deciding whether to limit discovery as inappropriate. Throughout the process leading to the petition, the Task Force carefully considered the proposed changes to Rules 16 and 26 regarding the scope of discovery and the factors to be considered in limiting otherwise permissible discovery. Especially in light of the

AAJ's amended comment, the Task Force does not believe that any revisions to these proposed amendments are appropriate.

Rule 26.1. Prompt Disclosure of Information.

Several of the Task Force's proposed amendments to Rule 26.1 recognize the differences in disclosing electronically stored information versus hard copy documents. Among other provisions, the proposed amendments set forth a procedure whereby the receiving party presumptively can choose the form of the other side's production of electronically stored information. In its comment to the petition, the State Bar suggests adding language to proposed Rule 26.1(b)(2)(B) to clarify that the court may, if appropriate, shift to the receiving party the costs of producing electronically stored information. The State Bar believes that the addition of this language may obviate some disputes over the format of production. While the Task Force is not sure that this additional language is needed in light of language in both the proposed rule and proposed Rule 26.1(b) discussing a court's authority to shift costs, the Task Force also sees no harm in adding the language to Rule 26.1(b)(2)(B). Accordingly, the Task Force has added, with slight grammatical modification, the language proposed by the State Bar.

Rule 35. Physical and Mental Examinations.

A comment filed by Aderant points out the existence of an ambiguity in proposed Rule 35(d)(2) regarding the timing of producing the examiner's report

and other related documents when requested. Namely, it is unclear from the proposed language ("Upon such request, the party who moved for or noticed the examination must, within 20 days, deliver to the requestor copies of . . .") whether production must be made within 20 days of the examination or the request. The Task Force agrees that the language should be clarified. To resolve the ambiguity, the Task Force revised the language in Rule 35(d)(2) to read: "If such a request is made, the party who moved for or noticed the examination must, within 20 days of the examination or request—whichever is later—deliver to the requestor copies of . . . ."

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanction.

In its February 16, 2016 comment, the AzAJ also raised general concerns regarding proposed Rule 37(g) ("Failure to Preserve Electronically Stored Information), and in particular its reach to "everything electronically stored [e.g., social media postings, emails, and text messages]," which the AzAJ says "creates a great deal of potential abuse." The Task Force does not believe that requiring "reasonable steps to preserve electronically stored information relevant to an action" will lead to any abuses. Indeed, the case law in Arizona already requires a party to take steps to preserve such information, with consequences if they fail to do so. The Task Force does not believe that any changes to proposed Rule 37(g) are appropriate.

Rule 54. Judgment; Costs; Attorney's Fees; Form of Proposed Judgments

Based on comments received after the petition's filing, the Task Force proposes the following changes to its proposed amendments to Rule 54.

(1) ***Use of the Term "Judgment":*** The amended petition modifies the proposed text of Rule 54 and related comments, to:

(a) Eliminate the sentence in subdivision (a) stating that "No judgment is final unless it recites that it is entered under Rule 54(b) or (c)." Although this provision also appears in the current rule (at Rule 54(c)), the statement is inconsistent with the first sentence of subdivision (a), which more broadly defines "judgment" to include "a decree and any order from which an appeal lies." The phrase "any order from which an appeal lies" includes a number of special orders that fall outside the scope of Rule 54(c) and are appealable by statute. *E.g.,* A.R.S. §§ 12-2101(2) (allowing appeal of "any special order made after final judgment") and 12-2101.01(A) (allowing appeal of various orders issued in connection with an arbitration).

(b) Delete the term "judgment" in Rule 54(f)(2)(C) and (g)(3)(B). Because these subdivisions are directed at decisions that are not certified under Rule 54(b), the use of the term "judgment" is technically incorrect. A corresponding change is proposed in the comment to Rule 54(f), to remove the reference to "judgment."

The comments received by the Task Force regarding proposed Rule 54 also have identified some inconsistency in the use of the terms "judgment" and "final judgment" throughout the Arizona Rules of Civil Procedure. The Task Force is continuing to review these issues and may submit further clarifying proposals in connection with any amended petition filed in July.

(2) ***Resolving Fees and Costs Before a Judgment Is Deemed Final.*** The Task Force proposes one clarification to its Rule 54 proposal regarding the treatment of fees and costs. As initially proposed, Rule 54 generally required (with certain exceptions) that a claim for fees or costs must be resolved before final judgment is entered, and that any award of fees or costs must be included in the final judgment. The Task Force's initial proposal also provided, in Rule 54(h)(3), that if "the court enters a final judgment . . . without first receiving a motion for judgment or a proposed form of judgment," the prevailing party could then file its request for fees or costs within 20 days after the entry of judgment. On further consideration, the Task Force believes that its initial proposal creates an ambiguity about whether a judgment that inadvertently fails to address a request for fees or costs is "final" for purposes of appeal.

The Task Force proposes to address this ambiguity by modifying the text of subdivision (h)(3) to provide that if costs or fees are required to be included in a final judgment—but are inadvertently omitted by the court—the prevailing party

seeking a cost or fee award "must file a motion to alter or amend the judgment within the time required by Rule 59(d)." This proposed revision makes clear that a judgment omitting such costs or fees will be final for purposes for appeal, unless a timely motion to alter or amend the judgment is filed.

Rule 55. Default; Default Judgment

Based on comments it has received, the Task Force proposes the following revisions to proposed Rule 55.

(1) ***Clerk's "Entry."*** To avoid confusion and improve clarity, the Task Force proposes to revise portions of its initial Rule 55 proposal that suggest that the clerk is required to take action to "enter" a party's default. As other portions of the revised rule make clear, the filing of the application for default constitutes the entry of default, with no further action by the clerk required. The revised language is shown in Appendix A at proposed Rule 55(a)(1), (2) and (4).

(2) ***Contents of Notice.*** One comment proposes amending Rule 55(b)(2) to specify that, in cases where a defaulted party has appeared, the required written notice must include the date, time, and place of any hearing. The comment cites a number of cases, including several cases emphasizing the importance of the written notice and one case holding that "to be effective, the notice should specify the time and place with particularity." *Lawrence v. Burke*, 6 Ariz. App. 228, 236, 431 P.2d 302, 310 (1967), *overruled on other grounds, Hagen v. U.S. Fidelity &*

Guaranty Co., 138 Ariz. 521, 525, 675 P.2d 1340, 1344 (App. 1983); *see also Gustafson v. McDade*, 26 Ariz. App. 322, 323, 548 P.2d 415, 416 (1976) (failure to provide 3-day notice renders a default judgment void) ("One purpose of the rule requiring notice to a party who has appeared is to afford him an opportunity to contest the damages amount").

Because the purpose of the notice is to allow an appearing defendant a chance to be present at the hearing and contest the amount of damages, the Task Force agrees that the rule should be clarified to set forth the required content of the notice. *See Gustafson*, 26 Ariz. App. at 323, 548 P.2d at 416 ("One purpose of the rule requiring notice to a party who has appeared is to afford him an opportunity to contest the damages amount"). Accordingly, the following sentence is proposed at the end of Rule 55(b)(2)(C): "The notice must include the date, time, and place of the hearing." As an additional clarification, the reference in the preceding sentence to the "application" is revised to make clear that the required notice relates to "the application for default judgment," to distinguish it from the application for default referenced in subdivision (a).

(3) ***Overseas Notice?*** The Task Force also considered a comment proposing that Rule 55(a) be amended to provide that a notice prior to entry of default is not required if the notice "would need to be mailed to any address outside the United States or any United States territory." The comment contends

that Arizona's multi-step notice procedure imposes undue delays in obtaining default judgments where the defaulting party is outside of the United States and must be served according to the requirements of the Hague Service Convention. The Task Force declined to adopt these proposed changes, which raise policy and constitutional implications, but believes the comment's concerns warrant further study in another forum.

Rule 84. Forms

The Task Force's initial petition did not include revisions to the Rule 84 Forms. This amended petition includes proposed revisions to selective Rule 84 Forms as required to incorporate relevant changes in the underlying Arizona Rules of Civil Procedure. Specifically, the Task Force proposes amendments to Rule 84 Forms as described below.

(1) ***Form 8 (Notice of Limited Scope Representation)*** is revised to reflect the proposed abrogation of experimental Rule 5.2, "Limited Scope Representation in Vulnerable Adult Exploitation Actions Brought Under A.R.S. § 46-451, et seq.," which mandates use of Form 8. At the same it proposes to abrogate Rule 5.2, the Task Force has proposed moving more general language governing limited scope representations from Rule 5.1 to a proposed Rule 5.3. The Task Force's proposed Rule 5.3 would mandate the use of Form 8 in all limited representations, which is not true of current Rule 5.1. The Task Force thus now

presents a revised Form 8, striking the references in it to A.R.S. § 46-451, and inserting appropriate cross-references in it to Rule 5.3.

(2) ***Form 9 (Form of Subpoena)*** is revised in several respects to reflect additional requirements and new language in proposed Rules 26 and 45.

(a) *Electronically Stored Information.* As reflected in Appendix A, the changes include new language regarding the required form for producing electronically stored information, corresponding to proposed changes to Rule 45(c)(2)(B) and (C) in the Task Force's petition. The proposed changes also specify that a party responding to a subpoena may "object to the production of electronically stored information" from sources that are identified as "not reasonably accessible because of undue burden or expense." These changes are based on new language in proposed Rule 45(c)(2)(D) and (c)(5).

(b) *Privilege Logs.* The proposed Form 9 revisions also incorporate the requirements of proposed Rule 26(b)(6)(A) with respect to privilege logs, requiring the responding party to adequately describe any information withheld based on a claim of privilege or as trial preparation material.

(c) *Court Order Required to Excuse Attendance.* Finally, the Task Force proposes revisions to clarify that a party served with a subpoena to testify at a hearing, trial, or deposition must attend and testify at the time and place

specified, unless the appearance is excused by the party or attorney serving the subpoena or by a court order.

The Path Forward

The Task Force continues to receive comments on its proposed amendments and anticipates receiving additional comments in response to this filing. Consistent with this Court's January 13 Order, the Task Force will file its final set of proposed amendments with the Court on July 8, 2016. That submission also will include proposed amendments to other rules that contain cross-references to the Arizona Rules of Civil Procedure and a revised "disposition table," identifying the current rules that have been deleted or relocated.

RESPECTFULLY SUBMITTED this 13th day of May, 2016.

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