# Appendix C
# Rule-by-Rule Analysis

## I. SCOPE OF RULES—ONE FORM OF ACTION

### Rule 1. Scope and Purpose

The Task Force proposes amendments that are stylistic and effect no substantive change.

### Rule 2. One Form of Action

The Task Force proposes amendments that are stylistic and effect no substantive change.

## II. COMMENCEMENT OF THE ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS; DUTIES OF COUNSEL

### Rule 3. Commencing an Action

The Task Force proposes an amendment that is stylistic and effects no substantive change.

### Rule 4. Summons

#### 1. Clarifying the Pleadings that Bring a Party Into an Action

The Task Force proposes to clarify—especially for the benefit of infrequent users of the Arizona Rules of Civil Procedure—the pleadings that bring a party into an action, and that therefore must be served on such party with a summons.

#### 2. Clarifying How the Effects of Waiving Service Differ From Those of Accepting Service

The Task Force proposes to cure the confusion between waiver of service, which entitles a party to additional time to serve a responsive pleading, and acceptance of service, which does not. Proposed Rule 4(f) contains a new subdivision (f)(1) that defines "Waiver of Service" and states that a party waiving gets additional time to respond under Rule 12(a)(1)(A)(ii), and (f)(2) that defines "Acceptance of Service" and states that a party accepting does not get that additional time.

**Rule 4.1. Service of Process Within Arizona**

The Task Force proposes amendments that are stylistic and effect no substantive change.

**Rule 4.2. Service of Process Outside Arizona**

With one minor exception, the Task Force proposes amendments that are stylistic and effect no substantive change. The exception is Rule 4.2(e), governing service of a nonresident under the Nonresident Motorist Act, A.R.S. § 28-2327. The Task Force proposes a modest expansion of the rule to include not only minors, the insane, and incompetent persons, but also other nonresidents. This change does not effect a substantive change in the law as the Act already applies to them.

**Rule 5. Serving Pleadings and Other Documents**

**Rule 5.1. Filing Pleadings and Other Documents**

**Rule 5.2. Forms of Documents**

The Task Force proposes not only stylistic, but also substantive and organizational changes to Rule 5, which the Task Force proposes be divided into subrules and combined with the content of present Rule 10(d), as explained further below.

**1. Organizational Changes.**

The Task Force proposes to divide present Rule 5, which concerns both service and filing of pleadings and papers, in two—resulting in a Rule 5 that addresses "Serving Pleadings and Other Documents," and a Rule 5.1 that addresses "Filing Pleadings and Other Documents." Additionally, the Task Force proposes to relocate to a new Rule 5.2 ("Forms of Documents"), the content of present Rule 10(d), which the Task Force believes is misplaced within Rule 10, Form of Pleadings, because its requirements apply more generally to any court filing, and because the user of the rules should find the requirements for preparing documents adjacent to and organized with the requirements for serving and filing those same documents.

**2. Making More Modern and Specific Provisions Concerning Filings.**

The Task Force proposes to add to proposed Rule 5.1 ("Filing Pleadings and Other Documents") provisions making this rule more modern and more specific. To modernize the rule, the Task Force proposes provisions defining filing by electronic means. [Proposed Ariz. R. Civ. P. 5.1(b)(1), (3)] In proposed Rule 5.2(c), the Task Force proposes detailed requirements for electronically filed documents. Such documents must be in a text-searchable .pdf, .odt, or .docx format, or another format permitted by an Administrative

Order, with text-searchable .pdf preferred. [Proposed Ariz. R. Civ. P. 5.2(c)(1)(A)] Proposed orders must be in .odt or .docx format, or another format permitted by an Administrative Order. [*Id.*] Finally, Proposed Rule 5.2(c)(3) also encourages but does not require the use of bookmarks and hyperlinks in filings.

To make the rule more specific, the Task Force also proposes to clarify that a document that is presented to a judge and then filed (as during trial, for example) is deemed filed on the date the judge receives it. [Proposed Ariz. R. Civ. P. 5.1(b)(2)]

### 3. Making the Requirements for Forms of Documents More Specific and in Some Respects Parallel to Requirements in the ARCAP.

The Task Force not only proposes moving the contents of present Rule 10(d) to Rule 5.2 and renaming it Forms of Documents, it also proposes making it more specific and in some respects parallel to the Arizona Rules of Civil Appellate Procedure. Proposed Rule 5.2(b)(1)(B) would establish 13-point as the minimum permissible type size. In concert with the page limitations for briefing to be established in proposed Rule 7.1, that typeface requirement would make briefs in the Superior Court identical in length to those in the United States District Court for the District of Arizona. *Compare* LRCiv. 7.1(b)(1) (mandating 13-point as the minimum type size) *and* LRCiv 7.2(e) (17 and 11 pages as the limits for principal and reply briefs, respectively). Additionally, proposed Ariz. R. Civ. P. 5.2(b)(1)(B) explains that the court prefers but does not require proportionally spaced serif fonts, such as Times New Roman, Century, and Garamond, and discourages monospaced or sans serif fonts, such as Courier or Calibri.

## Rule 5.3. Duties of Counsel and Parties

The Task Force proposes to abrogate Rule 5.2, while moving a reference to its present purpose into present Rule 5.1, which would be renumbered as Rule 5.3 and renamed "Duties of Counsel and Parties." Rule 5.2—adopted experimentally in 2009 and designed on its face to be reviewed within four years by a Supreme Court-appointed body (Ariz. R. Civ. P. 5.2(d))—authorized limited scope representation in vulnerable adult matters, where there was thought to be an especially acute need for these representations. Since Rule 5.2 was enacted, limited scope representations have been authorized more broadly and Rule 5.2 is no longer necessary. The Task Force recommends abrogating Rule 5.2, but to respect the concerns of a sector of the bar that advocated for the adoption of existing Rule 5.2, it also recommends incorporating language into Rule 5.1 reminding practitioners that limited scope representations are available in vulnerable adult actions.

## Rule 6. Computing and Extending Time

The Task Force proposes both organizational and substantive changes to Rule 6. In an organizational change, the Task Force proposes to move Rule 6(d) ("Orders to Show

Cause"), to Rule 7.3, where it would more logically be housed, in a series of rules dealing with other types of motions and filings. *See* Ariz. R. Civ. P. 7.1 (controlling requirements for motions generally); Ariz. R. Civ. P. 7.2 (controlling requirements for motions in limine); Ariz. R. Civ. P. 7.4 (controlling requirements for joint filings).

In a substantive change, the Task Force proposes Rule 6(d) ("Minute Entries and Other Court-Generated Documents"). This new subrule will resolve the confusion that surrounds when acts are due to be undertaken in response to orders. That confusion would arise because the only treatment of that question is presently (and incongruously) in existing Rule 58(e), which concerns judgments. By locating the rule that controls the timing of acts in response to orders in Rule 6 ("Computing and Extending Time"), the Task Force believes the rules will supply guidance to docket clerks, novice users of the rules, and others who might otherwise be unclear on how to calculate due dates.

The Task Force also proposes adopting 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. Proposed Rule 6(a)(3) and (4) provide that if the last day of the period falls on a Saturday, Sunday, or legal holiday, the act must be done on the first court-day before (and not after) the Saturday, Sunday, or legal holiday.

## III. PLEADINGS AND MOTIONS; PRETRIAL PROCEDURES

### Rule 7. Pleadings Allowed; Form of Motions and Other Documents

The Task Force proposes amendments that are stylistic and effect no substantive change.

### Rule 7.1. Motions

The Task Force proposes three substantive changes to this rule. First, the Task Force proposes that initial and response briefs be limited to seventeen pages of text, with replies limited to eleven pages of text. [Proposed Ariz. R. Civ. P. 7.1(a)] This limitation is consistent with that imposed by LRCiv 7.2(e) of the United States District Court for the District of Arizona, and is intended to accommodate a requirement in proposed Rule 5.2(b) that filings be in 13-point type size rather than 12-point type size, which is the font size that most lawyers now use (and some courts require). Second, the Task Force proposes, at the suggestion of a judge from Pima County (and consistent with LRCiv 7.2(f)), to make express that courts are not required to hold oral argument on motions, except for summary judgment motions. [Proposed Ariz. R. Civ. P. 7.1(d)] Third, the Task Force proposes to establish a uniform certification of good faith consultation to be utilized whenever the Rules require good faith consultation, as in Rules 11(c), 26(g), 37(a), and 56(d). The consultation must be in person or by telephone and cannot consist simply of correspondence. The certification could be made as an attestation that the opposing party

refused to consult, making good faith consultation impossible. [Proposed Ariz. R. Civ. P. 7.2(h)]

**Rule 7.2. Motions in Limine**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

**Rule 7.3. Orders to Show Cause**

The Task Force proposes to move this subrule from within Rule 6 ("Computing and Extending Time"), to the sequence of rules dealing with particular motions and filings. Substantively, the Task Force also proposes that Rule 7.3 require the court to permit a response by the party against whom the relief is sought, in contrast to present Rule 6(d), which does not discuss briefing.

**Rule 7.4. Joint Filings**

The Task Force proposes creating a new Rule 7.4 that would govern the preparation of joint filings, such as joint reports, proposed scheduling orders, and pretrial orders. Proposed Rule 7.4 would require a party to make itself available to prepare the joint document and cooperate in its preparation, clarify that parties cannot change any other party's portions of joint filings, and remind the trial court that it can sanction parties for noncompliance. The principal concern it addresses is refusal to participate in Rule 16 joint pretrial orders, though the rule has other applications.

**Rule 8. General Rules of Pleading**

The Task Force proposes amendments that are stylistic only and effect no substantive change. Among those are that existing Rule 8(d) ("Effect of failure to deny") was moved into Rule 8(b)(6), and Rule 8 was renumbered accordingly. Further, the Task Force proposes moving provisions from existing Rule 11(a) and (b) into a Rule 8(i) ("Verification") and a provision from existing Rule 5(i) into a Rule 8(j) ("Compulsory Arbitration"), as more logical placements for those subrules that address, respectively, verifications of pleadings and the submission of certificates of compulsory arbitration.

**Rule 8.1. Experimental Rule Regarding Assignment and Management of Commercial Cases**

This rule was promulgated on an experimental basis by Supreme Court Administrative Order Number 2015-15, as amended by Administrative Order Number 2015-86. It currently applies to cases in the pilot commercial court in Maricopa County. The Task Force did not alter the content of this rule.

## Rule 9. Pleading Special Matters

The Task Force proposes to delete Rule 9(i), which requires an answer to be verified if it asserts certain affirmative defenses. The Task Force believes that the rule, which dates back to territorial days, has long ago outlived its usefulness and is a trap for the unwary. Other than that change, the Task Force proposes amendments that are stylistic only and effect no substantive change.

## Rule 10. Form of Pleadings

The Task Force proposes amendments that are stylistic only and effect no substantive change. Rule 10(d) was among those merged into proposed Rule 5.2 ("Forms of Documents") and the existing reference to Rule 10(e) was deleted, as Rule 10(e) itself was deleted in 1987.

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

The proposed amendments to Rule 11 include both stylistic and substantive changes to the current rule. It should also be noted that the provisions of current Rule 11(b) ("Verification of pleading generally") would be moved to Rule 80(g), with only stylistic changes.

Among other substantive changes, the Task Force proposes to delete current Rule11(c) ("Verification of pleading when equitable relief demanded"). This is consistent with its recommendation to eliminate similar provisions of Rule 9 that currently require verification of certain types of pleadings.

The proposed amendments also incorporate, with only minor stylistic changes, the substance of the State Bar of Arizona's Petition R-15-0004, which proposes to amend Rule 11 in various respects. Further explanation of these proposed changes can be found in the State Bar's petition. Highlights of the proposed amendments include:

(1) Subdivision (a) ("Signature") would be amended in several respects. A sentence in current subdivision (a), providing that "pleadings need not be verified or accompanied by affidavit" unless specifically required by rule or affidavit, would be moved to proposed Rule 8(i). The Task Force proposes to add new subdivision (a)(2), 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." New subdivision (a)(3) is proposed, clarifying the permission required before a party may sign a jointly-filed document on behalf of a non-filing party.

(2) Subdivision (b) ("Representations to the Court") would be amended to adopt the expanded provisions of Federal Rule 11(b), which set forth four types of "certifications" that arise from a party or attorney's signature on a pleading, motion or other document. Federal Rule 11(b) was amended in 1993 to expand and clarify the responsibilities of a signing lawyer or party. The proposed amendments adopt the federal language verbatim.

(3) New subdivision (c) ("Sanctions") proposes procedural limitations designed to curb Rule 11 abuses as reported by practitioners and judges. The amendments propose to address abusive Rule 11 practices by providing that: (A) requests for Rule 11 sanctions must be made separately from any other motion; (B) before filing a Rule 11 motion, the moving party must attempt to resolve the matter by good faith consultation as provided in (new) Rule 7.1(h); and (C) if the matter is not resolved by consultation, the moving party must serve the opposing party with a 10-day advance written notice of the specific conduct allegedly violating Rule 11, before filing any motion. The proposed amendments also provide that the trial court "must" impose sanctions for Rule 11 violations. This would be a departure from the current federal rule, which makes such sanctions discretionary even if the court finds that a Rule 11 violation has occurred.

**Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

**Rule 13. Counterclaim and Crossclaim**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

**Rule 14. Third-Party Practice**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

**Rule 15. Amended and Supplemental Pleadings**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

## Rule 16. Scheduling and Management of Actions

The proposed amendments to Rule 16 include a number of stylistic and organizational changes. In addition, a handful of substantive changes also would be made to the rule.

### 1. Adding as an Objective of Case Management the Limitation of Discovery to that Appropriate to the Case

Consistent with changes proposed to Rule 26(b) to limit discovery to that appropriate to a given case, 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."

While, as discussed in further detail in relation to Rule 26(b), the Task Force proposes greater consistency between Arizona's rules and the federal rules regarding limits on the scope of discovery, the Task Force does propose a different word choice. Namely, while the federal rule was recently amended to state that discovery must be "proportional to the needs of the case," the Task Force believes 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. Given its mathematical connotations, the use of the word "proportional" could be misconstrued to place undue weight on two of the factors—namely, the amount in controversy and the cost of the discovery—over all the other factors. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1819 (2002) (defining "proportional" to mean "having the same or a constant ratio"; "corresponding in size, degree, or intensity"). In fact, this already appears to be happening in some jurisdictions. *See, e.g.*, Utah R. Civ. P. 26(c) (setting forth different limits on discovery based solely on the dollar amount in controversy in the case). The Task Force does not believe that such a focus on mathematical "proportionality" would serve the rule's purpose. *See, e.g.*, Fed. R. Civ. P. 26, Adv. Comm. Note to 1983 Amendment ("the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved"). To explain this distinction, the Task Force proposes the following new comment to Rule 16:

> Federal Rule of Civil Procedure 26(b)(1) was amended effective December 1, 2015, to expressly use the word "proportional" in describing the scope of discovery. Arizona Rules of Civil Procedure 16(a) and 26(b)(1)(B) have not been amended to incorporate use of the word "proportional," but instead Rule 16(a)(3) uses the word "appropriate." This was done to avoid

> any possible misreading of the rules that might place undue emphasis on any one factor (e.g., the amount in controversy). No single factor is intended to be dispositive in all cases, but rather the factors should be considered together in determining the appropriateness of given discovery in an action. While the language of "proportional" versus "appropriate" differs, the factors under Federal Rule of Civil Procedure 26(b)(1) for reaching that determination are similar to those under amended Arizona Rules of Civil Procedure 16(a)(3) and 26(b)(1)(B).

### 2. Recognition of Procedure Requiring Parties to Confer with Court Before Filing Discovery Motions

The Task Force also proposes amending Rule 16(c)(2) to explicitly recognize a procedure already employed by many trial court judges around the state—namely, that the court may include a provision in its Scheduling Order "direct[ing] that a party must request a conference with the court before moving for an order relating to discovery" (e.g., motion to compel, motion for protective order, etc.). This procedure is oftentimes laid out in an individual judge's scheduling order, but sometimes the parties need to search elsewhere to determine whether a judge requires such a procedure. The proposed amendment to Rule 16(c)(2) would formalize the procedure and encourage judges to include it in their scheduling orders so that the parties are aware of it.

### 3. Recognition that Parties May Agree to, or Court May Order, an Exchange of Expert Reports

An addition would be made to Rule 16(d)(4) allowing the parties to agree to, or the court to order, an exchange of expert reports. Currently, Rule 26.1(a)(6) requires a party to identify any expert it intends to call at trial and disclose "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, [and] a summary of the grounds for each opinion." Under the Federal Rules of Civil Procedure, a report must be provided from most testifying experts that includes, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them [and] the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B). The Task Force determined that given the differences in cases filed in federal court versus our state courts, a rule generally requiring such expert reports in all cases was unwise. In many cases, the added cost of requiring expert reports would not make sense. The Task Force, however, believes there are some cases where expert reports may be appropriate, and that the Rules should thus explicitly allow the parties to agree to, or the court to order, the exchange of such reports. While not formally recognized under the current rules, this is a practice that already occurs in some cases.

#### 4. Timing of Delivery of Exhibits in Conjunction with Joint Pretrial Statement

Rule 16 also would be amended to make minor changes to the timing of the parties' delivery of exhibits to each other under Rule 16(g). Under the current rule, the timing works off of the trial management conference (e.g., the plaintiff is to deliver its exhibits to the other parties 20 days before the trial management conference). A trial management conference is not necessarily held in all cases, though. *See* Ariz. R. Civ. P. 16(g)(1). Accordingly, the Task Force proposes amending Rule 16(g) so that the timing for delivery of exhibits would instead work off of the filing of the Joint Pretrial Statement (e.g., the plaintiff is to deliver its exhibits to the other parties 10 days before the deadline for filing the Joint Pretrial Statement). [*See* Proposed Ariz. R. Civ. P. 16(g)(3)]

### Rule 16.1. Settlement Conferences

The Task Force proposes amendments that are stylistic only and effect no substantive change.

### Rule 16.2. Good Faith Settlement Hearings

The Task Force proposes amendments that are stylistic only and effect no substantive change.

### Rule 16.3. Initial Case Management Conference in Actions Assigned to the Complex Civil Litigation Program

The Task Force proposes amendments that are stylistic only and effect no substantive change.

## IV. PARTIES

### Rule 17. Plaintiff and Defendant; Capacity; Public Officers

The Task Force proposes moving Ariz. R. Civ. P. 25(e)(2), a provision concerning the use of the title and name of a public officer in a suit against a public officer, to Rule 17(d), to align it with other provisions concerning parties. This also makes Arizona Rule 17 structurally parallel to Federal Rule 17, as a like provision is housed within that rule.

### Rule 18. Joinder of Claims

The Task Force proposes amendments that are stylitic only and effect no substantive change.

**Rule 19. Required Joinder of Parties**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

**Rule 20. Permissive Joinder of Parties**

The Task Force proposes amendments that are stylistic only and effect no substantive change.

**Rule 21. Improper Joinder and Non-Joinder of Parties; Severance**

The proposed amendments are stylistic and organizational and effect no substantive change.

**Rule 22. Interpleader**

The proposed amendments are stylistic and organizational and effect no substantive changes to Rule 22.

**Rule 23. Class Actions**

The Task Force proposes amending Rule 23 to, in large part, adopt the provisions of its federal counterpart. The federal rule has been amended multiple times over the last several years to add various provisions, with none of those provisions having made their way into the state rule. For example, the federal rule now includes detailed provisions concerning class counsel, the award of attorney's fees, and the requisite notice to the class, none of which are currently in Arizona's rule. The Task Force believes it is appropriate to adopt these federal changes, especially in light of the fact that the large majority of class actions are currently filed in federal court. The Task Force conferred with the State Bar's Class Actions Committee, and they agreed that the federal provisions should be adopted in the state rule.

The proposed amendments to Rule 23 do retain a few Arizona-specific provisions that come out of Arizona statutes. For example, as opposed to federal court (where the court of appeals may in its discretion permit an interlocutory appeal of an order granting or denying class certification), by statute in Arizona, a party is entitled to take an interlocutory appeal of an order granting or denying class certification. *Compare* A.R.S. § 12-1873 *with* Fed. R. Civ. P. 23(f). Similarly, A.R.S. § 12-1871 requires the inclusion of certain items in an order granting class certifications. These requirements were adopted into Ariz. R. Civ. P. 23 on an emergency basis in 2013. The proposed amendments to Rule 23 retain these provisions.

**Rule 23.1. Derivative Actions**

The current version of Rule 23.1 speaks of derivative actions by "shareholders or members to enforce a right of a corporation or of an unincorporated association." Derivative actions, however, are also maintainable in Arizona in the cases of both partnerships and limited liability companies. *See* A.R.S. §§ 29-356 (recognizing right of limited partner to bring derivative action) & 29-831 (recognizing right of LLC member to bring derivative action). The Task Force's proposed amendments to Rule 23.1 explicitly broaden its provisions to apply in these other situations.

In addition, the rule would be simplified to remove many of the current pleading and standing requirements. Those requirements generally come from statutes (*e.g.*, A.R.S. § 10-740 (laying out standing requirements for derivative actions on behalf of corporations)), but the current rule fails to include all of them. In addition, the statutory pleading and standing requirements differ depending on whether the derivative action involves a corporation, limited liability company, or limited partnership. *Compare* A.R.S. §§ 10-741 & 10-742 (setting forth conditions for corporate shareholder to bring derivative action) *with* A.R.S. § 29-831 (setting forth conditions for LLC member to bring derivative action) *with* A.R.S. §§ 29-356 & 29-357 (setting forth conditions for limited partner to bring derivative action). To avoid these issues, the Task Force proposes replacing the various requirements currently included in the rule with a provision that simply states that a plaintiff in a derivative action must "allege facts sufficient to show that the plaintiff satisfies all statutory and other requirements under the law for maintaining the derivative action."

**Rule 23.2. Actions Relating to Unincorporated Associations**

The proposed amendments are stylistic and organizational and effect no substantive changes to Rule 23.2.

**Rule 24. Intervention**

The proposed amendments to Rule 24 are primarily stylistic and organizational, but there is one proposed substantive change. Under the current rule, the plaintiff and defendant are "allowed a reasonable time, not exceeding twenty days, in which to answer the pleading of the intervener" if a motion to intervene is granted. The rule, however, does not require the successfully intervening party to actually file its pleading once the court grants intervention. In such a situation, it is unclear when the other parties are supposed to file their respective answers. To rectify this issue, the Task Force proposes amending this provision to adopt the procedure in cases of amended pleadings. Namely, if the motion to intervene is granted, the intervenor would have 10 days to file and serve the pleading in intervention. *Cf.* Ariz. R. Civ. P. 15(a) (requiring party seeking leave to amend to file and

serve its amended pleading within 10 days of the order granting leave). The parties would then have 20 days from service to answer.

## Rule 25. Substitution of Parties

The Task Force proposes various stylistic and organizational amendments to Rule 25. In addition, the Task Force proposes three substantive changes.

### 1. Clarification Regarding Notices of Death and Substitution After a Party's Death

Under current Rule 25(a), a party is required to file a motion for substitution for a deceased party no later than 90 days after the death is "suggested upon the record by service of a statement of the fact of death." The Task Force believes that use of the phrase "suggested upon the record" is confusing, and thus proposes to clarify that if one wishes to trigger this 90-day deadline, they must file and serve a statement noting the death of a party. In addition, the proposed amendments would further clarify who can file and serve the statement noting death (namely, either a party or the deceased party's successor or representative). So as to serve the purpose of substitution, if the statement is filed by a party, that party would need to identify in the notice the deceased party's successor or representative if known.

### 2. Deletion of Provision that Wrongful Death and Personal Injury Actions Do Not Abate Upon Defendant's Death

The proposed amendments would delete current Rule 25(b), which provides that wrongful death and personal injury actions do not abate due to the defendant's death. Arizona's survival statute (A.R.S. § 14-3110) already provides that wrongful death and personal injury actions do not abate upon a defendant's death, and thus Rule 25(b) is unnecessary. In addition, while Rule 25(b) is limited to wrongful death and personal injury actions, the survival statute provides for the survival of all causes of action upon a defendant's death except "a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy." Thus, in addition to being unnecessary, Rule 25(b) is also too narrow.

### 3. Provisions for Naming Public Officers as Parties in a Lawsuit Moved to Rule 17

Current Rule 25(e)(2) states that, "A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name…." This provision does not belong in Rule 25, which governs the substitution—not the naming—of parties. The provision instead more appropriately belongs in Rule 17

(governing the naming of parties), which is where it is found in the federal rules. Thus, the Task Force proposes moving it to Rule 17(d).

## V. DISCLOSURE AND DISCOVERY

### Rule 26. General Provisions Governing Discovery

The Task Force proposes various stylistic and organizational amendments to Rule 26.1. In addition, the Task Force proposes several substantive changes to the rule, which are detailed below.

#### 1. Scope of Discovery

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. *Compare S. Pac. Transp. Co. v. Veliz*, 117 Ariz. 199, 200, 571 P.2d 696, 697 (App. 1977) ("Relevancy is the standard in judging the propriety of [discovery].") *and Indus. Comm'n of Ariz. v. Superior Court*, 122 Ariz. 374, 375, 595 P.2d 166, 167 (1979) (applying "reasonably calculated" language in confines of information that itself was also relevant to the subject matter of the action) *with Brown v. Superior Court*, 137 Ariz. 327, 332, 670 P.2d 725, 730 (1983) ("The requirement of relevancy at the discovery stage is more loosely construed than that required at trial. For discovery purposes, the information sought need only be 'reasonably calculated to lead to the discovery of admissible evidence.'"). 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."

Concomitantly, the Task Force proposes amending Rule 26.1(a)(9) to delete the "reasonably calculated" language. That rule currently provides in relevant part that a party is to disclose documents that the "party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence." This language indicates that information "reasonably calculated to lead to the discovery of admissible evidence" need not itself be relevant to the subject matter of the action to fall within the scope of disclosure. Such a scope of disclosure would be inconsistent with the proposed change to Rule 26(b)(1)(A) requiring relevance. The

Task Force therefore proposes amending the language to instead require disclosure of documents that "may be relevant to the subject matter of the action."

### 2. Limits on Discovery

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, Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that the scope of discovery is limited to that "proportional to the needs of the case," considering various factors.

The Task Force favors greater consistency between Arizona's rule and the federal rule regarding the factors for limiting discovery. The Task Force therefore 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").

As discussed in relation to Rule 16, the Task Force proposes a different choice of words from the recent federal amendments. Namely, the Task Force believes that the phrase "appropriate to the needs of the case" better encapsulates the factors to consider in determining whether to limit discovery than does the phrase "proportional to the needs of the case."

### 3. Deletion of Explicit Provision Regarding Discovery of Insurance

Under the proposed amendments, current Rule 26(b)(2)("Insurance agreements") is deleted. As discussed below, the Task Force has strengthened and laid out in more detail the requirements under Rule 26.1 for disclosing matters relating to insurance. In light of those proposed changes, the Task Force believes that an explicit provision regarding discovery of insurance in Rule 26 is unnecessary. The deletion would also be consistent with the federal rules, which deleted a similar provision regarding discovery of insurance when the rules were amended to require disclosure of insurance.

### 4. Presumptive Limits on Number of Experts

Rule 26(b)(4)(D) sets forth the presumptive limit of one expert per side per issue. The rule currently speaks in terms of "independent experts." A recent court of appeals decision, *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 334 P.2d 210 (App. 2014), discussed the ambiguities of the phrase "independent experts" and, upon consideration of comments

to the rule, determined that the rule was only intended to apply to experts retained by a party to testify, and thus did not apply to an investigating police officer who offered opinions regarding the speed of a vehicle. The Task Force therefore proposes replacing that phrase with the phrase "retained or specially employed expert." This proposed phrase is consistent with *Felipe*, and is a term already found within the rules. *See* Ariz. R. Civ. P. 26(b)(4)(B); *see also* Fed. R. Civ. P. 26(a)(2)(B).

### 5. Notices of Non-Parties at Fault

Rule 26(b)(5) currently states that a party who alleges a non-party to be at fault must "provide" certain information regarding the non-party. Based on the wording of the rule, it is unclear whether parties are to file a notice of non-parties at fault, or whether they merely need to serve the notice on the other parties. Given that ambiguity, some—but not all—parties file their notices of non-parties at fault out of an abundance of caution. The Task Force proposes amending the rule to clearly convey that a party should, but is not required, to file a notice of non-parties at fault. The Task Force considered prohibiting parties from filing such notices with the court, but determined that it is oftentimes helpful for the court to be aware that the fault of non-parties will be an issue in the case. Similarly, the Task Force also considered requiring parties to file notices of non-parties at fault, but decided this could become a trap for the unwary, with a plaintiff potentially seeking to prohibit a non-party at fault defense merely because the defendant failed to file the notice.

The Task Force proposes one additional substantive change to Rule 26(b)(5) regarding supplementation and correction of notices of non-party at fault. A State Bar Committee Note to the 1989 amendment to Rule 26(b) states that "Rule 26(b)(5) is intended to be read in conjunction with the provisions of Rule 26(e)(1)(D), which requires the seasonable supplementation of responses to discovery requests addressed to the identity, location, and the facts supporting the asserted liability of any nonparty who is claimed to be wholly or partially at fault." The Task Force agrees that supplementation or correction of notices of non-parties at fault may be required, but believe that this requirement should be contained within the rule itself rather than in a comment. Thus, consistent with the language of Rule 26(e) regarding supplementation and correction of discovery responses, the Task Force proposes adding the following language to Rule 26(b)(5), "A party who has served a notice of non-party at fault must supplement or correct its notice if it learns that the notice was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties through the discovery process or in writing. A party must supplement or correct its notice of non-party at fault under this rule in a timely manner, but in no event more than 30 days after it learns that the notice is materially incomplete or incorrect."

### 6. Supplementation and Correction of Discovery Responses

The provisions in Rule 26(e) regarding supplementation and correction of discovery responses would be simplified to more closely follow the federal rule. Many of the provisions currently found in this rule relate to supplementation and correction of specific categories of discovery responses that were rendered irrelevant years ago by the addition of the disclosure rules. *See, e.g.*, Ariz. R. Civ. P. 26(e) (discussing supplementation of discovery responses "addressed to (A) the identity and location of persons having knowledge of discoverable matters, (B) the identity of each person expected to be called as an expert witness at trial …, (C) the identity of any person expected to be called as a witness at trial and (D) the identity, location and the facts supporting the liability of any nonparty"). The Task Force proposes simplifying the subdivision to more closely follow its federal counterpart.

### 7. Certification Required Before Consideration of Discovery Motions

Before the court is to consider a discovery motion, Rule 26(g) currently requires "a separate statement of moving counsel … certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter." The rule would be amended to instead reference new proposed Rule 7.1(h) regarding the requirements for good faith consultation certificates.

### 8. Claims of Privilege and Work Product Protection

Currently, Rule 26.1(f) contains provisions regarding both how a party is to assert a claim of privilege or work product protection and how the parties are to handle inadvertent disclosures. Because these issues arise both in relation to discovery and disclosure, the Task Force proposes moving the provisions to Rule 26(b)(6) with respect to claims of privilege or inadvertent production in response to written discovery requests. The Task Force then proposes amending Rule 26.1(f) to reference Rule 26(b)(6) with respect to claims of privilege or inadvertent production occurring in relation to Rule 26.1 disclosures.

In addition to these organizational changes, the Task Force proposes adding a requirement that claims of privilege be made "contemporaneously" with one's discovery response or disclosure. The current rule includes no timing requirement, which sometimes leads parties to delay providing their privilege log.

## Rule 26.1. Prompt Disclosure of Information

The Task Force proposes various stylistic and organizational amendments to Rule 26.1. In addition, the Task Force proposes several substantive changes to the rule detailed below.

### 1. Disclosure of Lay Witnesses

Rule 26.1(a)(3) currently provides that one must disclose "a fair description of the substance of each [lay] witness' expected testimony." That provision would be amended to incorporate language currently found in the comments regarding the detail that must be provided in disclosing lay witnesses. Namely, the Committee Comment to the 1996 amendment to Rule 26.1(a) provides, with regard to the degree of specificity required in disclosing the expected testimony of lay witnesses, "that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to describe the subject matter upon which the witness will testify." On the other hand, Arizona case law makes clear that "scripting" of testimony is not necessary. *See, e.g., Englert v. Carondelet Health Network*, 199 Ariz. 21, 25 ¶ 7, 13 P.3d 763, 767 (App. 2000). To more clearly convey these principles within the rule itself, the Task Force proposes amending Rule 26.1(a)(3) to read in relevant part that a party must disclose, "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."

### 2. Disclosure of Information Regarding Insurance, Indemnity, and Suretyship Agreements

Under the current version of Rule 26.1, the requirement for disclosing insurance-related information is lumped at the end of Rule 26.1(a)(8)'s requirement for disclosing tangible evidence, documents, or electronically stored information that a party plans to use at trial. The Task Force believes that such treatment at times leads parties to deemphasize the requirement. Rule 26.1(a)(10) would thus be added to create a separate category for disclosing insurance-related information.

The provision has also been broadened to require disclosure of information regarding indemnity or suretyship agreements. The purpose behind requiring disclosure of insurance information is to facilitate settlement. *See* Committee Comment to 1991 Amendment to Rule 26.1(a) (purpose of disclosure is to "encourage early evaluation, assessment and possible disposition of the litigation between the parties"); *see also* Committee Note to 1970 Amendment to Rule 26(b) (discovery of insurance information is intended to "aid settlement"). The Task Force believes this purpose would be similarly served by requiring the sharing of information in situations involving indemnity and suretyship agreements.

Finally, Rule 26.1(a)(10) would add greater detail regarding the documentation and information that parties are required to disclose regarding insurance, indemnity, and suretyship agreements. The provision would require parties to disclose, in addition to the agreement itself, the existence and contents of any denial of coverage or reservation of rights and the remaining dollar limits of coverage. Again, the Task Force believes that

such information serves the purpose of aiding settlement. For example, if a plaintiff knows that insurance coverage has been denied or a reservation of rights asserted, the plaintiff may decide not to pursue the case if he or she believes that coverage is unlikely and there is thus no source of recovery. On the other hand, if the plaintiff believes that the coverage denial or reservation of rights is not meritorious, the plaintiff might pursue a *Damron* or *Morris* agreement with the defendant. Similarly, by requiring disclosure of the remaining dollar limits of coverage, the proposed amendments serve the purpose of allowing the parties to properly evaluate and assess the lawsuit. For example, if the plaintiff learns that, though there is a sizable policy limit, in actuality much less of that limit remains available due to another claim(s) and/or defense costs that have eaten away at the limit, the plaintiff may pursue litigation and settlement differently. So that a defendant is not required to supplement its disclosure every month to account for the reduction by defense costs of the remaining policy limits, the proposed rule provides that one must supplement its disclosure of the remaining dollar limits of coverage only "upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial."

### 3. Disclosure of Electronically Stored Information

Rule 26.1 currently lumps the disclosure of electronically stored information 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 to account for the fact that (1) disclosure of electronically stored information ("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.

Similar to the recent provisions regarding ESI for the new Commercial Court pilot program in Maricopa County, the proposed provisions stress cooperation among the parties in determining what, if any, ESI should be produced and the format of production. The proposed provisions concomitantly provide additional time for the parties to work through these issues before they then disclose and produce ESI. The amendments also provide an abbreviated procedure for the parties to present any ESI disputes to the court if they cannot reach agreement. Namely, the parties are to present any disputes to the court in a single joint motion that includes the parties' positions and the certification from all counsel required under Rule 26(g).

With respect to the format for producing ESI, the amended rule establishes a presumption that ESI will be produced in the format requested by the receiving party. If the producing party believes that the requested format is unreasonable or unworkable, the party can seek a court order for a different format.

Finally, the Task Force proposes expressly incorporating into the disclosure rule the limits on discovery of ESI that is not "reasonably accessible" that are found in Rule 26.

### 4. Limits on Disclosure of Hard Copy Documents

With respect to the production of disclosed hard copy documents, the rule currently provides that they 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. Namely, 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.

### 5. Purpose of Disclosure Requirements

The Task Force proposes adding a new Rule 26.1(c) to lay out the purpose of the rule's disclosure requirements as "ensur[ing] that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action." This stated purpose is consistent with the current comments to Rules 26.1 and 37 and with the case law. The Task Force proposes this addition to more clearly provide a guiding principle to the parties and the trial court when weighing whether disclosure violations have occurred. The Task Force believes this will be particularly helpful in cases where disclosure issues are raised during the middle of trial and need to be decided quickly.

### 6. Timing of Initial Disclosures in Multi-Party and Multi-Pleading Cases

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). Namely, the subdivision would be amended to read:

> 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.

Under the current version of the rule—which requires service of disclosure statements "within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint—it is difficult to determine when initial disclosures need to be served in such cases. While the Task Force does not believe it is possible to clearly lay out the timing of initial disclosures under all the various permutations of multi-party, multi-pleading cases, the Task Force believes that the

proposed amendment provides greater guidance to the parties. The amended rule also permits the parties to reach agreement on the timing of initial disclosures in cases where the timing is unclear under the rule.

### 7. Supplementation of Disclosure

The Task Force understands that issues are sometimes caused by parties gaming the general requirement that supplementation of disclosures occur within 30 days of the discovery of the information by waiting to supplement until after a scheduled hearing or deposition. The Task Force therefore proposes adding the following sentence to Rule 26.1(d)(2): "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 a party fails to comply with this requirement, it will be subject to such sanctions under Rule 37(c) as the inability to use the information itself at the hearing or deposition or responsibility for the fees and costs incurred by the other party if, for example, a second deposition is ordered.

Rule 26.1(d)(2) has also been amended to incorporate a provision from the comments that information disclosed in a written discovery response or in a deposition need not be included in a formal disclosure statement so long as the parties have been reasonably informed of the information. *See* State Bar Committee Note to 1996 Amendment to Rule 37(c) ("In keeping with *Bryan v. Riddel*, 178 Ariz. 472 (1994), the committee wishes to reemphasize that the disclosure of the information need not be in a formal disclosure statement but can be in response to an interrogatory, request for production, request for admission, deposition, or an informal process so long as all parties are reasonably apprised of the identity of the witness, the information possessed by the witness, or other information sought to be admitted."). The Task Force further believes that this provision is consistent with the purpose of Rule 26.1's disclosure requirements discussed above.

## Rule 26.2. Exchange of Records and Discovery Limits in Medical Malpractice Actions

The proposed amendments are stylistic and organizational and effect no substantive changes to Rule 26.2.

## Rule 27. Discovery Before an Action Is Filed or During an Appeal

The Task Force proposes various stylistic and organizational amendments to Rule 27. In addition, the Task Force proposes substantive changes to the procedures laid out in Rule 27 for gaining discovery before an action is filed.

Currently, if one wishes to engage in discovery before the action itself is filed, he or she must apply for and obtain an order from the court allowing the discovery. The rule, however, provides no guidance as to what is to be done with that order once it is obtained. The Task Force proposes amending Rule 27 to provide that if the court allows pre-litigation discovery, the court is to enter an order directing the clerk to issue a subpoena for the permitted discovery. The applicant can then serve the subpoena on the person from whom he or she seeks the discovery.

In this way, the person from whom discovery is sought would have all of the same protections under Rule 45 that they would have if the discovery was sought after a lawsuit was filed. Under the current version of the rule, if the person from whom discovery is sought is not one of the "expected adverse parties," and thus is not served with the application for discovery, there is no express mechanism in Rule 27 permitting the person to object to the discovery. The proposed procedure also recognizes the fact that before a lawsuit is filed, there is no "party" per se from whom discovery can be sought under, for example, Rule 34. Instead, it makes more sense for all discovery in these circumstances to be conducted under the protections of Rule 45.

No substantive change is intended with respect to the amendments proposed to that portion of Rule 27 dealing with discovery during the pendency of an appeal.

**Rule 28. Persons Before Whom Depositions May Be Taken; Depositions in Foreign Countries; Letters of Request and Commissions**

The proposed amendments are stylistic and organizational and effect no substantive change.

**Rule 29. Modifying Discovery and Disclosure Procedures and Deadlines**

Rule 29 currently permits the parties to enter into stipulations modifying discovery procedures. The Task Force proposes expanding the rule to also apply to modifications of disclosure procedures. The Task Force also proposes amending the rule to allow parties to move for modification of discovery and disclosure procedures, with the amended rule setting forth the general requirements for such motions—namely, the modification sought, good cause for the modification, and compliance with Rule 26(g).

Currently, each of the various discovery rules include disparate provisions for parties to modify discovery procedures, especially the procedures for exceeding the presumptive limits for interrogatories, requests for production, and requests for admission. For example, current Rule 33.1(c) sets forth a lengthy paragraph of procedures for gaining leave of court to serve additional interrogatories, while Rule 34(b) includes its own different, and much more truncated, procedure for exceeding the presumptive limit, and Rule 36(b) yet its own set of procedures for exceeding the presumptive limit. The Task

Force finds no reasoned basis for having such a widely varying set of procedures for exceeding the presumptive discovery limits. Instead, the Task Force believes that Rule 29 should govern all such attempts to modify the discovery procedures, including presumptive limits.

## Rule 30. Depositions by Oral Examination

The Task Force proposes various stylistic and organizational amendments to Rule 30. In addition, the Task Force proposes four substantive changes to the rule.

### 1. Presumptive Limitation of a Single Deposition of a Person

Federal Rule 30(a)(2) states that a party must obtain leave of court to depose a person more than once in the case. Arizona Rule 30 does not currently contain such an express limit on deposing a person more than once in a case. The Task Force believes such a limit is appropriate, and thus proposes adding to Rule 30(a)(1) the following sentence, "Unless all parties agree or the court orders otherwise for good cause, a party may not depose … a person who has already been deposed in the action."

### 2. Depositions of Incarcerated Persons

Rule 30 currently requires a party to obtain a court order if he or she wishes to depose an incarcerated person. The Task Force understands that under current practice parties oftentimes gain approval from the custodian of the incarcerated person without obtaining a court order. The Task Force sees no reason for requiring a court order if the custodian will voluntarily permit the deposition without one. Accordingly, the Task Force proposes amending the rule to provide, "Subject to Rule 30(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court prescribes."

### 3. Designation of Additional Recording Method by Non-noticing Party

Under the current rule, a party who did not notice the deposition may request that it be recorded by audio or audio-video means. The rule, however, provides no procedure for a non-noticing party to notice an additional method for recording the deposition. Federal Rule 30(b)(3) states that with "prior notice to the deponent and the other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice." The Task Force proposes using that language but with the additional requirement of at least two days' written notice.

### 4. Objections and Conferences Between Deponent and Counsel

Currently, provisions governing both the method for making objections to questions during a deposition and the permissibility of conferences between the deponent and his or her counsel are found in Rule 32 regarding the use of depositions in court proceedings. In particular, they are included in Rule 32(d)'s discussion of the effect of errors and irregularities in depositions, which mostly pertains to what one needs to do to preserve objections. The Task Force believes these provisions more appropriately belong in Rule 30(c), which governs the examination of a deponent. Notably, the federal counterpart to Rule 30(c) follows this approach. *See* Fed. R. Civ. P. 30(c)(2) ("An objection must be stated concisely in a nonargumentative and nonsuggestive manner.").

In addition to moving these provisions into Rule 30(c), the Task Force proposes a substantive amendment to the provision regarding conferences between a deponent and his or her counsel. The rule currently states, "Continuous and unwarranted conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited." Ariz. R. Civ. P. 32(d)(3)(E). The Task Force believes that conferences between deponents and their counsel when a question is pending should be permitted only if needed to protect a privilege. Accordingly, the Task Force proposes amending the provision to read, "The deponent and his or her counsel may not engage in continuous and unwarranted conferences off the record during the deposition. Unless necessary to preserve a privilege, the deponent and his or her counsel may not confer off the record while a question is pending."

## Rule 31. Depositions by Written Questions

The Task Force proposes various stylistic and organizational amendments to Rule 31. In addition, the Task Force proposes two substantive changes.

First, unlike Rule 30, Rule 31 currently includes no limits on those who may be deposed by written questions. The Task Force does not believe that such a distinction should be drawn between oral depositions and depositions by written questions. Accordingly, the Task Force proposes amending Rule 31 to presumptively limit its use to the same categories of people who may be deposed orally, namely parties, experts, and document custodians.

Second, the Task Force proposes amending Rule 31 to provide more guidance to parties regarding objections to written questions. Rule 31 currently has no provision regarding objections. Instead, parties need to turn to Rule 32(d)(3)(C), which provides that objections to written questions under Rule 31 are waived unless served in writing on the other party within certain stated time limits. To provide greater clarity and guidance, the Task Force proposes moving the requirements for objections into Rule 31, with Rule 32

amended to simply state that objections to written questions are waived unless served in accordance with Rule 31.

## Rule 32. Using Depositions in Court Proceedings

The proposed amendments to Rule 32 are stylistic and organizational in nature. With respect to organizational changes, two provisions currently found in Rule 32 would be moved to Rule 30. Rule 32 sets forth the effect of errors and irregularities in depositions and what needs to be done to preserve objections to those errors and irregularities. Currently, however, Rule 32 goes beyond this and also lays out in Rule 32(d)(3)(D) how objections to the form of questions are to be made (e.g., such objections are to be concise) and sets limits in Rule 32(d)(3)(E) on conferences between the deponent and counsel. Under the proposed amendments, these provisions (with some changes noted in the discussion above regarding Rule 30) would be moved to Rule 30(c). Given that these provisions relate directly to the procedures for examining deponents, the Task Force believes they belong in Rule 30, and moving them there is also consistent with the federal rules. *See* Fed. R. Civ. P. 30(c)(2) (stating that objections "must be stated concisely in a non-argumentative and non-suggestive manner").

## Rule 33. Interrogatories to Parties

The Task Force proposes various stylistic and organizational amendments to the rules governing interrogatories, namely Rules 33 and 33.1. Chief among the organizational amendments is the deletion of Rule 33.1, with the provisions regarding uniform interrogatories moved into Rule 33. In addition to these stylistic and organizational changes, the Task Force proposes four substantive changes.

### 1. Reduced Time for Responding to Interrogatories

To be consistent with federal practice, the Task Force proposes reducing the time for responding to interrogatories from 40 days to 30 days. *See* Fed. R. Civ. P. 33(b)(2) (30 days to respond to interrogatories). The Task Force sees no reasoned basis for giving parties greater time to respond to written discovery under the state rule than the federal rule. In fact, in many situations it makes little or no sense for a party to have more time to respond under the state rule. For example, while in federal cases parties can serve unlimited numbers of requests for production and requests for admission, such requests are presumptively limited under Arizona's rules. Yet Arizona's rules give an extra 10 days to respond. In addition, if a good reason exists for having more time to respond, a party would have a mechanism for gaining extra time under Rule 29, either by stipulation or by motion.

### 2. Simplifying Provisions for Exceeding Presumptive Limit of 40 Interrogatories

Rule 33.1 currently contains lengthy provisions discussing how a party may exceed the presumptive limit of 40 interrogatories. *See* Ariz. R. Civ. P. 33.1(b) (discussing stipulations to exceed the presumptive limit) & 33.1(c) (discussing obtaining leave of court to exceed presumptive limit). As discussed above with respect to Rule 29, the provisions in Rule 33.1 for exceeding the presumptive limit differ from the provisions currently found in Rules 34 and 36 for exceeding the presumptive limits of RFPs and RFAs. The Task Force accordingly proposes amending the provisions for exceeding the presumptive limit (and moving them into Rule 33) to simply provide, "Unless the parties agree or the court orders otherwise, a party may serve on any other party no more than 40 written interrogatories." Stipulations and motions to exceed the presumptive limit would then be governed by proposed amended Rule 29.

### 3. Interrogatory Answers by Entities

Members of the Task Force have encountered situations where entities use persons to verify their interrogatory responses who lack knowledge regarding the responses. A provision has accordingly been added to Rule 33 clarifying that "[i]f the answering party is a public or private entity, an authorized representative with knowledge of the information contained in the answers, obtained after reasonable inquiry, must sign them under oath." The Task Force believes that this amendment will help assure that the purpose behind Rule 33's verification requirement is better served. It should be noted, however, that the proposed amendment would not require the representative to have first-hand knowledge of the information. It would be sufficient (indeed, expected) that the representative's answers often would be based on what others within the entity have told him or her.

### 4. Objections to Interrogatories

The Task Force proposes amending Rule 33 to clarify that objections to interrogatories must be stated with specificity. This is already the stated requirement with respect to objections to RFPs in Rule 34 and likewise is found in the federal rule. *See* Ariz. R. Civ. P. 34(b) (requiring that responding party "identify the reasons for any objection" and to specify the part objected to if objection is only made to part of an item or category); Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity."). In addition, the Task Force proposes amending the rule to also provide that if an objection is stated, a party must still answer the interrogatory to the extent it is not objectionable. This change would prevent parties from avoiding answering any of an interrogatory merely by objecting to only part of it.

## Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

The Task Force proposes various stylistic and organizational amendments to Rule 34. In addition, the Task Force proposes four substantive changes.

### 1. Reduced Time for Responding to RFPs

As with its proposal regarding interrogatories, the Task Force proposes reducing the time for responding to RFPs from 40 days to 30 days. Again, this is consistent with federal practice, *see* Fed. R. Civ. P. 34(b)(2)(A) (30 days to respond to RFPs), and for the reasons discussed above in relation to Rule 33, the Task Force sees no reasoned basis for giving parties greater time to respond to written discovery under the state rule than the federal rule.

### 2. Simplification of Provisions for Exceeding Presumptive Limit of 40 Interrogatories

Again, as with its proposal regarding interrogatories, the Task Force proposes simplifying the provisions found in Rule 34 for exceeding the presumptive limit of 10 RFPs. The reasons supporting this change are discussed above with respect to Rules 29 and 33.

### 3. Objections

Effective December 1, 2015, Federal Rule 34 was amended to require an objecting party to state whether any responsive materials are being withheld on the basis of a stated objection. The reasoning behind this federal amendment is that when a party objects to an RFP but still provides some documents in response to the RFP, it can be difficult for the requesting party to determine whether anything is being withheld on the basis of the objection. The Task Force agrees with this reasoning and thus proposes incorporating this federal rule change into Arizona's Rule 34. Similarly, language would be added to clarify that a party objecting to part of a request must specify the objectionable part and permit inspection of the other requested materials. Again, this is consistent with the federal rule, and is also consistent with the Task Force's proposed change to Rule 33 whereby a party must answer an interrogatory to the extent it is not objectionable.

### 4. Production of ESI

As discussed above, the Task Force has proposed substantial amendments to Rule 26.1 regarding the disclosure and production of electronically stored information ("ESI"). Among those proposed amendments are procedures for determining the form of production of ESI under Rule 26.1. Consistent with those proposed changes to Rule 26.1, the Task

Force proposes amending Rule 34 to incorporate the same procedures for determining the form of production of ESI in response to an RFP.

## Rule 35. Physical and Mental Examinations

The proposed amendments are stylistic and organizational and effect no substantive change.

## Rule 36. Requests for Admission

The amendments to Rule 36 are primarily stylistic and organizational in nature. However, as with interrogatories and requests for production, the Task Force proposes reducing the deadline for responding to requests for admission to 30 days from the service of the requests, which, again, is consistent with federal practice. In addition, as with interrogatories and requests for production, the provision currently in Rule 36 regarding the procedures for exceeding the presumptive limit of 25 requests for admission would be deleted. In its place, the rule would simply provide that "[u]nless the parties agree or the court orders otherwise, a party may serve on any other party no more than 25 requests for admission." As discussed above with respect to interrogatories and requests for production, detailed provisions for modifying discovery limits are unnecessary in Rule 36 because the proposed amendments to Rule 29 would already control.

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

With two exceptions, the proposed amendments to Rule 37 are stylistic and organizational in nature. The two exceptions are: (1) the proposed replacement of the word "shall" with the word "may" with respect to a court sanctioning a party under Rule 37; and (2) the proposed amendment of Rule 37(g) to set forth detailed standards for preserving electronically stored information ("ESI") and the sanctions and remedies for failing to do so.

### 1. Clarifying Court's Discretion Regarding Sanctions

The current version of Rule 37 includes provisions stating that the court "shall" award fees as sanctions under various circumstances, namely:

a. upon granting or denying a motion to compel (Rule 37(a)(4));

b. upon a party's failure to obey a discovery order (Rule 37(b)(2));

c. upon a party's failure to disclose (Rule 37(c)(1)); and

d. upon a party's failure to attend his or her own deposition or to answer interrogatories or requests for production (Rule 37(f)).

Under Arizona case law, it is well-established that a trial court's award of sanctions under these provisions is discretionary and not mandatory. *See, e.g., Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 505-06, 200 P.3d 977, 1002-03 (App. 2008) (applying abuse of discretion standard to court's fee award for disclosure violation); *J-R Constr. Co. v. Paddock Pool Constr. Co.*, 128 Ariz. 343, 344, 625 P.2d 932, 933 (App. 1981) ("The trial court has broad discretion in imposing sanctions pursuant to rule 37(b)."). The Task Force therefore believes that, rather than amending the word "shall" to the mandatory "must" on these occasions, the word should be amended to the permissive "may."

**2. Inclusion in Rule 37(g) of Standards for Preserving ESI and the Remedies and Sanctions for Failing to Do So.**

Rule 37(g) would be amended to include provisions regarding the preservation of ESI. Consistent with the changes to Federal Rule 37(e) that became effective in December 2015, the proposed rule includes provisions regarding remedies and sanctions for the failure to preserve ESI. Like the newly amended federal rule, the proposed amended Rule 37(g) would not permit a court to enter a dismissal or default, or give an adverse inference instruction, if a party's loss of ESI resulted from negligence rather than intentional conduct.

Some differences, however, exist between the federal rule and the proposed state rule. Most importantly, a provision has been added requiring a finding of prejudice to the other party before a case can be dismissed or default entered based on a failure to preserve ESI. The Task Force believes this addition is consistent with existing Arizona case law. *See, e.g., Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 251, 955 P.2d 3, 7 (App. 1997) ("Without a hearing or a determination on the availability of any lesser sanctions and the nature and extent of harm destruction of the evidence caused [the other party], we cannot say dismissal of the action was appropriate or warranted in this case."); *Fleitz v. Van Westrienen*, 114 Ariz. 246, 250, 560 P.2d 430, 434 (App. 1977) ("Imposition of sanctions for failure to make discovery is within the discretion of the trial court," with the trial court to consider "the prejudice to [the other side] and the willfulness of [the party's] omission.").

In addition, the proposed amended rule includes provisions regarding a party's obligation to preserve ESI. These provisions are intended to restate existing law, and come from case law, comments to the federal rule, and the Sedona Conference guidelines on the discovery and protection of ESI. The amended federal rule includes these preservation standards in a comment to the December 2015 amendments to Rule 37(e). The Task Force believes the standards should be included within the rule itself.

## VI. TRIALS

### Rule 38. Right to a Jury Trial; Demand; Waiver

The proposed amendments to Rule 38 are stylistic only, with one exception relating to jury demands in medical malpractice actions. Rule 38 was amended in 2013 in connection with extensive amendments to Rule 16, to provide that a demand for a jury trial must be made "not later than the date on which the court sets a trial date or ten days after the date a Joint Report and Proposed Scheduling Order under Rule 16(b) or Rule 16.3 are filed, whichever first occurs." As a practical matter, because Rules 16(b) and 16.3 do not apply in medical malpractice actions, that amendment allowed jury demands in medical malpractice actions to be made as late as the date of the trial setting. To address this inadvertent gap, the Task Force proposes to add new subdivision (b)(2) to Rule 38, which would provide that a jury demand is presumed in medical malpractice cases, and that no written demand needs to be filed or served. The proposed amendment also would permit parties in medical malpractice cases to waive a jury trial by filing a written stipulation.

### Rule 38.1. Setting of Civil Actions for Trial; Postponements; Scheduling Conflicts; Dismissal Calendar

The proposed amendments are stylistic and organizational and effect no substantive change.

### Rule 39. Trial by Jury or by the Court

Current Arizona Rule 39 combines rules on jury trial demands with more generalized trial procedures that are unique to Arizona and have no counterpart in Federal Rule 39. The Task Force proposal would amend Rule 39 so that it conforms to Federal Rule 39. Unrelated provisions of current Rule 39—which generally relate to trial procedures or jury instructions—would be moved to other rules containing related subject matter. This would improve the clarity and structure of the rules and assist practitioners in locating provisions relating to particular subjects.

Highlights of the proposed Rule 39 changes include:

(1) Subdivisions (a), (j) and (m) of current Rule 39 would become subdivisions (a), (b) and (c), respectively, of Rule 39. This new structure would parallel that of Federal Rule 39. The text of these subdivisions also would be revised to correspond to the federal rule's language, with minor exceptions.

(2) Current Rule 39(n) ("Interrogatories when equitable relief sought, answers advisory") would be omitted from Rule 39 and moved to revised Rule 49(c) where it would appear with related provisions on juror interrogatories.

(3) Portions of Rule 39(d) on jury instructions would be moved to Rule 51(b) and (e), governing jury instructions and the record on instructions.

(4) The remaining subdivisions of current Rule 39 would be moved to Rule 40, with stylistic and substantive revisions as discussed with respect to proposed Rule 40, below.

**Rule 40. Trial Procedures**

The Task Force proposes to delete current Rule 40 ("Assignment of cases for trial") because it is unnecessary in light of the recent amendments to Rules 16 and 38 governing trial setting procedure. A new Rule 40 is proposed, governing "Trial Procedures," that incorporates portions of current Rule 39 governing trial procedures. Although extensive stylistic and clarifying changes are proposed to the language of the current Rule 39 subdivisions, no substantive changes are intended.

Current Rule 39.1 ("Trial of cases assigned to the complex litigation program") would be deleted. This rule currently provides that in complex actions, the court should adopt trial procedures as necessary to facilitate the just, speedy and efficient resolution of cases. The substance of this rule—which the Task Force concluded should apply to any trial proceeding—is incorporated in proposed Rule 40(b) on "Objectives."

Finally, current Rule 80(b), governing the exclusion of minors from trial, would be moved to proposed Rule 40(m) ("Excluding Minors from Trial"), so that appears in the same place as other provisions governing trial procedures.

**Rule 41. Dismissal of Actions**

The Task Force proposal restyles Rule 41, with no substantive changes. The restyling generally conforms to Federal Rule 41, with modifications required to retain Arizona's unique requirement that a stipulated dismissal requires an order.

**Rule 42. Consolidation; Separate Trials**

The Task Force proposes to divide current Rule 42 into three separate rules—Rule 42 ("Consolidation; Separate Trials"), Rule 42.1 ("Change of Judge as of as a Matter of Right"), and Rule 42.2 ("Change of Judge for Cause"). The proposal also deletes references to former subdivisions that were previously abrogated, deleted or renumbered.

Subdivisions (a) and (b) of current Rule 42 would be retained in proposed Rule 42, with minor stylistic revisions that conform (almost verbatim) to Federal Rule 42.

**Rule 42.1. Change of Judge as a Matter of Right**

**Rule 42.2. Change of Judge for Cause**

Current Rule 42(f), governing changes of judge as a matter of right and for cause, would be restructured and moved to new Rules 42.1 and 42.2, respectively. In addition to stylistic revisions, the Task Force proposes several substantive and clarifying changes to current Rule 42(f) governing a change of judge as of right. The Task Force believes that such changes are long overdue, as the ambiguities and inconsistencies in the current rule have spawned confusion and disputes since they were adopted.

(1) The proposed rule would allow each side one change of judge, defining the term "judge" to include commissioners and judges pro tem. [Proposed Rule 42.1(a) ("When Available")] In contrast, the current rule allows each side one change of judge and one change of court commissioner.

(2) The proposed rule would clarify that an "informal" request for change of judge—as allowed in current Rule 42(f)(1)(A)—is subject to the same content requirements, time limits and waiver provisions as a written notice under the rule. [Proposed Rule 42.1(b)(2) ("Oral Notice")]

(3) New proposed subdivision (c)("Time Limitations") would modify the deadline for noticing a change of judge as a matter of right. Under the current rule, notice is timely if filed at least 60 days before the date set for trial. As amended, the rule would require notice within 90 days after the party giving notice first appears in the case, with an additional 10 days allowed if an assignment identifies the judge for the first time within 10 days before this deadline expires or after it has expired. [Proposed Rule 42.1(c)(1)-(2)] This proposed amendment is intended to force parties to exercise their "strike" earlier rather than later, when a reassignment of a judge is likely to be the most disruptive to a case and the judiciary's case management system. Imposing a deadline early in a case also lessens the need to determine whether a party has already waived its rights under the rule—a subject that has generated a complex body of case law that both courts and practitioners have found confusing. The subdivision also would be amended to require that in cases where the right to change of judge is renewed following remand under Rule 42(e), notice of a change of judge must be filed within 15 days after issuance of the appellate court's mandate under Rule 24 of the Arizona Rules of Civil Appellate Procedure.

(4) The waiver provisions in proposed subdivision (d) provide that a party waives the right to change of a judge "assigned to preside over any proceeding in the action," if one of the specified events or acts occurs. The current rule's waiver provisions apply to a judge that is "assigned to preside at trial or is otherwise permanently assigned to the action." This proposed change would eliminate the uncertainty that sometimes exists

about whether a judge has been assigned "to preside at trial" or has been "permanently" assigned to an action. [Proposed Rule 42.1(d)]

(5) The proposed rule would clarify, consistent with case law, that a right to change of judge after remand by an appellate court under subdivision (e) (current Rule 42(f)(1)(E)) is not renewed if the party—or the side on which the party belongs—previously exercised its right to change of judge in the action. [Proposed Rule 42.1(e)] *See Smith v. Mitchell*, 214 Ariz. 78, 148 P.3d 1151 (App. 2006) (if "right to a change of judge was previously exercised, it is not renewed upon remand"); *Brush Wellman, Inc. v. Lee*, 196 Ariz. 344, 996 P.2d 1248 (App. 2000) (same).

The Task Force also proposes stylistic changes to the procedures governing a change of judge for cause, with no substantive change intended. Among other things, the proposed rule would add a procedure for opposing an affidavit seeking a change of judge for cause, a subject on which the current rule is silent. [Proposed Rule 42.2(e) ("Hearing and Assignment")] Although not currently in the rule, this addition is consistent with existing practice.

**Rule 43. Taking Testimony**

The Task Force proposes stylistic changes to conform Arizona's rule to Federal Rule 43, with some exceptions. Subdivision (e) proposes a substantive addition, based on Federal Rule 43(a), which would allow the contemporaneous transmission of witness trial testimony from a different location. The corresponding federal rule requires "compelling" circumstances for this to occur, but the Task Force modified this standard to allow such transmission for "good cause and with appropriate safeguards."

**Rule 44. Proving an Official Record**

The Task Force proposal would amend Rule 44 to conform to Federal Rule 44, with minor exceptions. Certain provisions of Arizona's current rule that have no federal counterpart, but are covered by the Arizona Rules of Evidence, would be eliminated. Highlights of the proposed changes include:

(1) Subdivisions (a) through (c) would be revised to conform to Federal Rule 44(a) through (c), with minor revisions to improve clarity.

(2) Subdivision (d) [(k) in the current rule], governing proof of the appointment of a guardian, executor or administrator, has no federal counterpart. It would be retained with only minor revisions. The language would be updated to include personal representatives and conservators, consistent with current Probate Code terminology.

(3) Subdivisions (c) and (d) of the current rule, addressing proof of notarized documents and handwriting authentication, would be deleted because they are unnecessary. These topics are already covered by the Arizona Rules of Evidence.

**Rule 44.1. Determining Foreign Law**

The Task Force proposes stylistic changes to conform Arizona's rule to Federal Rule 44.1, with one exception. As revised in 2007, Federal Rule 44.1 omitted the express requirement that a party intending to raise an issue of foreign law must give "reasonable" written notice. The Task Force proposal retains this requirement, requiring a party to give "reasonable written notice, filed with the court."

**Rule 45. Subpoena**

The Task Force proposes stylistic changes to conform the language and structure of Arizona's rule to Federal Rule 45 where applicable. Unique aspects of Arizona's rule relating to requirements for objecting to, and moving to quash, a subpoena would be retained with only stylistic revisions.

The Task Force proposes substantive additions relating to the production of electronically stored information ("ESI") in response to a subpoena. Arizona's current Rule 45 is silent regarding the production of ESI. The Task Force proposal incorporates the substance of Federal Rule 45(b)(2)(E)(ii) governing the production of ESI in response to a subpoena. [Proposed Rule 45(c)(2)(A) through (C)] Corresponding changes will be proposed to Rule 84, Form 9 ("Subpoenas").

**Rule 45.1. Interstate Depositions and Discovery**

Rule 45.1 is based on the Uniform Interstate Depositions and Discovery Act. When adopted in 2013 in Arizona, the rule departed in some respects from the Uniform Act. The Task Force proposes stylistic, clarifying and substantive changes to Rule 45.1. Key changes would include:

(1) Subdivision (b) would be amended to eliminate the current rule's mandatory requirement—which is unique to Arizona and not part of the Uniform Act—that a foreign subpoena include below the case number the specific phrase: "For the Issuance of an Arizona Subpoena Under Ariz. Rule Civ. P. 45.1." Instead, the rule would provide only that the phrase "should" be included, which is intended to address concerns that some foreign jurisdictions may not permit form subpoenas to be altered. Where possible, the phrase should be included on the out-of-state subpoena presented to the clerk to alert the clerk to the basis for the request, but a subpoena issued without the phrase is still valid and enforceable.

(2) Substantive changes are proposed to subdivision (d) ("Deposition, Production and Inspection"). Arizona's current Rule 45.1, consistent with the Uniform Act, provides that discovery taken under Rule 45.1 is subject to all of Arizona's discovery rules. The Task Force felt that some of Arizona's unique limits on discovery should not be applied to discovery under Rule 45.1, but rather, should be governed by the rules of the foreign jurisdiction where the action is pending. The proposal modifies the current rule to provide that the following Arizona rules would not apply: (A) Arizona Rule 30(a)(1) (as proposed), which presumptively disallows depositions of third parties other than custodians of records; (B) Arizona Rule 30(a)(2) (as proposed), which precludes parties from taking depositions less than 30 days after serving the complaint; and (C) Arizona Rule 30(d)(1) (as proposed), which limits depositions to 4 hours on a single day absent agreement by the parties or a court order. The Task Force concluded that the rules of the foreign jurisdiction should govern when depositions may be taken, who may be deposed, and the length of depositions taken in the foreign action. The Task Force proposal provides that Arizona Rule 30(c)(2), which governs objections, would apply to depositions in out-of-state cases, except that an objector would be permitted to object in the manner required "to preserve objections in the jurisdiction where the action is pending," even if that goes beyond what is allowed under Arizona's rules.

(3) Subdivision (e) ("Objections, Motion to Quash or Modify; Seeking Protective Order") would be clarified to state that objections to a subpoena commanding attendance at a deposition must be made by timely motion under Rule 45(e)(2), and that a person properly served with a deposition subpoena must otherwise attend at the specified date, time and place. This would align Rules 45 and 45.1 and clarifies that the same requirements for objecting to a deposition subpoena apply whether the subpoena is issued under Rule 45 or Rule 45.1.

**Rule 46. Objecting to a Ruling or Order**

The Task Force proposes stylistic changes to conform Rule 46 to its federal counterpart, with minor alterations to the federal language to improve clarity.

**Rule 47. Jury Selection; Juror Information; Voir Dire; Challenges**

Rule 47 is unique to Arizona, with no federal counterpart. The rule's current language is outdated in many respects. For example, it provides that the clerk shall deposit the names of jurors in a "box" and shall "draw from the box as many names as the court directs." The Task Force proposes extensive stylistic revisions, including modernizing the rule's language to reflect current practice, reorganizing the rule's topics and adding subdivisions to promote clarity. No substantive change is intended. Former subdivision (g) on juror notebooks would be deleted from Rule 47 and be moved to Rule 40(f)(2). The language in new Rule 47(f) on alternate jurors would clarify the current rules to take into account that the identity of the alternates is not determined until the end of trial.

## Rule 48. Stipulations on Jury Size and Verdict

The Task Force proposes stylistic and organizational changes to Rule 48, dividing the rule into new subdivisions (a) and (b). The rule's heading would be changed to be more descriptive of its content. No substantive change is intended.

## Rule 49. Special Verdict; General Verdict and Questions; Proceedings on Return of Verdict; Form of Verdict

The Task Force proposes stylistic and organizational changes to Rule 49, with no intended substantive change. Current subdivisions (g) and (h) would be reordered as subdivisions (a) and (b), to correspond with Federal Rule 49(a) and (b). The language of the federal rule would be adopted with only minor alterations.

The balance of Arizona's rule is unique to Arizona, with no federal counterpart. Key changes would include:

(1) Subdivision (c) ("Written Questions in Actions Seeking Equitable Relief") would be moved from its current location in Rule 39(n), with stylistic changes.

(2) Current subdivisions (a) and (b) of Rule 49 would be moved to subdivisions (d) and (e), and restructured to add subheadings and subdivisions for clarity. The polling provisions that currently appear in Rule 49(f) would be moved to Rule 49(e)(2). Subdivision (e)(1), governing procedures once a verdict is returned, would be clarified to provide that the court must poll the jury if a juror states that it disagrees with the verdict as read by the clerk. Depending on the outcome of the polling, the court would have the authority to send the jury back for further deliberations or to order a new trial.

(3) New subdivision (f) would combine current subdivisions (c), (d), and (e) of the current rule, all pertaining generally to the form of verdict. The current provisions would be combined under a single subdivision with headings and subheadings, with stylistic revisions for clarity.

## Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

The Task Force proposal adopts the language of Federal Rule 50, with minor departures as noted below. No substantive change is intended.

A major difference between Federal and Arizona Rule 50 is the time period in which a motion for judgment as a matter of law must be renewed. Under Arizona's rule, the time period is 15 days after entry of judgment. The 2009 federal amendments extended the time period under the federal rule from 10 to 28 days. The Task Force proposes to retain

Arizona's 15-day period, which should be adequate in most state court cases. Arizona's Rule 6(b) also is more permissive than Federal Rule 6(b), allowing the court to extend the period in limited circumstances. The Task Force also proposes modifying certain language in Federal Rule 50(b) that is currently unclear, relating to when a movant may file a renewed motion for judgment as a matter of law.

Finally, a new sentence is added to Rule 50(b) to clarify that the 15-day deadline for filing a renewed motion for judgment as a matter of law and any alternative request for a new trial "may not be extended by stipulation or court order, except as allowed by Rule 6(b)(2)." Similar clarifying changes are proposed to Rules 52(b), 59(b)(1), (c) and (d), and 60(c). Although this limitation exists in current and proposed Rule 6, recent appeals court memorandum decisions illustrate that the omission of this important limitation in Rule 50 and the related rules is a "trap" for practitioners. *See Black v. BNSF Ry. Co.*, No. 1 CA-CV 14-0419, 2015 WL 5935367 at *3 ¶11 (Ariz. App. Oct. 13, 2015) (mem. dec.) (failure to timely file a new trial motion was not "excusable" under Rule 60(c) because counsel should have known that Rule 6(b) barred a trial court from extending the time in which to file the motion).

**Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error**

Stylistic and organizational changes are proposed to conform Arizona's rule to Federal Rule 51, while still preserving some unique aspects of Arizona's rule. Arizona's current rule has two subparts, Rule 51(a) and (b). The Task Force proposal would restructure the rule to conform more closely to Federal Rule 51, which has subparts (a) through (d).

The Task Force also proposes one substantive change in the current state rule—it would incorporate the substance of Federal Rule 51(b)(2) and (c)(2)(A), which together require objections to jury instructions to be made "before the instructions and arguments are delivered" to the jury. Arizona's current Rule 51 seemingly allows objections to be made even after the court instructs the jury and after closing argument ends, providing that: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection." The Task Force concluded that there was some benefit to a uniform federal and state rule governing the timing of objections to jury instructions, and that the federal approach is preferable because it gives the court the opportunity to correct a potentially erroneous instruction before it is given to the jury and incorporated into the parties' closing arguments.

Finally, the Task Force proposes to incorporate Arizona's case law doctrine of "fundamental error" into a new Rule 51(d)(2). *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (fundamental error doctrine in civil cases "may be limited" to deprivation of a constitutional right); *Moser v. Mardian Constr.*

*Co.*, 20 Ariz. App. 27, 30, 509 P.2d 1064, 1067 (1973) (fundamental error doctrine should be "sparingly applied" in civil cases). Federal Rule 51(d)(2) provides that: "A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights." Because Arizona's case law on "fundamental error" may differ in some respects from the federal doctrine of "plain error," the Task Force modified the federal rule's language to provide that "[a] court may consider a fundamental error as allowed by law, even if the error was not preserved."

**Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings**

The Task Force proposal incorporates the language of Federal Rule 52, with the following exceptions:

(1) Currently, Arizona Rule 52(a) requires the court to find facts specially and state separately conclusions of law only "if requested before trial." This "request" requirement also appears in Rule 52(c), which governs a judgment on partial findings. In contrast, Federal Rule 52(a)(1) provides that the court "must" make findings of fact and state conclusions of law in all cases tried without a jury or with an advisory jury. The Task Force proposal departs from the federal approach, and would maintain this unique provision of Arizona law because it serves an important purpose—to reduce the burden on the judiciary of having to make such findings in matters where the parties themselves do not feel that findings are necessary. State court judges handle a much higher volume of small cases than do the federal courts, making a requirement of findings in all cases unnecessarily burdensome.

(2) Subdivision (d) of Arizona's current Rule 52 ("Submission on Agreed Statement of Facts") does not have a federal counterpart. The Task Force proposes simplifying the rule's language to make it easier to understand. The last sentence of the current rule would be deleted because it seems to suggest, erroneously, that the agreed statement and the judgment constitute the entire record on appeal. The Task Force also proposes deleting the current rule's requirement that the court "certify" the statement as "correct," because it is unclear and does not conform to current practice.

(3) The Task Force proposal would retain in Rule 52(b) Arizona's requirement that a motion for amended or additional findings must be made no later than 15 days after the entry of judgment. In contrast, Federal Rule 52(b) allows 28 days for such a motion. Similar to the new language proposed in Rule 50(b), a sentence is added to alert practitioners that the time for filing such a motion can only be extended as allowed by Rule 6(b)(2).

**Rule 53. Masters**

The Task Force does not propose any substantive changes to Rule 53. Stylistic and organizational changes are proposed to clarify the rule and, where it is possible to do so without altering substance, to conform it to the structure and language of the federal rule. Unique aspects of Arizona's Rule 53—which are largely the product of rule petitions filed in 2005, 2011 and 2015 to address issues of concern in Arizona—are preserved.

## VII. JUDGMENT

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

The Task Force proposes stylistic, clarifying and substantive changes to Rule 54. Highlights of the proposed substantive and clarifying changes are as follows:.

(1) Subdivision (a) would be amended to expressly state that "no judgment is final unless it recites that it is entered under Rule 54(b) or (c)." Similar language would be added to subdivisions (b) and (c). These changes clarify the current rule, which does not explicitly require that a final judgment state that it is entered under Rule 54(b) or (c). Subdivision (a) would also be amended to define the term "decision" as used in the rule, which is important for determining the deadline for filing a request for costs under Rule 54(f) or a motion for fees under Rule 54(g).

(2) The Task Force proposes to delete last sentence of subdivision (b)—providing that "for purposes of this subsection, a claim for attorneys' fees may be considered a separate claim from the related judgment regarding the merits of a cause." This sentence was added to the rule in 1999 to allow a trial court to certify a final judgment under Rule 54(b) without first determining fees, changing the result in *Trebiloox v. Brown & Bain, P.A.*, 133 Ariz. 588, 653 P.2d 45 (App. 1982) (holding that trial court lost jurisdiction to award fees on appeal of Rule 54(b) judgment). Because the Task Force's proposal limits the circumstances in which a final judgment may be entered without first determining fees, this issue should arise less frequently under the amended rule. The Task Force's proposal includes a proposed new subdivision (i)(2) on "Jurisdiction," which provides that the trial court retains jurisdiction to award fees and costs so long as a motion and/or request is timely filed under the rule.

(3) The Task Force proposes stylistic and substantive amendments to Rule 54(f), governing costs. The current rule requires a party seeking costs to file and serve its statement of costs within 10 days after entry of a final judgment. This timing is dictated by A.R.S. § 12-346, which provides that a statement of costs must be filed and served within 10 days after judgment. The Task Force has recommended a legislative change to delete this statute, on the rationale that the timing for seeking costs is better left to court rule, and should generally take place before judgment is entered, and not after it is entered.

This eliminates the inefficient, piecemeal appeals that sometimes result from the current rule, which allows a separate judgment for costs. Highlights of the proposed amendments to subdivision (f) include:

(a) A prevailing party seeking both fees and costs must file its request for costs at the same time as the motion for fees under Rule 54(g). [Proposed Rule 54(f)(1) ("Time for Filing Request if a Motion for Attorney's Fees is Filed")]

(b) If a decision adjudicates all claims in the case and final judgment is to be entered under Rule 54(c), a request for costs must be filed within 20 days after the decision is filed. [Proposed Rule 54(f)(2)(A) ("Rule 54(c) Judgments")]

(c) For decisions subject to Rule 54(b), the time for requesting costs differs according to whether the decision adjudicates *all* claims or liabilities of a party, or adjudicates *fewer* than all claims or liabilities of a party. [*Compare* Proposed Rule 54(f)(2)(B) *with* 54(f)(2)(C)] If a decision subject to Rule 54(b) adjudicates all claims or liabilities of a party (with the result that the party would effectively be out of the case), a request for costs must be filed within 20 days after any motion or proposed form of judgment seeking entry of judgment under Rule 54(b) is served. [Proposed Rule 54(f)(2)(B)(i)] If the court declines to grant Rule 54(b) treatment, or if no party seeks Rule 54(b) certification, then the request for costs may be deferred until the conclusion of the action. [Proposed Rule 54(f)(2)(B)(ii)] Similarly, if a decision or Rule 54(b) judgment does not adjudicate all claims or liabilities of a party, the prevailing party may defer seeking costs until the conclusion of the action. [Proposed Rule 54(f)(2)(C) (request must be filed "no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first")]

(d) Finally, the Task Force draft proposes to amend Rule 54(f)(2)(D) to clarify that if a party objects to a request for costs, the party seeking costs may file a reply. The current rule is silent on whether a reply is allowed, but the judges on the Task Force felt that a reply would facilitate the court's rulings on objections to cost requests.

(4) Rule 54(g)(1) would be amended to provide that a claim for attorney's fees must be made in the pleadings "*or in a Rule 12 motion filed before the movant's responsive pleading*." The italicized language, which does not appear in the current rule, codifies the holding of *Balestrieri v. Balestrieri*, 232 Ariz. 25, 28 ¶ 11, 300 P.3d 560, 563 (App. 2013). In *Balestrieri*, the court of appeals rejected a strict interpretation of Rule 54(g)—which by its terms requires a claim for fees to be made "in the pleadings"—holding that a fee request made in a motion to dismiss (in lieu of a responsive pleading) satisfied the rule's requirement. In addition, the Task Force proposal deletes a portion of Rule 54(g)(3) allowing the trial court to refer issues relating to the value of services to a special master under Rule 53. The Task Force concluded that the determination of attorney's fees should not be referred to a master, but should be decided by the court.

(5) The Task Force also proposes amendments that would clarify the deadline for filing a motion for attorney's fees under Rule 54(g), similar to the amendments proposed to Rule 54(f) on costs. Rule 54(g)(1) now provides that a "motion for attorneys' fees shall be filed within 20 days from the clerk's mailing of a decision on the merits of the cause." The current rule does not define what constitutes a "decision on the merits of the cause." It also fails to adequately distinguish between decisions on the merits that will result in a final judgment under Rule 54(c) or 54(b), and other decisions on the merits that will not result in a final judgment and/or that only partially dispose of issues or claims. As to the latter, Rule 54(b) provides that such decisions are "subject to revision at any time," which makes a determination of fees premature. Additionally, for decisions that do not finally adjudicate all the claims in the action, or all claims or liabilities of a particular party in the action, determining who is a "prevailing party" for purposes of a fee award may well depend on the outcome of one or more remaining claims. The Task Force thus proposes different deadlines depending on the nature of the decision:

(a) If a decision adjudicates *all* claims in the action and judgment is to be entered under Rule 54(c), a motion for fees must be filed within 20 days after the decision is filed. [Proposed Rule 54(g)(2)]

(b) If a decision subject to Rule 54(b) adjudicates *all* claims or liabilities of a party (with the result that the particular party would effectively be out of the case), a motion for attorney's fees must be filed within 20 days after any motion or proposed form of judgment seeking entry of judgment under Rule 54(b) is served. If the court declines to grant Rule 54(b) treatment, or if no party seeks Rule 54(b) certification, then the motion for fees may be deferred until the conclusion of the case. [Proposed Rule 54(g)(3)(A)(ii) (in such a case, the motion must be filed "no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first")]

(c) Finally, if a decision subject to Rule 54(b) adjudicates *fewer* than all claims or liabilities of a party, the motion for fees also may be deferred until the conclusion of the case. [Proposed Rule 54(g)(3)(B) (motion must be filed "no later than 20 days after any decision is filed that adjudicates all remaining claims in the action, or 20 days after the action's dismissal, whichever occurs first")]

(6) The Task Force also proposes to modify Rule 54(g)(4) to provide that a movant's affidavit "must disclose the terms of any fee agreement for the services for which the claim is made." Federal Rule 54 contains a similar requirement, providing that a party must "disclose, if the court so orders, the terms of any agreement about fees for the services for which a claim is made." Arizona's current rule does not contain any such requirement. The Task Force believes that a mandatory disclosure requirement with respect to the "terms" of the fee agreement will expedite the fair resolution of claims for fees, and is

preferable to the federal approach, which imposes a greater burden on the judiciary by requiring a special request and order of the court to obtain such disclosure.

(7) The Task Force proposes to amend Rule 54 to add new subdivision (h), titled "Proposed Forms of Judgment," which incorporates portions of Rule 58 on the same topic. Proposed Rule 54(h) would provide that—except as otherwise allowed by Rule 54[1]—claims for attorney's fees and costs must be resolved before final judgment is entered, and the amount of such costs and fees must be included in the final judgment. Any proposed form of judgment must either state the amount of fees or costs awarded by the court, or include a blank where those amounts can be added by the court.

(8) The Task Force proposes to amend Rule 54 to add new subdivision (i), titled "Jurisdiction; Scope." Subdivision (i)(1) would be amended to incorporate the provisions of current Rule 54(g)(4), with stylistic revisions. Subdivision (i)(2) would be added to incorporate the substance of the last sentence of current Rule 54(b), recognizing that the court retains jurisdiction to award fees and costs following appeal of a Rule 54(b) final judgment that adjudicates fewer than all the claims or liabilities of a party, so long as a timely motion and request for costs and fees is made under Rules 54(f) and (g), respectively.

**Rule 55. Default; Default Judgment**

The Task Force proposes stylistic, organizational and clarifying changes to Rule 55. Rule 55(f) ("Judgment when service by publication; statement of evidence") would be deleted because it is unnecessary.

One substantive change is proposed, establishing the minimum content of a default application in new subdivision (a)(2). The current rule is silent on those requirements, leaving it to local rule or practice. The proposed rule would require that the application must, at minimum, identify the party against whom default is sought; state that the party has failed to timely plead or defend; provide a current mailing address if known; identify any attorney known to represent the party in the matter or a related matter; and attach a copy of the Rule 4(g) certificate of service. In addition, if the address of the party claimed to be in default, or the identity and address of an attorney known to represent the party in the action or a related action are not known, the application must so state. The proposed rule would establish the minimum content for a default application but would not preclude local courts from adopting supplemental requirements. The Task Force recognizes that

[1] As noted above in the discussion of Rule 54(g), a Rule 54(b) final judgment that adjudicates ***fewer*** than all claims or liabilities of a party need not address attorney's fees or costs at the time it is entered, allowing those items to be determined later. Thus, in that instance, the final judgment and proposed form of judgment would not be required to include an amount for fees and costs. [*See* Proposed Rule 54(g)(3)(B)]

local court clerks may need to impose additional requirements—for example, Maricopa County has a default judgment "checklist" that requires additional information.

The rule would be clarified to specify (in new subdivision (a)(3)(C)) that notice of the application for default under Rule 55(a)(3)(A) or (B) must be mailed on the date that the application is filed, "or as soon as practicable after its filing." The current rule does not specify when the notice must be given. The purpose of this amendment is to ensure that a party claimed to be in default, or its attorney, receive any required notice at the earliest practicable time.

**Rule 56. Summary Judgment**

Rule 56 was amended in significant respects in 2013. Those amendments adopted some of the 2007 federal stylistic revisions, while retaining other unique aspects of Arizona's rule. For example, subdivision (c)(3) of Arizona's rule addresses the requirements for supporting and opposing statements of fact, which have no counterpart in Federal Rule 56. The Task Force proposal retains the substance of the 2013 amendments, but proposes stylistic changes to simplify the rule. Some of the subdivisions of the current rule would be reordered to conform to the structure of Federal Rule 56.

In addition to stylistic improvements, subdivision (c)(2) is modified to eliminate provisions governing stipulated or court-ordered extensions of briefing schedules. Those provisions of the former rule pre-dated the adoption of Rule 7.1(g), which now provides uniform procedures governing and limiting the extension of briefing schedules on motions. Rule 7.1(g)'s provisions apply to motions for summary judgment under Rule 56. The structure of Rule 56(c)(3) also would be modified to add subdivisions and headings, consistent with the federal rule stylistic conventions. Portions of current subdivision (e), governing the form of affidavits, would be moved to subdivision (c)(5) and (6), to conform more closely to the federal rule's structure.

Subdivision (f) of the current rule would be moved to subdivision (d), to conform to the federal rule's structure. The Task Force proposal also would incorporate into the rule's text the factors identified in Arizona's case law for obtaining Rule 56(f) relief. [Proposed Rule 56(d)(1)(A)] *See Simon v. Safeway, Inc.*, 217 Ariz. 330, 173 P.3d 1031 (App. 2007) (setting forth factors). Currently, those factors are referenced in the Comment to Section (f) of the 2013 Amendments. The Task Force concluded that placing the factors in the rule would assist practitioners, ensuring that Rule 56(d) affidavits meet minimum requirements. In addition, subdivision (d)(1)(B) would specify that a request for Rule 56(d) relief be accompanied by "a certification of the party's efforts to resolve the matter as required by [new] Rule 7.1(h)." This proposed change is not substantive (as the current rule requires good faith personal consultation) and is intended to align Rule 56's requirements with new Rule 7.1's standardized provisions governing good faith consultation required under various rules.

**Rule 57. Declaratory Judgment**

The Task Force proposes stylistic changes to Rule 57, adopting the language of Federal Rule 57 with minor exceptions. The Task Force proposal would delete language in the current rule specifying that Rules 38 and 39 govern jury trial demands in declaratory judgment actions. The Task Force concluded that these cross-references were not necessary, as the rule itself generally provides that the rules of civil procedure apply in declaratory judgment actions. The proposal also omits an inapplicable reference to a federal statute contained in Federal Rule 57.

**Rule 57.1. Declaration of Factual Innocence**

The Task Force proposes various stylistic changes to Rule 57.1. No substantive changes have been made.

**Rule 57.2. Declaration of Factual Improper Party Status**

The Task Force proposes various stylistic changes to Rule 57.1. No substantive changes have been made.

**Rule 58. Entering Judgment**

The Task Force proposes stylistic, organizational and substantive amendments to Rule 58. The provisions of Rule 58(c), addressing the enforcement of judgments and special writs, would be relocated to Rule 69, governing procedures on execution. Rule 58(e), governing notice of entry of judgment, would be relocated to Rule 58(c). And Rule 58(b), governing remittitur and related topics, would be relocated to Rule 58(d). In addition to these and other stylistic changes throughout the rule, the following changes are proposed:

(1) The Task Force proposes to relocate portions of current Rule 58(a), addressing the inclusion of costs and fees in forms of proposed judgment, to Rule 54(h). To enhance clarity, subdivision (a)(1) proposes to add a new cross-reference to Rule 5.1(d) which contains other formatting requirements for proposed judgments, and to Rule 54(b).

(2) The Task Force proposes to move the provisions of Rule 58(d), governing objections to the form of judgment, to Rule 58(a)(2). In addition to stylistic changes, one substantive change is proposed in Rule 58(a)(2). Rule 58(d)(1) now allows a court to immediately enter a judgment "other than for money or costs," or a judgment denying all relief, without waiting five days after service of a proposed form of judgment. The Task Force proposes to amend the rule to eliminate this exception, so that the five-day waiting period will apply to all judgments (subject to certain exceptions as set forth in Rule 58(a)(2)(A)(i) through (iii)).

(3) The Task Force proposes to combine portions of current Rule 58(a) and (e), governing the manner of entering judgments and the date of entry of judgment, into proposed subdivision (b), titled "Entering Judgment." With respect to minute entries, current Rule 58(e) provides that "the date of entry shall be the date on which the clerk affixes a file stamp on the minute entry." The proposed amendment treats minute entries like other judgments, providing that they are effective on filing: "A judgment, including a judgment in the form of a minute entry, is entered when the clerk files it." [Proposed Rule 58(b)(2)(A) ("Time and Manner of Entry; Generally")] With respect to habeas corpus proceedings, the current language provides that a judgment is final when "entered in the minutes of the court." The Task Force draft clarifies that language, providing that: "A judgment in habeas corpus proceedings need not be signed, and is final when set forth in a minute entry that is filed." [Proposed Rule 58(b)(2)(B)] *See Maricopa Cty. Juvenile Action No. JS-8441*, 174 Ariz. 341, 849 P.2d 1371 (1992) (noting ambiguity of phrase "'entered in the minutes' of the court," where minute entry had multiple dates on its face).

(4) Current subdivision (e), which addresses the clerk's distribution of minute entries generally, is misplaced. The Task Force proposes to relocate this subdivision to proposed Rule 80(h), which would address the general topic of minute entries and electronic distributions by the clerk.

**Rule 59. New Trial; Altering or Amending a Judgment**

The proposed changes to Rule 59 are primarily stylistic and organizational, with one substantive change. The proposal generally would conform Arizona's rule to Federal Rule 59, but it retains some unique aspects of Arizona's current rule.

A substantive change is proposed in subdivision (f)(2), relating to the trial court's conditional grant of a new trial where damages are either excessive or insufficient. The current rule provides (in Rule 59(i)(2)) that the party adversely impacted by the trial court's order may file a statement consenting to the modified damage amount. In that case, if the opposing party appeals, the consenting party may cross-appeal, but "the perfecting of a cross appeal" is "deemed to revoke the consent." The Task Force felt that the current rule unfairly penalizes the cross-appealing party. One of the primary reasons for consenting to a remittitur or additur is the hope of thereby ending the litigation and avoiding an appeal by the moving party. If, despite the opposing party's consent, the moving party nevertheless perfects an appeal, the consenting party should have the right to cross-appeal while preserving its consent if the trial court's order is affirmed on appeal. Thus, the proposed amendments would eliminate the current rule's provision that a cross-appeal is "deemed to revoke" the consent, providing instead that "[i]f the court's ruling on damages is affirmed, the party's prior acceptance will remain in effect, unless the appeal's final disposition requires otherwise."

In addition to this substantive change, proposed clarifying amendments include:

(1) A new subdivision (a), specifying that the rule governs motions for a new trial or to alter or amend a judgment following "a trial, the grant of summary judgment, or other proceeding that results in a final judgment." This language conforms to established Arizona case law holding that a motion for new trial is appropriate following the grant of summary judgment and in other circumstances resulting in a final judgment. *See Watts v. Medicis Pharm. Corp.*, 236 Ariz. 511, 342 P.3d 847 (App. 2015) (Rule 59 motion following dismissal under Rule 12(b)(6); citing cases); *Maganas v. Northroup*, 112 Ariz. 46, 537 P.2d 595 (1975) (Rule 59 motion following grant of summary judgment); *J-R Constr. Co. v. Paddock Pool Constr. Co.*, 128 Ariz. 343, 625 P.2d 932 (App. 1981) (Rule 59 motion following dismissal for failure to comply with discovery order). Subdivision (a)(1) would retain the current rule's list of specific grounds supporting a new trial, with only stylistic revisions. This list is not contained in the federal rule.

(2) Subdivision (b) would clarify that Rule 7.1 governs responses and replies to a motion for new trial. The current rule is silent on this subject.

(3) A new sentence would be added to subdivisions (b)(1), (c) and (d), specifying that the deadline for moving for a new trial, or to alter or amend a judgment, may not be extended by stipulation or court order. This limitation is contained currently in Rule 6(b)(2), but recent appeals court memorandum decisions illustrate that the omission of this important limitation in Rule 59 itself is a "trap" for practitioners. *See, e.g., Black v. BNSF Ry. Co.*, No. 1 CA-CV 14-0419, 2015 WL 5935367 at *3 ¶ 11 (Ariz. App. Oct. 13, 2015) (mem. dec.) (failure to timely file a new trial motion was not "excusable" under Rule 60(c) because counsel should have known that Rule 6(b) barred a trial court from extending the time in which to file the motion).

**Rule 60. Relief from Judgment or Order**

The Task Force proposes changes to Rule 60 to make it conform more to its federal counterpart. Rules 60 (a) through (d) were combined into one rule to conform to Federal Rule 60. Former Rules 60(b) and (d) which are not in the federal rules are now proposed Arizona Rules 60(e) and (f). The Task Force recommends retaining the Arizona six-month deadline instead of adopting the federal rule's one-year deadline. Finally, a sentence is added to Rule 60(c) specifying that the deadline for moving for a new trial may not be extended except as allowed by Rule 6(b)(2).

**Rule 61. Harmless Error**

The Task Force recommends revising this rule to adopt the language of this rule's federal counterpart. No substantive changes result from doing so.

### Rule 62. Stay of Proceedings to Enforce a Judgment

The Task Force proposes various stylistic and organizational amendments to Rule 62. Some of the provisions peculiar to the current Arizona rule were retained and references to federal judges and/or federal law were removed.

### Rule 63. Judge's Inability to Proceed

The Task Force recommends adopting language of the federal counterpart to this rule. There are no substantive differences between the federal rule and the current Arizona rule.

## VIII. PROVISIONAL AND FINAL REMEDIES; SPECIAL PROCEEDINGS

### Rule 64. Seizing a Person or Property

The Task Force recommends adoption of the federal rule with minor changes. There are no substantive differences with the current Arizona rule.

### Rule 64.1. Civil Arrest Warrant

The Task Force generally proposes amendments that are stylistic only and effect no substantive change. To resolve a recurring issue, however, the Task Force also proposes clarifying in the rule that it does not create substantive rights and merely prescribes procedures.

### Rule 65. Injunctions and Restraining Orders

The Task Force proposes stylistic, organizational and clarifying changes to Rule 65. The language and structure of Federal Rule 65 would be adopted in part, but unique aspects of Arizona's rule would be retained. No substantive change is intended. Highlights of the proposed amendments include:

(1) Subdivision (a)(2), governing consolidation of a preliminary injunction hearing with a trial on the merits, would be amended to clarify that such consolidation requires reasonable notice to the parties. In addition, if consolidation is ordered after the preliminary injunction hearing has begun, the court may continue the matter if necessary to allow adequate time for the parties to complete discovery. Although not explicit in the current rule, these protections are consistent with existing practice.

(2) Subdivision (b)(1)(A) would be amended to clarify that issuance of a temporary restraining order without notice is appropriate if specific facts are presented to

show that "prior notice will likely cause the defendant to take action resulting in" immediate and irreparable injury, loss or damage. This exception is intended to address the circumstance here the fact of giving notice, by itself, is likely to cause the responding party to take steps that will cause irreparable harm to a movant.

(3) Subdivision (f), titled "Procedure for Obtaining Sanctions; Order to Show Cause," would restructure and clarify the provisions of current subdivision (j). New subdivision (f)(1) would clarify that the court may issue sanctions for civil contempt, "or for criminal contempt as allowed by law," against a party or person who violates an injunction. The current rule does not distinguish between civil and criminal contempt, and simply allows a general sanction of "contempt." Because the sanction of criminal contempt is subject to Arizona statutory and decisional law, the amendment would clarify that any sanction of criminal contempt must meet the requirements of applicable substantive law. *See, e.g.*, A.R.S. §12-861 to -863 (defining criminal contempt and specifying procedures).

(4) Subdivision (f)(5) would be amended to clarify that the court "need not hold an evidentiary hearing unless there is a genuine dispute of material fact." This provision conforms to federal law, which recognizes that an evidentiary hearing is required only if there is a genuine factual dispute. *See Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 77 (1st Cir. 2002) ("'party has a right to an evidentiary hearing in a civil contempt proceeding only if, and to the extent that, genuine issues of material fact exist'") (citation omitted). This subdivision also is amended to specify, consistent with A.R.S. § 12-863, that a jury trial may be required before a sanction of criminal contempt is ordered.

(5) Subdivision (f)(6) would be amended to clarify that before a person is filed or jailed for civil contempt, the court must allow an opportunity to purge the contempt (where applicable) by complying with the court's order or as otherwise ordered by the court. *See Korman v. Strick,* 133 Ariz. 471, 652 P.2d 544 (1982) (party held in civil contempt for failing to pay attorney's fees as ordered must be given opportunity to purge the contempt by paying the fees).

**Rule 65.1. Proceedings Against Surety**

The Task Force recommends adoption of the federal rule with minor changes to remove language peculiar to federal claims. Substantively there are no differences between the federal rule and current Arizona Rule 65.1.

**Rule 65.2. Action Under A.R.S. § 23-212 or § 23-212.01**

The Task Force proposes major stylistic changes to the current Arizona rule but no substantive changes. There is no federal counterpart to this rule.

**Rule 66. Receivers**

The Task Force proposes various stylistic changes and one substantive change to the rule. Currently, Rule 66 permits seeking appointment of a receiver by including an application in a verified complaint or by filing an independent verified application. The Task Force proposal eliminates the first option. Proposed Rule 66 requires a party to request a receiver by filing an application supported by and accompanying affidavit. Current Rule 66 is substantially different from its federal counterpart and the substance of current Arizona Rule 66 was retained.

**Rule 67. Deposit into Court**

The Task Force proposes various stylistic changes adopting parts of the current Arizona Rule. Proposed Rule 67 reflects the abrogation of former Rule 67(d) dealing with cost bonds.

**Rule 68. Offer of Judgment**

The Task Force proposes major stylistic changes but have retained the rule's substantive provisions, which are very different from its federal counterpart.

**Rule 69. Execution**

The Task Force proposes to adopt the federal format of Rule 69 but has retained the substance of the current Arizona rule while incorporating some stylistic changes.

**Rule 70. Enforcing a Judgment for a Specific Act**

The Task Force proposes adopting the federal rule.

**Rule 70.1. Application to Transfer Structured Settlement Payment Rights**

The Task Force proposes only minor stylistic changes with respect to this rule. There is no federal counterpart to this rule.

**Rule 71. Enforcing Relief for or Against a Nonparty**

The Task Force recommends adoption of the federal rule.

## IX. COMPULSORY ARBITRATION

**Rule 72. Suitability for Arbitration**

**Rule 73. Appointment of an Arbitrator**

**Rule 74. General Proceedings and Pre-Hearing Procedures**

**Rule 75. Hearing Procedures**

**Rule 76. Post-Hearing Procedures**

**Rule 77. Appeal**

The Task Force has proposed mostly stylistic changes to these rules with some minor substantive changes. Some provisions of the arbitration rules have been moved within the rules to make placement of these provisions more appropriate. There have also been some heading changes to make the arbitration rules more readable and intuitive. A minor substantive change was made to former Rule 75(b) that required Rule 26.1 disclosures within 30 days rather than 40 days for cases outside of arbitration. Former Rule 75(b) is now Rule 74(b). The Task Force proposes making the disclosure deadline 40 days to make it consistent with Rule 26.1. The Task Force also recommends the removal of some inconsistencies in the current rules, such as the conflict between Rule 74(c) and Rule 76(b)(1) regarding Rule 68 sanctions.

## X. GENERAL PROVISIONS

**Rule 78. [Reserved]**

**Rule 79. [Reserved]**

**Rule 80. General Provisions**

The Task Force has recommended some major stylistic changes. Various paragraphs of the rule were renumbered. The Task Force recommends deleting Rule 80(a) because it is unnecessary. Additionally, the Task Force suggests moving current Rule 80(b) to Rule 40 and deleting current Rule 80(i), and including of a rule on verification in Rule 8.

**Rule 81. Effective Dates; Applicability**

The Task Force has proposed adoption of Federal Rule 81 with minor stylistic revisions.

**Rule 81.1. Juvenile Emancipation**

There is no federal counterpart to this Arizona rule. The Task Force recommends only minor stylistic revisions with respect to the current rule.

**Rule 82. Jurisdiction and Venue Unaffected**

The Task Force has recommended minor stylistic changes to the current Arizona rule.

**Rule 83. Superior Court Local Rules**

There is no federal counterpart to this rule and the Task Force has recommended only stylistic changes.

**Rule 84. Forms**

The Task Force proposes adoption of the language formerly contained in Federal Rule 84, which was abrogated in December 2015. The existing forms would be retained, but some of the forms' cross-references to the rules would be modified to reflect renumbering .

**Rule 85. Title**

**Rule 86. Effective Date**

The Task Force proposes abrogating these two rules because they are unnecessary.