Don Bivens, Chair
Committee on Civil Justice Reform, Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)	
	)	
PETITION TO AMEND THE ARIZONA RULES OF CIVIL PROCEDURE, TO MODIFY RULES 8, 8.1, 11, 16, 26, 26.1-.2, 29, 30, 31, 33–37, 45, 45.2; ABROGATE RULE 16.3; ADOPT NEW RULES 26.2 and 45.2 AND MODIFY RULE 84	)	Supreme Court No. R-17-___

Arizona has long been a leader in civil justice reform. With this Petition, the Committee on Civil Justice Reform ("CCJR") proposes that the State continue down that path. In late 2015, the Arizona Supreme Court created the CCJR, drawn from many quarters of Arizona's bar, court system, and public, charging it with developing recommendations "to reduce the cost and time required to resolve civil cases in Arizona's superior courts." The CCJR spent 2016 carefully considering recent national reform efforts and studies, as well as Arizona's own history of pathbreaking rules reforms, to generate proposals to promote the "just, speedy and inexpensive determination of every action," Ariz. R. Civ. P. 1, and the administration of justice "without unnecessary delay," ARIZ. CONST., art. 2, sec. 11. The CCJR now petitions this Court, pursuant to Rule 28, to adopt several sets of reforms to realize the promise of our law that justice be speedier and less costly:

(1) **Case management reforms**: We propose a system of differentiated case management for Arizona courts. Founded on the guiding principle of proportionality, these reforms would limit discovery based on what is at issue in each case. We also propose reducing satellite litigation about discovery by promoting quick resolution of discovery issues without the necessity of motions, strengthening disclosure by empowering judges under Rule 37 to fashion orders that shift costs where appropriate, and promoting effective issue clash by stripping away some tools by which lawyers hedge in answers. These proposals appear in

recommended amendments to Arizona Rules of Civil Procedure, Rules 8, 8.1, 16, 26, 26.1, 26.2, 29, 30, 31, 33, 34, 36, 37 and in a newly proposed Rule 26.2. We propose adapting the forms in Rule 84 consistent with these new case management practices. We thus propose new Form 3, amended Forms 9, 11(a)-(b), 12(a)-(b), and 13(a)-(b), and abrogating Form 10.

(2) **Discovery reforms**: We also propose simplifying disputes concerning electronically stored information ("ESI"). New Rule 45.2 would protect parties and nonparties alike from unreasonably burdensome requests to preserve their ESI, shifting costs against the requestor where appropriate. We propose adopting recent reforms to expert discovery in the federal rules, which will save parties time and money. And we propose clarifying the rights of nonparties to resist unduly burdensome subpoenas, and enhancing remedies for deposition abuse. These reforms include amendments to Rules 26, 26.1, 35, and 45; as well as the adoption of new Rule 45.2. Consistent with the proposed rule changes, Rule 84 would be amended to add new Form 7 and to amend Form 9 on subpoenas.

(3) **Sanction practice:** We also propose changes to Rule 11 to help assure that pleadings are well-grounded and that sanctions – when warranted – are actually imposed. We believe this will help litigants avoid unnecessary expense.

I. HOW THESE PROPOSED AMENDMENTS CAME TO BE.

Twenty-five years ago, the Arizona Supreme Court wisely enacted the innovative Zlaket Rules. Those reforms cut down waste and inefficiency in pretrial procedures by requiring mandatory, relevance-based disclosures intended to scale back civil discovery. The wisdom of Arizona's innovation in this area has been confirmed by later developments in the federal rules, which now feature some mandatory early disclosures, by jurisdictions which now require relevance-based mandatory disclosure (Utah, Colorado, and Minnesota), and most recently, by a proposed federal rules pilot program to implement Arizona-style relevance-based disclosure in five different federal district courts.

Unmistakably influenced by Arizona's leadership on these issues, a national movement to reform civil discovery has gathered momentum in the past decade. Working through organizations like the Conference of Chief Justices ("CCJ"), the Institute for the Advancement of the American Legal System ("IAALS"), the National Center for State Courts ("NCSC"), and the American College of Trial Lawyers ("ACTL"), leading judges, lawyers, and scholars have studied the duration and cost of civil discovery, particularly as ESI proliferates. Their studies confirm, time and again, that in too many civil cases, parties can spend months or even years obtaining discovery that is almost never used in open court. Discovery has becomes an end in itself, because the costs of discovery can quickly become

disproportionate to the issues at stake, forcing resolutions driven by economics and not merits, so that parties seldom reach trial and often do not feel heard.

Mindful of this reform movement, the Arizona Supreme Court charged the CCJR with reviewing leading national reform proposals including the 2016 report of the National Conference of Chief Justices, Civil Justice Initiative ("CCJ-CJI") and NCSC's accompanying *Landscape of Civil Litigation in State Courts* report, the 2015 IAALS/ACTL report titled *Reforming Our Civil Justice System: A Report on Progress and Promise*, and the December 2015 amendments to the Federal Rules of Civil Procedure.

The Arizona Supreme Court constituted the CCJR by appointing members from the public and private sectors with varied perspectives on Arizona's civil justice system. The CCJR includes judges from around the state, drawn from the Superior Court, Court of Appeals, and Supreme Court, as well as a court clerk and a court administrator. It also includes lawyers representing the plaintiffs' personal injury bar, consumer rights and public interest groups, defense attorneys, law firms of all sizes, and advocates for Arizona's businesses and for the public at large.

After many thousands of person-hours of study, deliberations, drafting, and revision, this diverse group unanimously recommended the reforms described below in this Petition, which are set forth fully as Appendix A (the clean copy of the proposed new Rules), and Appendix B (the redline). The CCJR grounds its

proposals for making Arizona litigation more just, speedy, and inexpensive in the reform source materials described above, and in many others cited in its extensive Report to the Arizona Judicial Council. In October 2016, the Arizona Judicial Council considered the CCJR's Report (available here) and unanimously supported its recommendations, one of which was the filing of this Petition.

II. THE CCJR PROPOSES A NUMBER OF CASE MANAGEMENT REFORMS TO MAKE DISCOVERY AND DISCLOSURE MORE JUST, MORE SPEEDY, AND LESS EXPENSIVE.

A. The CCJR Proposes Differentiated Case Management Rules to Make Discovery Proportional to the Needs of the Case, Determined Both Economically and Qualitatively.

The CCJR proposes a system of differentiated case management centered on a new Rule 26.2. That proposed Rule sorts cases near the outset of litigation into one of three tiers, based on a combination of the case's qualitative factors that define Tiers 1, 2, and 3, including the amount in controversy. The tiers limit the parties to particular levels of discovery corresponding to what is at issue in their suit, consistent with the guiding principle of proportionality that is now part of both the federal and Arizona Rules of Civil Procedure.

New Rule 8(g) creates a presumptive method for assigning a case to a tier, and also a vehicle to move it to a different tier as the parties or court believe is appropriate. When parties file their Complaint or Counterclaim, they must plead either the amount in controversy (excluding duplicative claims), or in which of

three general categories of amount in controversy (0 to $50,000, $50,000 to $300,000, or $300,000 or above) the case belongs, as required by a new Rule 8(g). The amount in controversy or category pleaded results in an initial, presumptive assignment of the case to a particular case-management tier.

But proposed Rule 8(g) also requires the parties to meet when the answer or responsive pleading is due and to discuss what tier they think the case should occupy. From there, either party can move the court to assign the case to a different tier, if they think the case warrants more or less discovery. In doing so, they can invoke Rule 26.2(b)(2), which explains to the court and the parties what qualitative attributes Tier 1, Tier 2, and Tier 3 cases have, as their complexity escalates. This allows the parties to ask the court to right-size their case based on clear guidance in the case management rules. And even if neither party asks the court to reconsider the presumptive tier, the court has the power to examine the pleadings and a required short report of counsel to tier the case as the court believes appropriate under Rule 26.2(b)(2).

The CCJR believes this approach strikes the right balance between the purely economic approach to tiering recently implemented in Utah, and a purely qualitative approach, which might prove unwieldy and which would force courts to exercise discretion where the parties would prefer to receive by default the amount of discovery permitted in the presumptive tier.

B. A Strengthened Rule 37 Would Allow Increased Enforcement of the Disclosure Rules and Shifting of Costs to Keep Discovery Proportional.

Research supports the need for increased enforcement of Rule 37 on its terms to promote the cooperative disclosure of relevant information and decrease the need for additional adversarial discovery. A 2009 IAALS study of the Arizona bench and bar confirmed what the CCJR heard anecdotally from lawyers and judges alike – Rule 26.1 is seldom enforced by the penalty for noncompliance under Rule 37. The 2009 survey reported that 58 percent of respondents believe that the rules are "occasionally" or "almost never" enforced. Only 4 percent think that the rules are "almost always" enforced. Given that effective early disclosure is essential to streamlining discovery, the CCJR focused its case management reforms in part on improving Rule 26.1 – by fostering greater compliance with it.

The CCJR's proposed revision would improve compliance with Rule 26.1 by creating broad-ranging authority in a Rule 37(g) (modeled on Utah's Rule 37(g)) for a court to shift disclosure and discovery costs as it deems just to secure compliance with the disclosure and discovery rules, and to keep the costs of discovery proportional. Thus, parties who request higher levels of discovery might be permitted them, provided they bear the incremental fees and costs incurred by all sides. Likewise, obstreperous conduct by any party in the process of disclosure or discovery might more easily be subject to the imposition fees and costs.

There is an appetite for this reform in the bench and bar. Trial judges expressed to the CCJR that they would like to enforce the existing disclosure and discovery rules more actively, but feel unable to do so, in part, because sanctions for nondisclosure are likely to be reversed. *See, e.g.*, *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284 (1995). To address this concern, the CCJR proposes requiring an affirmative finding that a nondisclosure was not prejudicial as a precondition to allowing the use of evidence derived from late disclosure, abrogating any case law that might suggest the contrary. The CCJR also proposes adding language to Rule 37(d) underscoring the court's "discretion [to] impose any sanctions the court deems appropriate in the circumstances." The CCJR also proposes a detailed Comment to Rule 37 underscoring the power of fee shifting as an integral part of the new system of proportionality-driven case management, and stressing the expectation that courts will use that power to keep discovery proportional.

C. The CCJR Proposes an Expedited Procedure to Resolve Discovery Disputes to Curtail the Cost and Delay They Occasion.

The CCJR recommends adopting what is already current practice in many courts – a requirement that parties raise discovery disputes first in a short discussion with the court before any written discovery motions are permitted. This practice is also recommended by IAALS in its 2014 report, "*Working Smarter, Not Harder: How Excellent Judges Manage Cases,*" at page 23. Arizona state and federal courts that have instituted this practice find that most discovery disputes

can be solved by oral discussion. Written discovery motions are seldom necessary. Given the substantial delays and costs in formal discovery dispute resolution, adopting this practice would benefit both courts and parties.

Proposed Rule 26(d) would resolve discovery disputes with an expedited procedure that promotes efficiency while still safeguarding parties' rights. It requires parties to submit a short written statement of the discovery issues in dispute, and then requires the court to issue a minute entry resolving the dispute, so there is a record of the dispute and resolution, avoiding one potential disadvantage to informal resolution of these disputes. If during this expedited process the court determines that further briefing is necessary, it can require the parties to proceed formally under Rules 26(c) and 37(a), which remain in place. Discovery disputes involving nonparties served with Rule 45 subpoenas would not be subject to Rule 26(d), though nonparties could agree to proceed under these expedited procedures.

D. The CCJR Proposes To Promote the Clear and Early Framing of Issues By Preventing Parties From Hiding Behind Unresponsive Formulations Such as "The Document Speaks For Itself."

Too often, lawyers hedge when they should answer. Rules 8 and 36 both clearly contemplate that in responding to contentions, a response may deny, admit, deny in part explaining the basis for the denial, or deny based on a lack of knowledge. Despite that clarity, the CCJR notes that pleadings and responses to requests for admission too often fail to follow any of the permitted options. In

particular, parties often state with respect to contentions about documents that "the document speaks for itself," without saying whether they are denying, admitting, denying in part while explaining, or denying for lack of information sufficient to permit admission or denial. The law does not permit that. *See, e.g., Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, 2015 WL 5730662 *1-3 (N.D. Ind. Sept. 30, 2015). *See also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1264 (3d ed. 2004). We propose writing prohibitions of that type of evasion into Rules 8 and 36, so parties can get to the bottom of their dispute quickly, as the Rules contemplate.

III. THE CCJR'S PROPOSED DISCOVERY REFORMS WILL REDUCE THE BURDENS AND COSTS OF DISCOVERY.

A. Protection from Unreasonable ESI Preservation Requests.

Litigants and prospective litigants often send notices to parties, potential parties, and third parties, demanding that they preserve ESI for future use in a lawsuit. These preservation demands can be burdensome, and pose an underlying risk of spoliation sanctions if a court later finds that the recipient of such a demand failed to act reasonably to preserve relevant information. New Rule 37(g), effective January 1, 2017, helps address these concerns by clarifying when a duty to preserve arises, and what constitutes reasonable steps to preserve. Yet that Rule does not provide a mechanism for parties or nonparties to obtain timely advance rulings on the scope of any preservation obligation.

Proposed Rule 45.2 addresses this gap with a new procedure for a judicial determination regarding the existence or scope of a preservation obligation. The procedure outlined below would be available to parties and nonparties, and would provide an avenue for relief even if litigation is not yet pending:

(1) The Rule is triggered by the receipt of a "preservation request." The rule defines a "preservation request" as "a written notice to a party or nonparty requesting that the recipient preserve electronically stored information for possible use in pending or anticipated litigation." [Proposed Rule 45.2(b)(1)]

(2) A party or person seeking to invoke the Rule must first object in writing to the preservation request, and must thereafter confer with the opposing party in a good faith effort to resolve the dispute. [Proposed Rule 45.2(c), (d), and (e)]

(3) If the dispute cannot be resolved and there is an ongoing lawsuit, the parties may seek a court determination under the new expedited discovery dispute procedures in proposed Rule 26(d). A nonparty who received a preservation demand may file a motion for protective order in the pending action. The CCJR proposes corresponding amendments to Rule 26(c), adding a sentence that: "A person receiving a request to preserve electronically stored information may move for a protective order in the court in the county where the action is pending, as provided in Rule 45.2(d)(2)."

(4) If no action is currently pending, the person receiving the demand may file a verified petition seeking a court determination of its preservation obligation. As under Rule 27 ("Discovery Before an Action is Filed or Pending an Appeal"), the petition must be served in the same manner as a summons. [Proposed Rule 45.2(e)(2)] Notably, only the nonparty recipient, and not the demanding party, has the right to file a petition under proposed Rule 45.2(e), so nonparties are safeguarded, while demanding parties cannot force nonparties into litigation over preservation demands.

(5) Proposed Rule 45(f) would allow the court to issue orders limiting preservation obligations, including orders providing for cost-sharing or shifting.

(6) Finally, proposed Rule 45.2(g) provides a "safe harbor": A party or person complying with an order issued under the rule "is deemed to have taken reasonable steps to preserve electronically stored information under Rule 37(g)."

B. <u>Addressing the Burden of ESI Discovery.</u>

The CCJR proposes significant amendments to Rules 26 and 26.1 to provide additional guidance concerning ESI discovery and disclosure, including:

(1) *Proposed Rule 26(e).* Arizona's Rule 26(b), like federal Rule 26, provides that a party need not provide discovery or disclosure of ESI from sources that the party shows are "not reasonably accessible." However, Rule 26 does not contain any standards for determining if ESI is "not reasonably accessible." To

address this omission and provide guidance to litigants, the CCJR proposes adding a framework and standards for addressing disputes over the accessibility of ESI. The new procedures would require a party or person who claims that ESI is not reasonably accessible because of "undue burden or expense" to provide an affidavit "describing the burden and estimating the expense that would be incurred." [Proposed Rule 26(e)(2)][1] The proposed rule identifies: (i) factors to consider in determining the issue of "undue burden or expense;" (ii) factors to consider in determining whether there is good cause for ordering discovery despite any such burden or expense; and (iii) conditions the court can impose on the discovery, including cost-sharing or shifting. [Proposed Rule 26(e)(2) through (5)]

(2) *Presumptive Limits on ESI Discovery*. The proposed amendments to Rule 26(b) would preclude a party from demanding an opportunity to image another party's data sources, inspect another party's data storage devices, or to discover ESI that would require "restoration of data through forensic means," absent special circumstances such as a claim of fraud, spoliation, or other misconduct. [Proposed Rule 26(b)(2)(B)(ii)]

(3) *Giving Effect to Contractual Limits on Discovery.* The CCJR proposes to amend Rule 26(b)(2)(D) to presumptively enforce contracts between businesses "limiting a party or person's obligation to preserve information, or to provide

[1] For parties utilizing the expedited discovery dispute provisions of Rule 26(d), this affidavit would not be required unless ordered by the court. [Proposed Rule 26(d)]

disclosure or discovery." It is increasingly common for businesses to negotiate contractual limits on their preservation and discovery obligations, but there is an open question whether courts will enforce such arrangements to the extent they conflict with applicable court rules. The proposed amendments clarify that Arizona courts should generally enforce these contractual limits. Notably, the new provision does not apply to consumer contracts or contracts between individuals.

(4) *Proposed Changes to Rule 26.1 on Disclosure of ESI.* A proposed amendment to Rule 26.1(c)(1) builds on the new ESI disclosure procedures that took effect January 1, 2017. [*See* Rule 26.1(b)(2) (parties must promptly confer and attempt to agree on matters relating to its production)] The CCJR proposes to add a requirement that at their initial conference, "each party must have at least one representative present who is reasonably familiar with the party's systems containing electronically stored information." The proposed amendments also identify eight specific topics that should be addressed, as applicable, regarding ESI disclosure, such as search protocols, agreements on preservation, and the like. [*See* Proposed Rule 26.1(b)(1)(A) through (H)]

(5) *Proposed Changes to Privilege Log Requirements.* Preparing detailed privilege logs can be unduly burdensome, especially with voluminous ESI productions. The CCJR proposes to amend Rule 26(b)(6) to reduce this burden by allowing the parties to stipulate to, or the court to order, alternate requirements,

including less detailed logs that "identif[y] by category or exclude[e] certain categories of documents."

C. Changes to Rule 45 That Provide Additional Protections for Nonparties Who Receive Subpoenas.

Proposed changes to Rule 45 include:

(1) An amendment to Rule 45(c)(2)(D) ("Inaccessible Electronically Stored Information") would add a cross-reference to the new procedures in proposed Rule 26(e) for resolving disputes over whether ESI is reasonably accessible.

(2) An amendment to Rule 45(c)(5) would add a new subdivision (A) ("Claiming Privilege or Protection"), allowing the subpoenaed person to object to providing a privilege log based on undue burden or expense. Under the proposed amendments, the subpoenaing party and the nonparty must confer in good faith and attempt to resolve the dispute. If the dispute cannot be resolved, the subpoenaing party may move to compel a log, but the proposed rule provides that the subpoenaing party presumptively bears the reasonable expense of its preparation.

(3) The CCJR proposes to amend Rule 45(e)(1) to add a limitation that "absent good cause, a subpoena may not seek production of materials that have already been produced in the action or that are available from parties to the action." The "good cause" standard recognizes that in some cases, there may be a good reason to seek documents from a third party even if the same records are available from parties, such as where the previous productions appear to be incomplete, or

the subpoenaed person's possession of a particular document has independent relevance. The amendments also would require the party seeking discovery to pay the subpoenaed person's reasonable expenses for producing documents or ESI. If the subpoenaed person expects to incur expenses other than routine clerical and per-page copying costs as allowed by statute, the person must provide the subpoenaing party with an advance estimate of those costs. The proposed amendment also allows the court to order payment of costs in advance.

(4) An amendment to subdivision (e)(3) ("Service") would require service of subpoenas for the production of documents, ESI, tangible things, or an inspection of premises on other parties "at least 5 days" before service on the subpoenaed person. This requirement parallels federal Rule 45(a)(4), which also requires advance service on parties, but without specifying a five-day time period.

(5) Subdivision (c)(6)(C)("Duty to Confer") would be clarified to provide that before any motion may be brought concerning compliance with a subpoena, the movant must first attempt to resolve the dispute by good faith consultation. Any motion must include a good faith consultation certificate under Rule 7.1(h).

D. Changes to Rules 26 and 26.1 to Make Expert Practice More Streamlined Where Feasible, and More Detailed Where Needed, Consistent With Proportionality.

The CCJR's proposed amendments would incorporate provisions of federal Rule 26 that protect from discovery, with a few exceptions, draft expert reports and

communications between experts and the lawyers who retained them. Consistent with the federal rationale, the CCJR believes that these limits will make expert discovery more efficient and less costly. [Proposed Rule 26(b)(4)(B) and (C)]

An amendment to Rule 26.1 would adopt a "hybrid" approach to expert disclosures. The rules presently require relatively limited expert disclosures, and—unlike the federal rule—do not mandate formal reports. Yet in some cases, such as those involving complex scientific or technical evidence, more detailed disclosures are needed to give the opposing party fair notice, and to enable the court to assess the admissibility of expert testimony. To address these concerns, the CCJR proposes a new subdivision (d) on the form of expert disclosures. The rule would require expert reports in Tier 3 cases "or if a hearing is required to determine if the testimony satisfies the requirements of Ariz. R. Evid. 702."

In all other cases, disclosures need not be in the form of an expert report. But when no report is required, parties must disclose information on an expert's compensation and past testimony. The CCJR felt that requiring this information up-front, and without a request, would reduce disputes and promote efficiency. [Proposed Rule 26.1(d)(3)(E) and (F)] The required content of any expert report parallels the corresponding federal rule, with the added requirement that the report must identify "any publication within the scope of Ariz. R. Evid. 801(18) on which the expert intends to rely for any opinion." [Proposed Rule 26.1(d)(4)(E)]

E. Changes to Simplify Rule 35.

Arizona's current Rule 35 ("Physical and Mental Examinations") restricts videotaping examinations without a court order. This leads to unnecessary and costly motion practice, because typically one party wants a recording. An amendment to Rule 35(c)(2) would permit any party to audio or video record a mental or physical examination, unless the court finds that recording would adversely affect the examination's outcome. Judges and practitioners believe this amendment would eliminate the unnecessary expense of motions, while still allowing protection from video or audio-recording if warranted in a particular case.

IV. THE CCJR PROPOSES REVISIONS TO RULE 11 TO REDUCE THE NUMBER OF SANCTION MOTIONS, BUT TO MAKE SANCTIONS MORE LIKELY FOR REAL ABUSES.

Arizona's Rule 11 practice has long been both over-extensive and under-extensive. It is over-extensive because parties file too many Rule 11 motions and often seek Rule 11 relief without sufficient cause as an ancillary, throwaway point in motions directed primarily to other issues. Yet Arizona's Rule 11 practice is also under-extensive, because courts too seldom impose sanctions when there have been genuine abuses. Thus, just as the CCJR found cause to strengthen Rule 37 to promote active management of the discovery process to aid case management, it likewise seeks to strengthen Rule 11 to move cases forward more quickly and inexpensively. Rule 11's infirmities were partially remedied by the January 1,

2017 amendments, which require: (a) meeting and conferring before filing a Rule 11 motion; (b) a short writing memorializing and focusing the parties' dispute before any Rule 11 motion practice; and (c) a separate Rule 11 motion, to guard against throwaway requests for sanctions.

But there is more to be done. To make Rule 11 motions less frequent, but granted more commonly when they point to real abuses, the CCJR suggests reforms that build upon the January 1, 2017 amendments to Rule 11. The CCJR's proposed amendments to Rule 11(c) make sanctions mandatory ("must") once a violation is found, rather than permissive ("may"). In addition, the proposed amendments require that when considering an appropriate sanction, the court must take into account the "opportunities provided to the person or party violating Rule 11 to withdraw or correct the alleged violation." The combined intent of these proposals is to mandate Rule 11 sanctions where a party had fair warning and ample opportunity to cure the violation, but nonetheless failed to do so.

The CCJR's proposed Rule 11 would also strengthen the certifications a filer must make when signing court pleadings. Filers would certify not simply that factual contentions have or will likely have evidentiary support after discovery, but instead, would certify that factual contentions and the denials of same are "well-grounded in fact." The "well-grounded in fact" standard is the subject of existing Arizona case law. *See Villa de Jardines Ass'n v. Flagstar Bank FSB,* 227 Ariz. 91,

253 P.3d 288 (App. 2011). A filer would certify not merely that claims and contentions are non-frivolous, but instead would certify that they are colorable, which is meant to be a higher standard than non-frivolous, though still not a standard requiring that a claim or contention succeed to avoid sanctions, as noted in proposed Rule 11(b)(4).[2]

Conclusion

The CCJR believes that Arizona should continue to lead in civil justice reform. These reforms build on Arizona's established legal culture of innovation, pragmatism, disclosure, and cooperation among counsel. Enacting these reforms will allow our courts to deliver on the promise of Rule 1– to provide Arizonans with "the just, speedy, and inexpensive determination of every action." The CCJR thus requests that this Court enact the rules attached hereto as Appendix A.

RESPECTFULLY SUBMITTED this 10th day of January, 2017

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[2] The Court's January 1, 2017 amendments adopted federal Rule 11's language requiring that factual contentions either "have evidentiary support" or "*will likely have evidentiary support*" after further discovery. The CCJR's proposals here reflect its concern that the italicized portion of the federal standard—allowing parties to make claims without evidentiary support, to be shored up by future discovery—is difficult to apply or enforce, and may encourage the very discovery abuses that the CCJR's other proposed reforms seek to curb.