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

9 In the Matter of:

Supreme Court No. R-17-0010

10 **PETITION TO AMEND THE**  
11 **ARIZONA RULES OF CIVIL**  
12 **PROCEDURE, TO MODIFY RULES 8,**  
13 **8.1, 11, 16, 26, 26.1-.2, 29, 30, 31, 33-37,**  
14 **45, 45.2; ABROGATE RULE 16.3;**  
15 **ADOPT NEW RULES 26.2 and 45.2**  
16 **AND MODIFY RULE 84**

**COMMENT OF THE**  
**STATE BAR OF ARIZONA**

17 The State Bar of Arizona (“State Bar”) comments in favor of adopting most  
18 of what is proposed in the Petition of the Committee on Civil Justice Reform  
19 (“CCJR”) to amend the Arizona Rules of Civil Procedure. First, the State Bar  
20 favors most of the CCJR’s case management reforms, subject to the adoption of its  
21 own extensive suggestions to refine and improve the work of the CCJR, created  
22 over months of meetings and close study, review, and debate. Second, the State  
23 Bar likewise favors the CCJR’s discovery reforms, again subject to the adoption of  
24 its proposed refinements. Third, the State Bar opposes most of the CCJR’s  
25

1 suggested revisions to Rule 11. Fourth, the State Bar suggests delayed  
2 implementation of the CCJR’s case management reforms, to permit a robust  
3 program of education about these important changes. Fifth, though the State Bar  
4 favors the CCJR’s tiered case management proposals, it acknowledges that  
5 sentiment about those proposals is split, with some having reservations about their  
6 wisdom or efficacy. The Comment explains each of these positions in turn.  
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9 **Background of Proposed Amendments**

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11 As the Petition notes, the Arizona Supreme Court established the CCJR in  
12 December 2015 and directed it to develop recommendations “to reduce the cost  
13 and time required to resolve civil cases in Arizona’s superior courts.” (Admin.  
14 Order No. 2015-126.) In developing recommendations, the CCJR was charged  
15 with looking at the following materials as further described in the Petition: the  
16 report and recommendations of the Conference of Chief Justices’ Civil Justice  
17 Initiative, the reports and recommendations of the Institute for the Advancement of  
18 the American Legal System (IAALS), particularly its Rule One Initiative and April  
19 2015 Report on Civil Justice Reform, and the 2015 federal court rules  
20 amendments. (Admin. Order No. 2015-126.)  
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23 The CCJR consisted of twenty-four members. It conducted extensive study  
24 of relevant materials, met monthly as a full CCJR, and also conducted a large  
25

1 number of subgroup meetings in fashioning its ultimate recommendations. In  
2 October 2016, the CCJR issued the report setting forth its recommendations, *A*  
3 *Call to Reform*, to the Arizona Judicial Council (“AJC”). As summarized in the  
4 CCJR’s report, its proposals were consistent with the materials that the Court  
5 directed the CCJR to review. The AJC unanimously supported the CCJR’s  
6 recommendations.  
7

8  
9 Following the issuance of the CCJR’s report, the Committee extensively  
10 studied the Petition over the course of several meetings, as well as in subcommittee  
11 meetings. Members of the Committee submitted detailed redlines of the entire  
12 CCJR draft or proposed revisions to many different parts of it. These diverse  
13 inputs were in turn incorporated into a working draft about which the full  
14 Committee met repeatedly. The result of that further study is attached hereto in an  
15 effort to make the CCJR work more effective and just.  
16

### 17 **I. The Proposed Amendments: Case Management Reforms**

18  
19 The State Bar agrees with the assessment that there is a problem with  
20 discovery costs that can unreasonably burden litigants of all kinds, and which can  
21 create difficulties with access to justice. Relatedly, the State Bar endorses the  
22 CCJR’s emphasis on proportionality as one important principle in the management  
23 of discovery. (IAALS 2015 Report, at 17: “[p]roportionality should be the most  
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25

1 important principle applied to all discovery.”) The January 1, 2017 amendments to  
2 the Arizona Rules of Civil Procedure have already adopted the December 2015  
3 federal rule changes regarding proportionality. The CCJR’s newly proposed case  
4 management reforms attempt to build on those changes in an effort to aid what the  
5 CCJR properly calls “Arizona’s unique legal culture of innovation, pragmatism,  
6 mandatory disclosure, and cooperation among opposing counsel.” (*A Call to*  
7 *Reform*, at 2.) The following addresses the major stylistic and substantive  
8 modifications to the Petition proposed by the State Bar.  
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11 **A. Differentiated Case Management**  
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13 The State Bar preponderantly supports the proposed fundamental changes to  
14 case management, subject to this Comment’s analysis in Sections III. and IV. The  
15 State Bar is hopeful that they may make civil litigation more speedy, and  
16 inexpensive in Arizona, as the CCJR intends. Wishing to give the reforms the best  
17 chance of success in those regards, the State Bar offers its own proposed  
18 modifications to the CCJR’s proposed case management procedures:  
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20

- 21 (a) Proposed Rule 8(b)(1) in the attached should be adopted as it contains  
22 the language of existing Rule 8(f), which was omitted from the  
23 Petition. It would provide that no pleading shall contain a dollar  
24 amount or figure for damages sought in cases where a party is  
25 pursuing a claim other than for a sum certain or for a sum which can

1 by computation be made certain. In addition, Proposed Rule 8(b)(2)  
2 would require that if damages are not pled, a party must plead that  
3 their damages are such as to qualify for a specified tier, while the  
4 Petition's waiver provisions accompanying that provision should be  
5 removed;

6 (b) Proposed Rule 8(h) regarding the required early meeting about  
7 expected course of case, tiering, and report of the same, should be  
8 moved to Rule 16, because the early meeting the CCJR proposes  
9 concerns the same subject matter and closely tracks with the existing  
10 Rule 16(b) conference (as the CCJR itself noted in its deliberations),  
11 and modified as discussed below;

12 (c) Proposed Experimental Rule 8.1(f) concerning the commercial court  
13 should be modified such that commercial court cases are deemed to be  
14 assigned to Tier 3 unless and until the court assigns the case to a  
15 different tier after the Rule 16(d) scheduling conference. Other  
16 modifications to Rule 8.1 are shown in the attached in the Appendix;

17 (d) Proposed Rule 16(b) in the Appendix would include the provisions  
18 relating to the early meeting regarding tiering and build those  
19 provisions into the existing Joint-Report-and-Scheduling-Order  
20 process set forth in Rule 16. Modifications from the CCJR's proposal  
21 include language that all counsel and unrepresented parties who have  
22 appeared are jointly responsible for arranging and participating in the  
23 meeting (Proposed Rule 16(b)(1)), and the parties are also to discuss  
24 the subjects set forth in Rule 16(c) (Proposed Rule 16(b)(2)(F)). In  
25 addition, rather than file a separate document after the meeting, the  
parties are to set forth the parties' positions on the issues related to the

1 early meeting and proposed scheduling order in the parties' Joint  
2 Report (Proposed Rule 16(c)(2)). The State Bar believes these  
3 changes will make the process more efficient and economical for  
4 parties and the courts;

5 (e) The State Bar has also proposed modified forms for the Joint Report  
6 and Proposed Scheduling Order, as noted under Proposed Rule  
7 16(b)(7) and in Proposed Forms 11(a)-14(b) in the Appendix;

8 (f) Proposed Rule 16(c)(6) in the attached would require that any motion  
9 to vary the tier to which a case is deemed to be assigned under  
10 Proposed Rule 26.2(c)(3) must be made by the date on which the  
11 parties file their Joint Report, and by a separate motion, not to exceed  
12 three pages in length. Responses to said motion would also be limited  
13 to three pages, and must be filed within five days after service of the  
14 motion. No replies would be permitted;

15 (g) Proposed Rule 16(c)(8) in the attached would require the early  
16 meeting requirements of Proposed Rule 16(b) apply to cases subject to  
17 compulsory arbitration; however, those cases would still be exempt  
18 from the Joint Report and Proposed Scheduling Order requirements;

19 (h) As has been requested in the pending State Bar's Petition R-17-0006,  
20 the attached redline shows elimination or modification of special rule  
21 provisions relating to medical malpractice cases, such as current Rule  
22 16(e) and Proposed Rule 26.3, which overlap with changes proposed  
23 by the CCJR. If the Court desires a redline without the proposed  
24 changes related to R-17-0006, the State Bar can promptly provide  
25 one;

1 (i) The State Bar proposes substantial stylistic modifications to Proposed  
2 Rule 26.2. As to substantive changes, however, the State Bar  
3 proposes that the Proposed Rule 26.2(e) definition of damages in  
4 tiering exclude claims for punitive damages, interest, attorney's fees  
5 in the case to be tiered, and costs. Proposed Rule 26.2(d)(3) should be  
6 amended to more clearly allow a later-joined or later-served party to  
7 promptly request the court to change the assigned tier. Also,  
8 Proposed Rule 26.2(f)(3) in the attached would expand the parties'  
9 time in which to complete discovery in Tier 3 cases from 210 to 240  
10 days, and would make clear that courts have the power to extend the  
11 time for discovery beyond the presumptive deadlines in Rule 26.2;  
12 and

13 (j) Finally, Rule 30(a)(1) should be modified to allow specifically that a  
14 party may depose any treating physician in a medical malpractice  
15 action to import the salient language from a comment to Rule 30 that  
16 the CCJR has proposed be eliminated.

## 17 **B. Rule 37 Reforms**

18  
19 The State Bar supports the CCJR's Proposed Rule 37 that provides for  
20 increased enforcement of disclosure rules and shifting of costs to keep discovery  
21 proportional. The State Bar's proposed modifications, other than stylistic  
22 modifications, are summarized as follows:  
23

24 (a) Proposed Rule 37(c)(1) should be modified to provide that in  
25 appropriate circumstances, the Court may impose any of the sanctions

1 of Proposed Rule 37(g)(2)(B)—e.g., presume the information was  
2 unfavorable, permissive or mandatory adverse inference instruction,  
3 dismissal or default judgment—for a failure to disclose;

4 (b) Maintain the existing protections that a party may not be sanctioned  
5 for failing to admit what is requested under Rule 36 if the party failing  
6 to admit had a reasonable ground to believe that it might prevail on  
7 the matter, or there was other good reason for the failure to admit as  
8 set forth in Proposed Rule 37(e)(3)-(4) in the attached. The State Bar  
9 believes these existing protections are appropriate, should be  
10 maintained, and were inadvertently omitted in the Petition’s  
11 proposals; and

12 (c) Proposed Rule 37(h) regarding orders to achieve proportionality  
13 should be harmonized with Rule 26(c), related to protective orders in  
14 discovery. The State Bar’s draft does so by preserving the provisions  
15 of Rule 26(c), to avoid the suggestion that adding Rule 37(h) altered  
16 the meaning of Rule 26(c) or made case law under it inapposite, while  
17 striking provisions in Rule 37(h) that were redundant of those in Rule  
18 26(c), substituting in their place a cross-reference to Rule 26(c)’s  
19 existing provisions.

20 **C. Expedited Procedure to Resolve Discovery Disputes**

21  
22 The State Bar supports the CCJR’s Proposed Rule 26(d) that will allow for  
23 an expedited procedure for resolving discovery and disclosure disputes, and agrees  
24  
25

1 that it will likely benefit both courts and the parties. The State Bar has proposed  
2 only minor, stylistic modifications in the attached.  
3

#### 4 **D. Reforms to Promote Clear and Early Framing of Issues**

5 The State Bar agrees with the CCJR's proposed reforms to Rules 8 and 36,  
6 including those to preclude responses that "the document speaks for itself" in lieu  
7 of appropriate admissions or denials.  
8

### 9 **II. The Proposed Amendments: Discovery Reforms**

10  
11 The State Bar agrees with adoption of the CCJR's proposed discovery  
12 reforms that seek to reduce the burdens and costs of discovery, subject to their  
13 further refinement. As to the CCJR's specific proposals set forth in the Petition,  
14 the State Bar's positions and proposed modifications are summarized below.  
15

#### 16 **A. Reform Addressing Unreasonable ESI Preservation Requests**

17  
18 The State Bar finds that Proposed Rule 45.2 provides an appropriate  
19 procedure allowing for a judicial determination regarding the existence or scope of  
20 an ESI preservation obligation, with the following modifications:  
21

- 22 (a) The provision that a preservation request may, but need not, relate to  
23 anticipated litigation against the nonparty should be moved from  
24 Proposed Rule 45.2(b)(2) to Rule 45.2(b)(1) as it more properly fits  
25 under the determination of a "preservation request;" and

1 (b) The Bar proposes additional language to clarify that “no waiver or  
2 prejudice results” from a party or person’s election not to invoke the  
3 dispute resolution procedures of the new rule. In particular, such an  
4 election will not be “deemed to be a failure to take reasonable steps to  
5 preserve electronically stored information under Rule 37(g)(2) or to  
6 otherwise preserve information or documents later requested in a  
7 pending action.” The proposed revisions appear in Proposed Rule  
8 45.2(h) in the attached.  
9

10 **B. ESI Discovery Reform**

11 The State Bar supports most of the CCJR’s proposals to address the burdens  
12 of ESI discovery, with the modifications summarized below:  
13

14 (a) Proposed Rule 26(b)(2)(B)(i) should be modified to clarify that a  
15 party seeking to limit or preclude discovery of ESI based on the good-  
16 faith operation of an electronic information system, or the good-faith  
17 application of a document retention policy, must still make a showing  
18 that the information is not reasonably accessible “because of undue  
19 burden or expense.” A similar clarification is proposed to the parallel  
20 language that appears in Rule 45 and in Rule 84, Form 9 (Form of  
21 Subpoena).

22 (b) The State Bar supports the CCJR’s proposed limits on discovery of  
23 ESI in Proposed Rule 26(b)(2)(B)(ii), with the minor clarification that  
24 ESI discovery must be related to “the case” rather than the CCJR’s  
25 phrasing of “the merits of the case;”

- 1 (c) Proposed Rule 26(e)(2) should be modified to clarify that on any  
2 motion for protective order or Rule 26(d) proceeding, the party or  
3 person objecting to the disclosure or discovery of ESI must submit an  
4 affidavit describing the burden and estimating the expense that would  
5 be incurred;
- 6 (d) Proposed Rule 26(e)'s standards for determining if ESI is "not  
7 reasonably accessible" are an improvement on the existing rule. The  
8 State Bar would add a Proposed Rule 26(e)(3)(E) to include an  
9 additional factor that the court must consider "whether the difficulty  
10 or expense of accessing the information is attributable to the good-  
11 faith routine operation of an electronic information system, or the  
12 good-faith and consistent application of a document retention policy,  
13 before a duty to preserve arose under Rule 37(g)(1);"
- 14 (e) The requirement that the court should consider the parties' resources  
15 in determining good cause under Proposed Rule 26(e)(4)(D) should be  
16 removed, as it is duplicative of the Rule 26(b)(1) factors already  
17 incorporated by reference into Rule 26(e)(4);
- 18 (f) Proposed amendments to Rule 26.1(c)(1) regarding disclosure of ESI  
19 are meritorious, and the State Bar merely seeks modifications to  
20 provide that the parties' representatives at the meet-and-confer  
21 conference may include counsel and that disputes must be presented  
22 under the expedited process of Proposed Rule 26(d). The State Bar  
23 also proposes clarifying changes to Proposed Rule 26.1(c)(1)(H)  
24 regarding stipulations addressing inadvertent production of privileged  
25 information and orders under Rule 502(d) of the Arizona Rules of  
Evidence; and

1 (g) The State Bar proposes minor clarifications to Proposed Rule 26(b)(6)  
2 regarding privilege logs.

3 (h) The State Bar does not support the CCJR's addition of Proposed Rule  
4 26(b)(2)(D), governing "Contractual Limits" on discovery, which  
5 provides that the court "must enforce any mutually and freely  
6 negotiated contract between business organizations" that limits the  
7 party or person's obligation to preserve information or to provide  
8 disclosure of discovery. The State Bar is concerned that this provision  
9 will give rise to satellite litigation over the enforceability of such  
10 agreements, that it improperly limits the discretion of a trial court to  
11 manage discovery in a particular case, and that it could encourage the  
12 improper destruction of evidence that should be preserved, including  
13 evidence relating to potential claims of third persons not parties to the  
14 agreement. The State Bar believes that the other limitations on  
15 discovery contained in the CCJR's proposals—including discovery  
16 limits through tiering—are sufficient to address the burden of  
17 discovery, making this provision unnecessary.

18 **C. Rule 45 Reform**

19  
20 The State Bar agrees that the changes the CCJR proposes to Rule 45 would  
21 provide additional and appropriate protections to nonparties who receive  
22 subpoenas. It proposes the following modifications to the CCJR's Proposed Rule  
23 45, hoping to improve upon it further:  
24  
25

- 1 (a) Proposed Rules 45(c)(2)(D) and Rule 45(c)(6) should be modified to  
2 clarify that the past good-faith operation of an electronic information  
3 system or good-faith and consistent application of a document  
4 retention policy are not independent grounds for objecting to a  
5 subpoena, but rather are examples of where discovery might be  
6 objectionable because it would be unduly burdensome or expensive.  
7 (As discussed above, the State Bar proposes similar revisions to  
8 Proposed Rule 26(b)(2));
- 9 (b) Proposed Rule 45(c)(6)(C) should be modified to clarify that absent  
10 the consent of the subpoenaed person, the expedited procedures of  
11 Rule 26(d) do not apply to motions under Rule 45;
- 12 (c) Proposed Rule 45(d)(3) should be modified to provide that a notice  
13 and copy of the subpoena must be served on each party at least 2,  
14 rather than 5, days before service on the subpoenaed person. The State  
15 Bar believes this modification is more consistent with the realities of  
16 the practice and will still give an opposing party sufficient time to  
17 object to a subpoena.

18 The State Bar agrees with the CCJR's addition of language providing that  
19 "unless otherwise ordered," a subpoenaing party must pay the reasonable expenses  
20 incurred by the subpoenaed person in responding to a subpoena. The State Bar is  
21 concerned that as proposed, however, the CCJR's revisions conflict with A.R.S. §  
22 12-351, which addresses recoverable costs in connection with the production of  
23 documents in response to a subpoena. Section 12-351 defines recoverable  
24  
25

1 “reasonable costs” to include a specified per-page copying charge and clerical  
2 costs of \$25 per hour. As revised by the CCJR, Rule 45 permits recovery of  
3 additional expenses that may go beyond what is expressly permitted by Section 12-  
4 351. The State Bar proposes to alleviate this potential conflict by adding a  
5 procedure requiring the subpoenaed person to object if it seeks payment of  
6 expenses beyond those allowed by statute. If the dispute cannot be resolved, the  
7 court may quash or modify the subpoena or, in the alternative, may condition  
8 compliance on the payment of such additional reasonable expenses by the  
9 subpoenaing party. These proposed changes are shown in the attachment at  
10 Proposed Rule 45(e)(1)(B), and in the corresponding portion of Form 9.

#### 14 **D. Expert Practice Reform**

15 The State Bar agrees with the CCJR’s proposals relating to expert practice,  
16 including as summarized below, with these minor modifications:  
17

- 18 (a) The State Bar supports the CCJR’s Proposed Rule 26(b)(4)(B) and  
19 (C), which incorporate the provisions of federal Rule 26 as to draft  
20 expert reports and communications between experts and the lawyers  
21 who retained them;
- 22 (b) Proposed Rule 26.1(d)(2) should be modified to clarify that expert  
23 reports should be required in Tier 3 cases for “any witness retained or  
24 specially employed to provide expert testimony in the action or one  
25 whose duties as the party’s employee regularly involve giving expert

1 testimony.” The additional language parallels similar language in  
2 Federal Rule 26 on when an expert report is required, and clarifies  
3 that even in a Tier 3 case, an expert report should generally not be  
4 required for a non-retained expert.

- 5 (c) Proposed Rule 26.1(d)(2) should be modified such that the more  
6 formal “federalized” expert report requirements apply in Tier 3 cases  
7 as a matter of course, but in other cases only if the court so orders  
8 after determining—upon request or on its own—that the federal-type  
9 reports will assist it in determining if an expert’s testimony satisfies  
10 Arizona Rule of Evidence 702 requirements.

11 The State Bar supports, without modification, the CCJR’s proposals  
12 requiring increased disclosures regarding experts—*e.g.*, Proposed Rule  
13 26.1(d)(3)(E) and (F) requirements that a party must disclose an expert’s  
14 compensation and past testimony even if no expert report is required, and also  
15 Proposed Rule 26.1(d)(4)(E)’s requirement for identification of publications within  
16 the scope of Ariz. R. Evid. 803(18) on which the expert intends to rely for any  
17 opinions.  
18  
19

### 20 **E. Rule 35 Reform**

21  
22 The State Bar supports the CCJR’s proposed changes to Rule 35 that would  
23 allow any party to audio or video record a mental or physical examination, unless  
24 the court finds that recording would adversely affect the examination’s outcome.  
25

1 **III. The Proposed Amendments: Sanctions Practice**

2  
3 The State Bar generally opposes the CCJR’s proposed amendments to Rule  
4 11.<sup>1</sup> Rule 11 was amended effective January 1, 2017, in an attempt to bring it into  
5 greater harmony with the comparable Federal Rule 11. Before the 2017  
6 Amendment, the Task Force on the Arizona Rules of Civil Procedure, the State  
7 Bar, and its Civil Practice and Procedure Committee had devoted a tremendous  
8 amount of time to analyzing and revising Rule 11. That work is reflected in  
9 Petition R-14-0004, the State Bar’s Comment to Petition R-16-0010, and the State  
10 Bar’s Comment to Petition R-15-0043. There is no reason for the Court to turn  
11 quickly away from several years of well-considered proposals that culminated in  
12 this Court’s January 1, 2017, amendments to Rule 11.  
13  
14

15  
16 This Court should also reject the CCJR’s current proposals, because they  
17 would cause Arizona’s Rule 11 to deviate further from the federal Rule 11, at a  
18 time when Arizona’s rules are increasingly congruent with the federal rules.  
19

20 And federalizing aside, the proposed revisions are, respectfully, likely to  
21 confuse the bar and bench. For example, the State Bar fears that the proposed  
22 revisions could spark additional litigation regarding the meaning of any difference  
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24 <sup>1</sup> The State Bar does not oppose the last two sentences of the CCJR’s proposed  
25 amendments to Rule 11(c)(1), which concern imposing sanctions for the filing of a  
document or for failure to meet and confer in relation to filing a Rule 11 motion.

1 between “colorable” and “nonfrivolous,” as well as other proposed variations with  
2 the federal Rule 11. Some of the CCJR’s proposed revision to Rule 11 seems  
3 calculated to increase Rule 11 practice – and the State Bar believes that Rule 11  
4 practice does not make litigation speedier or less expensive, but contrarily, tends to  
5 make it slower, more costly, more retributive, and harder to settle. *Compare*  
6 Admin. Order No. 2015-126 (seeking “to reduce the cost and time required to  
7 resolve civil cases in Arizona’s superior courts.”) Finally, as to the CCJR’s  
8 proposed change of making sanctions mandatory (replacing the newly adopted  
9 permissive “may” with a directly contrary mandatory “must” in Rule 11(c)(1)), the  
10 State Bar adopts by reference its Comment filed with respect to Petition R-15-  
11 0043, and observes that the public should not have to labor through having three  
12 Rules 11 in three years – 2016, 2017, and 2018 – with the prior version well-  
13 understood, the current version easing the severity of Rule 11 practice, and a new  
14 version making the practice more frequent and more punitive.  
15  
16  
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18

19 **IV. The State Bar Favors Delayed Implementation of The CCJR’s Proposal**  
20 **for a System of Tiered Case Management.**

21  
22 The State Bar believes that the method and speed of implementation of the  
23 CCJR’s case management proposals will be important in whether those proposals  
24 succeed in serving Arizona’s litigants well. To that end, the State Bar has two  
25

1 suggestions, as it respectfully notes that the CCJR has thus far not addressed the  
2 issue of implementation in its Petition or report.

3  
4 First, the State Bar believes that the tiering proposal centered principally in  
5 proposed Rule 26.2 should apply only to cases filed after the effective date of the  
6 rule change. Thus, if Rule 26.2 is adopted effective July 1, 2018, the State Bar  
7 suggests that it should apply only to cases filed after that date, with any case filed  
8 previously subject to discovery limits and case management practices from the  
9 prior rule-set.  
10

11 Second, the State Bar believes that the tiering proposal should be made  
12 effective either 6 or 12 months after January 1, 2018. One advantage of such a  
13 delay would be to permit education of the bench and bar. Precisely because these  
14 changes significantly alter the landscape of the civil rules, if the Court adopts them,  
15 it should work through the court system, the Superior Court in Arizona's counties,  
16 the State Bar, the CCJR, and other groups to insure that the changes are adequately  
17 communicated to the bar and bench. The need for education is more acute because  
18 of the broad scope of the January 1, 2017, amendments to the Arizona Rules of  
19 Civil Procedure. The State Bar stands ready to assist, but notes that this is a real  
20 challenge: the Task Force on the Arizona Rules of Civil Procedure's Petition  
21 elicited eight comments. The CCJR's work is not widely known at this writing.  
22 Practitioners and courts tend only to pay attention to rules when they encounter  
23  
24  
25

1 them operationally, in the field. This is not an argument against change, but is an  
2 argument for aggressive communication about the change. Another advantage of  
3 delayed implementation would be to permit the administrative groundwork for this  
4 reform to be laid in the Superior Courts, so that the administrative staffs of those  
5 courts need to be prepared for the sea change in deadlines and case management  
6 practices that tiering would entail, as one Superior Court judge noted during the  
7 State Bar's study of these issues.  
8  
9

10 **V. Some Members of the State Bar Have Concerns About the Necessity For**  
11 **the Proposed Differentiated Case Management.**  
12

13 While the State Bar endorses all of the above reforms, other than the Rule 11  
14 changes, it wants to register that some members question why there should be a  
15 tiering or case management reform at all.  
16

17 There are several bases for this view centered around critiques of the  
18 CCJR's proposed tiering system. For one thing, there are some who argue that the  
19 lower discovery limits in Tiers 1 and 2 would make it harder for parties to  
20 understand their cases and to assess the reasonability of settlement. There are  
21 others who find the dollar limits in the tiers arbitrary or unduly narrow. There are  
22 some who believe there has been insufficient demonstration empirically of the  
23 success of tiering in Utah or elsewhere. Indeed, some sentiment in favor of the  
24  
25


1 CCJR's proposal is grounded more in the idea that the CCJR is bringing forth the  
2 one extant proposed solution to what the State Bar acknowledges is a serious  
3 problem – excessive cost and delay in discovery – and that the absence of other  
4 serious proposals entitles the CCJR's proposal to support, more than the intrinsic  
5 merit of the CCJR's proposal itself. Others suggest that tiering will promote the  
6 opposite of the objectives of Rule 1, as by creating satellite litigation around tiering  
7 itself.  
8  
9

10 Separate and apart from misgivings about the CCJR's tiering, there is some  
11 opposition to the proposed tiering reform centered around a preference for the  
12 existing rule-set. Those making this argument believe that the stability and  
13 predictability of litigation under a well-established rule-set is a virtue, and that  
14 frequent rule change disserves the litigating public. Some adhering to this view  
15 believe that active judicial case management under the existing rules as modified  
16 as of January 1, 2017 offers more promise than does tiering. Some members also  
17 believe that the refinements concerning ESI discovery in the January 1, 2017,  
18 amendments to the rules, with their emphasis on increased meeting and conferring,  
19 are sufficient measures to make contemporary litigation more efficient. The State  
20 Bar wants the Court to be aware that it believes a significant segment of the Bar is  
21 and will be of this view.  
22  
23  
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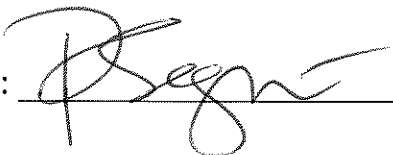
1  
2  
3 **CONCLUSION**

4 The State Bar appreciates the serious issues to which the Supreme Court's  
5 Administrative Order 2015-126 was directed. It finds significant merit in the  
6 proposals of the CCJR. And it respectfully requests that the Court adopt the  
7 Petitioner's proposed rule amendments, but with the modifications described in  
8 this Comment, which are fully set forth fully within the Appendix.

9 RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of May, 2017.

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12 \_\_\_\_\_  
13 Lisa M. Panahi  
14 General Counsel

15 Electronic copy filed with the  
16 Clerk of the Arizona Supreme Court  
17 this 22<sup>nd</sup> day of May, 2017.

18 by:  \_\_\_\_\_  
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