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	Petition No. R-17-0010 Reply of the Committee on Civil Justice Reform; Amended Proposed Rules

The Committee on Civil Justice Reform ("CCJR") has carefully reviewed and analyzed the Comments and other reactions to its Petition. Based on that close review and consideration of feedback from lawyers and judges through committees, Comments, and the CCJR's own public meeting on those Comments, the CCJR respectfully submits this Reply in Support of its Petition, which attaches a proposed Amended Draft of the CCJR's proposals. As explained below, the Amended Draft adopts almost all of the Comment of the State Bar, which represents hundreds of hours of analysis and work by judges and lawyers. The CCJR also explains why it asks the Court to decline to adopt other Comments, and to refer one comment to the State Bar for further study and review. *See* Sup. Ct. R. 28(A)(3). The CCJR also asks this Court to adopt the Amended Draft effective July 1, 2018, to permit education about the significant changes it contains.

I. THE CCJR ASKS THIS COURT TO ADOPT ITS PROPOSED CASE MANAGEMENT REFORMS, AS MODIFIED IN THE AMENDED DRAFT, AND TO MAKE THEM EFFECTIVE ON JULY 1, 2018, AS THE STATE BAR HAS REQUESTED.

A. The CCJR Proposes the Adoption of Almost All of the Amendments to its Work That Were Proposed by the State Bar After Several Months of Intensive Study and Review.

The CCJR is glad to report to this Court that the State Bar's Civil Practice and Procedure Committee intensively reviewed and vetted the CCJR's January 2017 draft proposal, and has significantly enhanced it through a process in which many judges and lawyers experienced in the drafting of civil procedural rules

actively participated. The CCJR believes that the State Bar's intensive review and debate created a host of revisions that made the Amended Draft stronger, easier to read, and better organized, and eliminated unintended glitches. Based on the work of the State Bar, the Amended Draft adopted its Comment entirely as it pertained to case management, save one change discussed just below. That Comment:

- Proposed consolidating the proposed early meeting of counsel concerning tiering, which was in Rule 8(h) of the CCJR's January draft, with the Rule 16(b) Case Management Conference, so counsel would have only one early meeting;

- Noted functional overlap between the CCJR's newly-proposed Rule 37(h), which strengthens the power of the Superior Court to enter a wide range of orders to implement proportionality, and Rule 26(c), and proposed an effective way of harmonizing those Rules;

- Proposed substantive revisions to Rule 26.2, the rule at the heart of the CCJR's proposed case management reforms, to clarify that damages for purposes of tiering a case exclude punitive damages and attorneys' fees in the case to be tiered, to more clearly allow a later-joined party to promptly request a change of tiers, and to modestly extend the deadline for discovery in Tier 3 cases, from 210 to 240 days; and

- Proposed keeping the language of existing Rule 8(f) that would prevent the pleading of specific dollar amounts of damages other than a case in which a party pursues a claim other than for a sum certain or which can be made certain.

The CCJR disagreed with only one aspect of the State Bar's Comment as it pertained to case management. The State Bar recommended striking from the CCJR's proposal two provisions assuring that clients actually want to spend more on discovery beyond tier limits before the Superior Court relaxes the tier limits at

counsel's request. These Rules provide that when counsel seek to move or stipulate that a case will be moved into a higher tier (with more discovery), or that overlimit discovery will be permitted, that counsel will have to certify that they have provided their client with a statement of anticipated additional expense to result from the additional discovery, and that the client has approved the statement. *See* Amended Draft, at Rule 26.2(c)(1)(B) (placement in higher tier) and Rule 26.2(g)(1)(A) (overlimit discovery). With respect to the State Bar's concerns, these Rules are favored by the client representatives consulted by the CCJR. Clients are the constituency Rule 1 is there to serve – they are the people (or businesses, or municipalities) for whom cases are to be resolved speedily and inexpensively. They are underrepresented in law reform. Their will should be heard, and this creative attempt at assuring their rights are protected should be made part of Rule 26.2, despite the well-intended objection of the State Bar.

B. The CCJR Recommends Against Adopting the Comment of the Honorable Jay Polk Concerning "Non-Traditional" Civil Cases.

The CCJR appreciates the concerns expressed in the Comment of the Honorable Jay Polk, Associate Presiding Judge of the Probate and Mental Health Department, of the Superior Court in Maricopa County. The Comment proposes that this Court consider exempting cases governed by rule-sets other than the Arizona Rules of Civil Procedure from the tiering requirements of the Amended

Draft's proposed Rule 26.2. Having carefully considered Judge Polk's Comment, the CCJR respectfully suggests that this Court not adopt it.

First, the Comment suggests that the lack of asserted damages might make such cases difficult to place in a tier under Rule 26.2. *See* Comment, at 2:5. However, in the Amended Draft, a case without damages is presumptively a Tier 2 case, subject to the rights of parties to seek an assignment to a higher or lower tier. The CCJR believes this adequately addresses the stated concern about damages.

Second, the Comment suggests that probate discovery, and discovery conducted under different rule-sets relating to the Arizona Rules of Civil Procedure, will be impacted by the tiering. To the extent a rule-set incorporates the Arizona Rules of Civil Procedure, the Comment's premise is correct. However, the CCJR believes that tiering works for probate disputes, an example the Comment notes. Probate disputes will either have no asserted amount of damages, making civil discovery in them presumptively governed by Tier 2 (subject to a host of procedures to modify those default limits), or will have an asserted amount of damages, in which case they can and should be governed by tiers. The rules of discovery in family court are unaffected by tiering, because the family law rules do not incorporate the general civil rules by straight incorporation, but instead selectively incorporate enumerated rules (not presently including draft Rule 26.2). For these reasons, the CCJR recommends not adopting the Comment.

C. The CCJR Recommends Against Adopting the Comment of the Honorable Randall Warner Concerning the Complex Litigation Program.

The CCJR appreciates the concerns expressed in the Comment of the Honorable Randall Warner, Civil Presiding Judge, Maricopa County. This Comment proposes that this Court continue to locate the rules governing the Complex Litigation Program in Rule 8(h) and 16.3, rather than relocating them to the Maricopa County Local Rules, as the Amended Draft suggests. The Comment also suggests exempting complex cases from tiering and Rule 26.2 altogether. Having carefully considered Judge Warner's Comment, the CCJR respectfully suggests that this Court not adopt it, for the following reasons.

First, the CCJR has good reason to suggest the relocation of the rules concerning complex cases into the Maricopa County Local Rules. While the Comment is properly concerned with confusing litigants (as the Comment suggests, through confusing lawyers through rule changes, at page 3, line 12), there is far greater confusion from leaving in place existing Rules 8(h) and 16.3 while enacting proposed Rule 26.2. Rule 26.2 defines Tier 3 with reference to complexity. *See* Rule 26.2(b)(3) ("***Tier 3: Case Characteristics.*** "These are the cases that are logistically or legally complex.") While Rule 26.2(b)(3) would tell readers that the most complex cases are Tier 3, the Comment would leave in place

current Rule 8(h), which defines complex cases, creates procedures for designating the matter complex, for opposing the designation, and for certifying complexity.

Those provisions in Rule 8(h) do the same things for Maricopa County complex cases that Rule 26.2 does for cases that are "complex" enough for Tier 3 – defining these complex cases (Rule 26.2(b)(3)), creating procedures for deciding whether they are complex enough for Tier 3 or not (Rule 26.2(c)(2)), and permitting parties to oppose proposed tier assignments (Rule 26.2(c)(1)). It would be extremely confusing to have two sets of rules on the face of the general civil rules, both of which are founded on definitions of "complex" matters, and both of which have different processes for determining what is or isn't complex. And that confusion would be greatly worsened by the fact that no court outside Maricopa County has a complex case program, so that litigants in other counties might not realize that Rules 8(h) and 16.3 are irrelevant to them. To avoid this redundant and confusing parallel structure in the Arizona Rules of Civil Procedure, the CCJR believes that one set of rules concerning "complex" case definitions and procedures should exist, and that it should be Rule 26.2. For that reason, the CCJR respectfully recommends that the substance of Rules 8(h) and 16.3 be relocated to the Maricopa County Local Rules.

Second, the CCJR does not believe there is any downside to relocating the substance of Rules 8(h) and 16.3 in this way. As an initial matter, the CCJR does

not propose any alteration whatsoever to any of the rules governing Maricopa County's successful and important Complex Civil Litigation Program. It only proposes moving these two rules to avoid confusing parallel structures in the general civil rules that apply to every county in Arizona. Importantly, the Comment agreeably states that the Maricopa County Superior Court's Civil Department "do[es] not oppose that in principle." *See* Comment, at 3:11. Additionally, the CCJR recognizes the concern that out-of-state counsel in large matters might not know of Maricopa County's Complex Civil Litigation Program, and for that reason and to meet the concerns of Judge Warner's Comment in part, has suggested in the Amended Draft leaving placeholders where present Rules 8(h) and 16.3 are, noting that Maricopa County has a Complex Civil Litigation Program, and referring readers to the Maricopa County Local Rules for the rules governing the operation of that program. Thus, there is no failure to signal the Program's existence, and no change to its rules at all.

Third, the CCJR opposes the Comment's final suggestion, one of many suggestions that particular dockets or case-types (here, the Complex Litigation Program) be exempted from tiering under Rule 26.2. Commenters have at different times suggested exempting medical malpractice actions, the Maricopa County Commercial Court, and/or the Maricopa County Complex Court from tiering, as well as situating it in one county only. The CCJR believes that the

tiering proposal should be implemented statewide and that there should not be particular geographical or subject matter carve-outs. For one thing, Rule 26.2, just like the current civil rules, permits a Superior Court to actively manage a case to permit discovery far exceeding the presumptive limits, subject to the Superior Court's review and approval. For another, as the Comment points out, exempting the Complex Litigation Program will promote attempts at forum selection. And finally, simply exempting the Complex Litigation Program from Rule 26.2 would have the unfortunate effect of exempting it too from the requirement that clients approve each counsel's statement of anticipated additional discovery expense before counsel can seek discovery beyond tier limits. For all of these reasons, the CCJR respectfully suggests that this Court not adopt this particular Comment.

D. The CCJR Recommends That This Court Not Adopt the Comment of the Arizona Association for Justice ("AAJ").

The CCJR appreciates the concerns expressed in the Comment of the AAJ. This Comment suggests, with respect to case management reform, that the Amended Draft should: (1) delete language making pleading particular damages a waiver of claims for damages in amounts exceeding the limit for the tier pleaded; (2) clarify the meaning of meeting and conferring in the early meeting of counsel, in part to permit meetings without personal or telephonic consultation; (3) remove the tiering system's definitions; (4) eliminate the requirement in proposed Rule 26(f) that parties serve disclosures before taking discovery; and (5) delete proposed

Rule 26.2(i)'s requirement that the parties report to the court what discovery they actually took. The Comment also suggests confining tiering to a pilot program in the commercial court or exempting all tort cases from tiering. The CCJR recommends against adopting these recommendations. Addressing these concerns in order:

First, the damages-waiver language of concern to the AAJ was deleted at the request of the State Bar, so that concern of the AAJ has been accommodated.

Second, meeting and conferring is already defined in Rule 7.1(h) to require personal consultation and to exclude mere exchanges of e-mails. The CCJR does not think meeting and conferring should be different for discussions of tiering.

Third, the CCJR has now included "medical malpractice cases" in the Amended Draft's Rule 26.2(b)(3) as cases that should be in Tier 3, absent unusual circumstances. This change accommodates much of this Comment. The CCJR respectfully rejects the AAJ's suggestion that inevitable debates over tiering should lead to the removal of tiering. The CCJR considered proposing a strictly economic tiering system like Utah's, but did not, given concerns of justice and individualized case management. Objections to a model of judge-managed flexibility in tiering either call for a strictly economic system (which would lead to other objections in many quarters), or are really objections to any tiering. Either way, the CCJR respectfully adheres to its recommendation of flexible, judge-managed tiering.

Fourth, the CCJR believes that discovery is sometimes misused at the outset of cases to suggest burdens and coerce settlement, and that those instances aside, parties should still have to obey Rule 26.1 before they supplement disclosure – which the Amended Draft seeks to elevate in importance – with discovery.

Fifth, the requirement in proposed Rule 26.2(i) is to keep the parties honest in not evading the discovery limitations of their tier, and to empower courts to sanction those who exceed limitations without leave, thus violating the principle of proportionality. The CCJR believes that requirement wise and warranted.

E. The CCJR Recommends That This Court Not Adopt the Comment of the Attorneys For MICA.

The CCJR appreciates the concerns expressed in the Comment of the Attorneys for MICA. The Comment argues that: (1) Tier 3 discovery limits are unfair; (2) medical malpractice cases should be exempt from tiering; (3) tiering should be adopted if at all in a pilot program; (4) requiring post-discovery reports to the court of discovery actually taken is burdensome and unfair, because the court could shift costs to defendants; and (5) the complex case program should be retained. Other than (5), the CCJR recommends against adopting this Comment.

First, the Tier 3 discovery limits in proposed Rule 26.2 are similar to those in the present civil rules. Both permit 10 requests for production. Neither proposed Rule 26.2 nor the current rules limit the number of hours in a case devoted to expert depositions. Proposed Rule 26.2 would reduce requests for

admission permitted without leave from 25 to 20. Proposed Rule 26.2 would reduce the number of interrogatories permitted without leave from 40 to 20, while permitting uniform interrogatories and their subparts to count as one interrogatory. Finally, proposed Rule 26.2(f) permits 30 hours of fact witness deposition per side, which means 60 hours of depositions total. And Rule 26.2(g) permits the parties in a Tier 3 case to request more. There is no abridgement of rights here.

Second, given that the Amended Draft now includes "medical malpractice cases" in its description of matters generally assigned to Tier 3, the Comment's concern is addressed, and there is no reason to exempt these cases from tiering.

Third, while tiering can be improved upon and modified, making it a 12 month pilot project will not promote stable application or adoption of these rules.

Fourth, the post-discovery reports on discovery taken will promote compliance and proportionality, as discussed above.

Fifth, the CCJR agrees and did not propose altering or eliminating the complex case designation, merely relocating it with placeholders in the general civil rules to guide unfamiliar readers easily to the Maricopa County Local Rules.

F. The CCJR Recommends That This Court Refer the Comment of Isabel Humphrey to the State Bar's Civil Practice and Procedure Committee for Review and Consideration.

The CCJR appreciates the Comment of Isabel Humphrey, which suggests that the civil rules should focus more on facilitating disclosure and less on

discovery. The CCJR agrees with that general statement of purpose, but was unable in the brief time after its receiving this Comment to determine what further changes would aid these worthy goals. The CCJR recommends that this Court refer it to the State Bar's Civil Practice and Procedure Committee for evaluation and study, as Rule 28(A)(4) contemplates.

G. The CCJR Recommends That This Court Not Adopt the Comment of Aderant That Rule 8(h)(1) Be Rewritten To Change "Answers" to "Files An Answer," Which Is Not an Improvement.

II. THE CCJR'S AMENDED DRAFT ADOPTS ALMOST ALL OF THE STATE BAR'S PROPOSED CHANGES IN THE AREA OF DISCOVERY REFORMS, BUT DECLINES TO ADOPT THE AAJ'S AND MICA'S SUGGESTED CHANGES CONCERNING EXPERTS.

A. The CCJR Proposes to Adopt All But One of the State Bar's Proposed Changes As to Discovery Reforms.

As with the State Bar's Comments on its proposed case management reforms, the CCJR greatly appreciates and almost entirely adopts in its Amended Draft the State Bar's extensive revisions to the CCJR's discovery reforms.

The CCJR, however, respectfully disagrees with the State Bar's recommended deletion of proposed Rule 26(b)(2)(D) ("Contractual Limitations"), which promotes and protects cooperative pre-litigation efforts by businesses to control escalating discovery costs. *See* Comment, at 12. This proposal is at the heart of the CCJR's mission to address the cost and burden of civil litigation. Proposed Rule 26(b)(2)(D) provides that the court "must enforce any mutually and

freely negotiated contract between business organizations … limiting a party or person's obligation to preserve information, or to provide disclosure or discovery." It recognizes that businesses are already attempting to address the crushing burden of document preservation and discovery through negotiated contracts. Regrettably, it remains unclear whether courts will enforce such contracts where they vary from established court rules. *See* Brudz & Redgrave, *Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation*, XVIII RICH. J. L. & TECH. 13. The CCJR's proposal gives businesses greater certainty that Arizona courts will enforce their negotiated, pre-litigation contracts.

The State Bar's Comment argues that the proposed rule will give rise to "satellite litigation" over enforceability, improperly limit trial court discretion, and potentially impact the rights of third persons. Contrary to the State Bar's fears, however, the CCJR's proposed rule should decrease, rather than increase, litigation over the enforceability of such contracts. As the article cited above reflects, businesses are already entering such contracts, and courts inevitably will be called on to interpret and enforce them. *Id.* at 1-5. The proposed rule provides predictability that can only reduce such disputes.

The proposed rule also does not improperly burden a trial court's discretion to manage discovery. Notably, the proposed rule only applies to contracts *limiting* discovery – it would not require a court to enforce an agreement that provides for

greater, more burdensome discovery than allowed by existing court rules. As between consenting businesses, there is no sound reason why a court should not enforce their freely negotiated contract providing for *less*, rather than *more*, discovery. Such a provision falls squarely within this Court's charge that the CCJR develop proposals that will reduce the cost of civil litigation in Arizona.

The CCJR proposes two clarifications that it believes address the State Bar's concerns. First, the Amended Draft clarifies that the rule only applies to "pre-litigation" contracts. Parties who agree to limit their discovery obligations during litigation must still seek the court's permission as required. Second, the Amended Draft clarifies that such contracts cannot, and do not, alter the rights of nonparties to the contract. *See* Proposed Rule 26(b)(2)(D) ("Nothing in this subdivision impairs the rights of nonparties to the contract."). Contracting parties already cannot limit the discovery rights of non-contracting parties in future litigation, which are established in Arizona law and codified by rule. *See* Ariz. R. Civ. P. 37(g) (setting forth contours of duty to preserve). So while the new rule would change nothing in this regard, these clarifications should alleviate those concerns.

B. The CCJR's Amended Draft Adheres to its Proposed Expert Witness Reforms, With One Exception.

The Court should reject Comments by the AAJ and the Attorneys for MICA against the CCJR's proposed expert witness reforms, with one exception.[1]

First, MICA opposes the CCJR's proposed protection of draft expert reports and related communications from discovery, arguing that this limitation will "prejudicially deprive[] parties of a full and fair cross examination of the expert." The CCJR rightly concluded that the burden and expense of allowing such discovery outweighs any potential cross-examination benefits, just as did the Advisory Committee on the Federal Rules of Civil Procedure in adopting the same amendments to federal Rule 26 in 2010. *See* Fed. R. Civ. P. 26(b)(4) Committee Note (2010 Amendment) ("The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen.").

[1] The CCJR has addressed the AAJ's comment that the proposed Rule 26.1(d) revisions do not define who is an "expert" for purposes of the report requirement. The amended petition incorporates language proposed by the State Bar, clarifying that expert reports are only required for witnesses who are "retained or specially employed to provide expert testimony in the action or one whose duties as the party's employee regularly involve giving expert testimony." *See* Fed. R. Civ. P. 26(a)(2)(B) and (C) (containing identical limitation). This addition does not change existing Arizona case law addressing when a treating physician must be compensated as an expert witness for purposes of providing deposition testimony, which is governed by *Sanchez v. Gama*, 310 P.3d 1, 233 Ariz. 125 (Ct. App. 2013).

Second, the AAJ opposes requiring expert reports in Tier 3 cases generally, arguing that the report requirement will increase the burden and expense of litigation. MICA argues that expert reports will be unduly expensive in medical malpractice cases, which often involve multiple experts. Both of these comments urge the court to retain Arizona's current disclosure rules for expert witnesses.

As an initial matter, the CCJR opposes excepting medical malpractice cases from the Tier 3 expert report requirement. The CCJR agrees with the State Bar's pending Petition No. R-17-0006, which proposes to eliminate current distinctions in the civil rules that treat medical malpractice actions differently than other civil actions. The CCJR also disagrees with the AAJ's and MICA's arguments that requiring expert reports in Tier 3 cases will be unduly burdensome. The CCJR's proposal addresses concerns of judges and practitioners that Arizona's current expert disclosure rules are not well-suited to complex matters, and often give rise to disputes and motion practice over whether an expert's opinions have been properly disclosed. Judges on the CCJR also noted that in complex cases, expert reports allow the court to better address admissibility under Rule 702. The CCJR's proposal recognizes that there may be exceptions, and provides as a safety hatch that expert reports are required in Tier 3 cases "unless the *parties stipulate* or the *court orders otherwise*." The CCJR's proposal strikes the correct balance and should be adopted as proposed.

The AAJ also argues that new requirements to disclose an expert's compensation and a list of past testimony are unduly burdensome. But this information should be readily available to any expert witness. Requiring it up-front will eliminate disputes and the costs of pursuing it through other discovery.

II. THE CCJR ADHERES TO ITS PROPOSED RULE 11 REFORMS, AND RESPECTFULLY OPPOSES THE STATE BAR'S COMMENTS REJECTING THEM ALMOST ENTIRELY.

A. The CCJR Disagrees With the State Bar's Arguments Against Making Rule 11 Sanctions Mandatory.

The State Bar argues that the CCJR's proposal for mandatory sanctions will make Rule 11 practice "more frequent and more punitive." This fear is unfounded given the January 2017 amendments, which now require the moving party to engage in a two-step consultation and written notice procedure ***before*** any motion can be filed. The current rule also requires Rule 11 motions to be filed separately from any other motion or filing. This framework will operate to reduce, rather than increase, Rule 11 motion practice. Moreover, under the CCJR's proposal, courts still have considerable leeway in fashioning an "appropriate" sanction.

As the State Bar itself argued in its original Petition to Amend Rule 11 filed in 2015, adding mandatory sanctions for a violation is a key element of fairness in the new Rule 11 scheme. *See* R-15-0004 (arguing that "the State Bar does not favor using the permissive term 'may,' as the heightened procedural requirements proposed in the amendments allow ample opportunity for a party or attorney in

violation of the Rule to take corrective measures"). The two-step process required by the current rule imposes a heavy burden on the moving party, requiring it to expend time and money engaging in a good faith consultation, and preparing a detailed written notice, followed by a formal motion. To avoid having a chilling effect on meritorious Rule 11 motions, the burden imposed on the movant should be counterbalanced by the requirement of mandatory sanctions if the court finds a violation. Otherwise, a moving party faced with these hurdles may well decide that invoking Rule 11 is more trouble than it is worth. This undercuts Rule 11's important purpose of curbing abusive litigation.

B. The CCJR Disagrees With the State Bar's Opposition to Modified Certification Standards In Rule 11(b), Because the Amended Draft Merely Readopts the Standard in Arizona's Former Rule 11 and the Case Law Interpreting It.

As the State Bar notes, the CCJR proposes to replace the word "nonfrivolous" with the word "colorable" in Rule 11(b)(4). Far from being new, the term "colorable" was well-established in Arizona's Rule 11 case law before the 2017 amendments. *See, e.g., Villa De Jardines Ass'n v. Flagstar Bank*, 227 Ariz. 91, 253 P.3d 288 (Ct. App. 2011) ("Rule 11 requires that attorneys have 'a good faith belief, formed on the basis of . . . reasonable investigation, that a colorable claim exists'") (quoting *Boone v. Superior Court*, 145 Ariz. 235, 241, 700 P.2d 1335, 1341 (1985)). In contrast, the term "nonfrivolous" does not appear in any reported Rule 11 case in Arizona; as noted by the CCJR, "nonfrivolous" implies a

lesser standard than what had previously governed Rule 11 motions in Arizona. The CCJR believes that its proposal to replace the term "nonfrivolous" with the term "colorable" will reduce, rather than increase, possible confusion in this area.

Similarly, the CCJR proposes to restore the standard in Arizona's former Rule 11 requiring that factual allegations be "well grounded in fact." The State Bar also opposes this change, arguing it will create confusion. As explained in the Petition, the CCJR was concerned that newly amended Rule 11(b)(3) – providing that factual contentions need only have "evidentiary support after a reasonable opportunity for further investigation or discovery" – would encourage groundless allegations and post-filing fishing expeditions. This change should not be confusing to practitioners as it simply incorporates the standard of the former rule and the well-established case law applying that rule. *Id.* (applying "well grounded in fact" standard of Arizona's pre-2017 Rule 11 to uphold sanctions).

III. THE CCJR AGREES WITH THE STATE BAR'S PROPOSAL FOR A JULY 1, 2018 IMPLEMENTATION OF THE AMENDED DRAFT.

The CCJR agrees with the State Bar's proposal that this Court briefly delay implementation of the CCJR's Amended Draft, until July 1, 2018. There are good reasons for this modest delay. First, there is the need for public education. The change from conventional discovery limitations to a tiered system of case management, with different schedules, meeting requirements, and new types of filings requires a program of judge and lawyer education. The brief proposed

delay mirrors one in 2013 around far more modest case management reforms. It would induce widespread CLE before the June 30, 2018 deadline for education. Second, there is rule-revision fatigue in the bench and bar. The rule-using public is still adjusting to the changes in the January 1, 2017 restyling of the entirety of the civil rules. The CCJR's proposed changes are more far-reaching. Third, the Presiding Civil Judge and Civil Court Administrator for Maricopa County have argued that the CCJR's proposals will work better in the civil courts if more time is allowed to educate the bench and bar about it. The CCJR agrees, and believes that deference to the Superior Court on this point is desirable. For all of these reasons, the CCJR asks this Court to adopt the Amended Draft effective July 1, 2018.

Conclusion

For all of these reasons, the CCJR respectfully requests that this Court adopt the changes in the Amended Draft effective July 1, 2018, attached hereto as Appendix A in blackline, and as Appendix B in a clean Word version. The CCJR respectfully submits a proposed implementation order as Appendix C, and proposed conforming changes to other rule-sets as Appendix D.

RESPECTFULLY SUBMITTED this 30th day of June, 2017

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