

# **APPENDIX B**

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

\*\*\*

**(c) Service with Filing and Documents Not to Be Filed.**

- (1) ***Filing and Service.*** After a complaint's filing, if a document must be filed within a specified time, it must be both filed and served within that time period.
- (2) ***Documents Not to Be Filed.*** The following documents may not be filed separately and may be filed as attachments or exhibits to other documents only if relevant to the determination of an issue before the court:
  - (A) ***Subpoenas.*** Any praecipe used solely for issuance of a subpoena or subpoena duces tecum, any subpoena or subpoena duces tecum, and any affidavit of service of a subpoena, except for postjudgment proceedings;
  - (B) ***Discovery and Disclosure Documents.*** Notices of deposition; deposition transcripts; interrogatories and answers; disclosure statements; requests for production, inspection, or admission, and responses; requests for physical and mental examination; and notices of service of any discovery or discovery response;
  - (C) ***Proposed Pleadings.*** Any proposed pleading, unless filing is necessary to preserve the record on appeal;
  - (D) ***Prior Filings.*** Any document that has been previously filed in the action, which may be called to the court's attention by incorporating it by reference;
  - (E) ***Authorities Cited in Memoranda.*** Copies of authorities cited in memoranda, unless necessary to preserve the record on appeal; and
  - (F) ***Offers of Judgment.*** Offers of judgment served under Rule 68.
- (3) ***Attachments to Judge.*** Except for proposed orders and proposed judgments, a party may attach copies of documents described in Rule 5.1(c)(2) to a copy of a motion, response, or reply delivered to the judge to whom the action has been assigned. Any such documents provided to the judge must also be provided to all other parties.
- (4) ***Sanctions.*** If this rule is violated, the court may order removal of the offending document from the record and charge the offending party or counsel such costs or fees as may be necessary to cover the clerk's costs of filing, preservation, or storage. It may also impose any additional sanctions provided in Rule 16(h).\*\*\*

## Rule 8. General Rules of Pleading

(a) **Claim for Relief.** A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) **Claims for Damages.**

(1) ***Restrictions on Pleading Dollar Amounts.*** In all actions in which a party is pursuing a claim other than for a sum certain or for a sum which can by computation be made certain, no dollar amount or figure for damages sought may be stated in any pleading allowed under Rule 7. The pleading setting forth the claim may include a statement reciting that the minimum jurisdictional amount established for filing the action has been satisfied.

(2) ***Requirement to Plead Damage Tier.*** A party who claims damages but does not plead an amount must plead that their damages are such as to qualify for a specified tier defined by Rule 26.2(c)(3).

(c) **Defenses; Admissions and Denials.**

(1) ***Generally.*** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) ***Denials—Responding to the Substance.*** A denial must fairly respond to the substance of the allegation. A denial does not fairly respond to the substance of an allegation if it answers an allegation by:

(A) stating that “the document speaks for itself”;

(B) stating that the answering party “denies any allegations inconsistent with the language of a document”; or

(C) answering an allegation by claiming that it states a legal conclusion.

## APPENDIX B—Clean Version of Proposed Rules

- (3) ***General and Specific Denials.*** A party who intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial subject to the obligations provided in Rule 11(a). A party who does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
- (4) ***Denying Part of an Allegation.*** A party who intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
- (5) ***Lacking Knowledge or Information.*** A party who lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. A party thus cannot deny an allegation “on information and belief.” Instead, it must either admit or deny an allegation if it has information sufficient to form a belief, or must instead state that it has insufficient information to form a belief about the truth of an allegation.
- (6) ***Effect of Failing to Deny.*** An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

### (d) **Affirmative Defenses.**

- (1) ***Generally.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:
- (A) accord and satisfaction;
  - (B) arbitration and award;
  - (C) assumption of risk;
  - (D) contributory negligence;
  - (E) duress;
  - (F) estoppel;
  - (G) failure of consideration;
  - (H) fraud;
  - (I) illegality;
  - (J) laches;
  - (K) license;

## APPENDIX B—Clean Version of Proposed Rules

- (L) payment;
- (M) release;
- (N) res judicata;
- (O) statute of frauds;
- (P) statute of limitations; and
- (Q) waiver.

(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

**(e) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.**

(1) ***Generally.*** Each allegation of a pleading must be simple, concise, and direct. No technical form is required.

(2) ***Alternative Statements of a Claim or Defense.*** A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

**(f) Construing Pleadings.** Pleadings must be construed so as to do justice.

**(g) Civil Cover Sheets.**

(1) ***Generally.***

(A) When filing a civil action, a plaintiff must complete and submit a Civil Cover Sheet in a form approved by the Supreme Court. The public may obtain this form from the website of the Administrative Office of the Courts.

(B) The Civil Cover Sheet must contain:

- (i) the plaintiff's correct name and mailing address;
- (ii) the plaintiff's attorney's name and bar number;
- (iii) the defendant's name(s);
- (iv) the nature of the civil action or proceeding;

## APPENDIX B—Clean Version of Proposed Rules

- (v) the main case categories and subcategories designated by the Administrative Director;
  - (vi) the amount in controversy pleaded, or if that amount is not pled, the discovery tier to which the pleading alleges the action would belong; and
  - (vii) such other information as the Supreme Court may require.
- (C) A superior court may require by local rule that additional information be provided in an Addendum to the Civil Cover Sheet.
- (2) *Writs of Garnishment.*** A writ of garnishment does not require a Civil Cover Sheet, but it must include, under the case number on the petition's or complaint's first page, one of the following notations, as applicable:
- (A) federal exemption;
  - (B) enforce order of support;
  - (C) enforce order of bankruptcy;
  - (D) enforce collection of taxes; or
  - (E) non-earnings.
- (h) Maricopa County Complex Civil Litigation Program.** The Maricopa County Superior Court has established a complex civil litigation program, which is addressed in Maricopa County Local Rule 3.12. Maricopa County Local Rule 3.12 contains the text of former Arizona Rules of Civil Procedure 8(h) and 16.3. Maricopa County Local Rules, Forms 1–3 contain the text of Forms 10, 13(a), and 13(b), formerly found within Rule 84.
- (i) Verification.** Unless a rule or statute specifically states otherwise, a pleading need not be verified or supported by an affidavit. If a rule or statute requires a pleading to be verified, the pleading must be accompanied by an affidavit by the party—or a person acting on the party's behalf who is acquainted with the facts—attesting under oath that, to the best of the party's or person's knowledge, the facts set forth in the pleading are true and accurate.
- (j) Compulsory Arbitration.** A complaint and an answer must be accompanied by the certificate required by Rule 72(e) and any corresponding local rule.

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

\*\*\*

**(e) Assignment of Cases to Commercial Courts.**

- (1) ***Plaintiff's Duties.*** A plaintiff seeking assignment of an eligible case to the commercial court must (A) include in the initial complaint's caption the words "eligible for commercial court," and (B) complete a civil cover sheet that indicates the action is an eligible commercial case.
- (2) ***Assignment to Commercial Court.*** The court administrator will review a complaint and civil cover sheet filed in accordance with Rule 8.1(e)(1) and will assign an eligible case to a commercial court judge.
- (3) ***Motion to Transfer out of Commercial Court.*** After assignment of a case to the commercial court, a commercial court judge, upon motion of a party or on the judge's own initiative, may transfer the case out of commercial court if the judge determines the matter is not a "commercial case" as defined in this Rule. Any party filing a motion under this Rule must do so no later than 20 days after that party's appearance in the case.
- (4) ***Motion to Transfer to Commercial Court.*** On motion of a party filed within 20 days after that party's appearance in the case, or the court's own initiative within 20 days after the filing of the first responsive pleading or Rule 12 motion, a judge of a general civil court may order the transfer of a case to the commercial court if that judge determines the matter is a "commercial case" as defined in this Rule.
- (5) ***Complex Cases.*** Assignment of a case to the commercial court does not impair the right of a party to request reassignment of the case to the Maricopa County complex civil litigation program under Maricopa County Local Rule 3.12.

**(f) Case Management.** Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3. Rules 16(a) through (j) apply to cases in the commercial court, except:

- (1) ***Scheduling Conference.*** Scheduling conferences under Rule 16(d) are mandatory.
- (2) ***Early Meeting.*** Before filing a Rule 16(c) Joint Report, and in addition to conferring about the subjects in Rule 16(b)(1), the parties must confer, as

## APPENDIX B—Clean Version of Proposed Rules

set forth in the commercial court’s checklist governing the production of electronically stored information, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of such information, including:

- (A) requirements and limits on disclosure and production of electronically stored information;
  - (B) the form or formats in which the electronically stored information will be disclosed or produced; and
  - (C) if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing electronically stored information.
- (3) ***Joint Report and Proposed Scheduling Order.*** The parties’ Rule 16(c) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and (b), including:
- (A) whether the parties expect electronically stored information to be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;
  - (B) whether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to Arizona Rule of Evidence 502, and, if so, whether they have filed a stipulated order;
  - (C) whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial-preparation materials under Rules 26(b)(6) and 26.1(h);
  - (D) whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order; and
  - (E) whether the commercial court should assign the case to a tier other than Tier 3 after the Rule 16(d) scheduling conference and, if so, why.
- (4) ***Motions to Dismiss.*** Any motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation certificate complying with Rule 7.1(h) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.

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

**(a) Signature.**

- (1) **Generally.** Every pleading, written motion, and other document filed with the court or served must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The court must strike an unsigned document unless the omission is promptly corrected after being called to the filer's attention.
- (2) **Electronic Filings.** A person may sign an electronically filed document by placing the symbol “/s/” on the signature line above the person's name. An electronic signature has the same force and effect as a signature on a document that is not filed electronically. The court may treat a document that was filed using a person's electronic filing registration information as a filing that was made or authorized by that person.
- (3) **Filings by Multiple Parties.** A person filing a document containing more than one place for a signature—such as a stipulation—may sign on behalf of another party only if the person has actual authority to do so. The person may indicate such authority either by attaching a document confirming that authority and containing the signatures of the other persons who have authority to consent for such parties, or, after obtaining a party's consent, by inserting “/s/ [the other party's or person's name] with permission” as any non-filing party's signature.

**(b) Representations to the Court.** By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the factual contentions are well grounded in fact;
- (3) the denials of factual contentions are well grounded in fact or, if specifically so identified, are reasonably based on lack of knowledge or information sufficient to form a belief.
- (4) the claims, defenses, and other legal contentions are warranted by existing law or by a colorable argument for extending, modifying, or reversing existing law or for establishing new law. A legal contention may be colorable even if it does not succeed on the merits.

## APPENDIX B—Clean Version of Proposed Rules

### (c) Sanctions.

- (1) **Generally.** If a pleading, motion, or other document is signed in violation of this rule, or if a party fails to participate in good faith in the consultation required under Rule 11(c)(2), the court—on motion or on its own—must impose on the person who signed it, a represented party, or both, an appropriate sanction. The sanction may include an order to pay to the other party or parties the amount of the reasonable expenses incurred, including a reasonable attorney’s fee, because of the filing of the document or because of the party’s failure to participate in the required Rule 11(c)(2) consultation. In 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 under Rule 11(c)(2).
- (2) **Consultation.** Before filing a motion for sanctions under this rule, the moving party must:
  - (A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and
  - (B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).
- (3) **Motion for Sanctions.** A motion for sanctions under this rule must:
  - (A) be made separately from any other motion;
  - (B) describe the specific conduct that allegedly violates Rule 11(b);
  - (C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and
  - (D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).
- (d) **Assisting Filing by Self-Represented Person.** An attorney may help draft a pleading, motion, or other document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or other document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts.

**Rule 16. Scheduling and Management of Actions**

**(a) Objectives.** In accordance with Rule 1, the court must manage a civil action with the following objectives:

- (1) expediting a just disposition of the action;
- (2) establishing early and continuing control so that the action will not be protracted because of lack of management;
- (3) ensuring that discovery is proportional to the needs of the action, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of proposed discovery outweighs its likely benefit;
- (4) discouraging wasteful, expensive, and duplicative pretrial activities;
- (5) improving the quality of case resolution through more thorough and timely preparation;
- (6) facilitating the appropriate use of alternative dispute resolution;
- (7) conserving parties' resources;
- (8) managing the court's calendar to eliminate unnecessary trial settings and continuances; and
- (9) adhering to applicable standards for timely resolution of civil actions.

**(b) Required Early Meeting About Expected Course of Case, Tiering.**

(1) **Timing; Purpose.** At the earliest practicable time, but no later than 30 days after a party answers or files a motion directed at the complaint, or 120 days after the action commences—whichever occurs first—that party and the plaintiff must meet and confer about the anticipated course of their case, including the tier to which it should be assigned under Rule 26.2 and the subjects set forth in Rule 16(b)(2) and (c). The parties must discuss whether and how they can agree to streamline and limit claims and affirmative defenses to be asserted, discovery to be taken, and motions to be brought. The purpose of the conference is to plan cooperatively for the case, and to facilitate the case's placement in one of three tiers for discovery. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging and participating in the Early Meeting.

(2) **Topics for Early Meeting.** The parties should discuss at least:

## APPENDIX B—Clean Version of Proposed Rules

- (A) their anticipated disclosures concerning witnesses, including the number of fact witnesses, whether they will seek to use expert witnesses, and how much deposition testimony they expect will be necessary;
- (B) their anticipated disclosures of documents, including any issues already known to them concerning electronically stored information;
- (C) motions they expect to file, so that the parties can determine whether any of the motions can be avoided by stipulations, amendments, or other cooperative activity;
- (D) any agreements that could aid in the just, speedy, and inexpensive resolution of the case;
- (E) the discovery tier to which the case should be assigned under Rule 26.2, and whether the parties wish to stipulate—or any party wishes to move for—assignment to a tier other than that to which the case would be assigned given the amount in controversy; and
- (F) the subjects set forth in Rule 16(c).

### (c) **Filing of Joint Report and Proposed Scheduling Orders.**

- (1) **Timing.** No later than 14 days after the Early Meeting, the parties must file a Joint Report and a Proposed Scheduling Order. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for attempting in good faith to agree on a Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court. The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order or after holding a Scheduling Conference.
- (2) **Content of Joint Report.** The Joint Report must state—to the extent practicable—the parties' positions on the subjects set forth in Rule 16(b)(2) and (c)(3) and must attach a proposed Scheduling Order. The parties are not required to describe their Early Meeting in the Joint Report, but may do so. Any summary must describe the case with respect to the characteristics in Rule 26.2(b) and (c) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. In the Joint Report, the parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue that the other party has taken unreasonable positions. Unless ordered by the court, a summary must not exceed 4 pages of text, which length must be split evenly between separate statements of the parties if they do not agree on the summary's contents. The Joint Report must attach a good faith consultation certificate

## APPENDIX B—Clean Version of Proposed Rules

under Rule 7.1(h) and certify that the parties conferred regarding the subjects set forth in Rule 16(b)(2) and (c)(3).

- (3) *Content of Proposed Scheduling Order.*** The proposed Scheduling Order must state the discovery tier to which the case is assigned, and must specify deadlines for the following by calendar date, month, and year:
- (A)** serving initial disclosures under Rule 26.1 if they have not already been served;
  - (B)** identifying areas of expert testimony;
  - (C)** identifying and disclosing expert witnesses and their opinions under Rule 26.1(d);
  - (D)** propounding written discovery;
  - (E)** disclosing nonexpert witnesses;
  - (F)** completing depositions;
  - (G)** completing all discovery other than depositions;
  - (H)** final supplementation of Rule 26.1 disclosures;
  - (I)** unless the court orders otherwise for good cause, a deadline for holding a Rule 16.1 settlement conference or private mediation to occur no more than 15 months after the action commenced, but in no event later than 60 days after the date discovery is set to complete consistent with the discovery tier to which the case is assigned under Rule 26.2(f);
  - (J)** filing dispositive motions;
  - (K)** a proposed trial date; and
  - (L)** the anticipated number of days for trial.
- (4) *Dates Certain.*** The Scheduling Order must include calendar deadlines specifying the month, date, and year for each of the items included in the Proposed Scheduling Order, consistent with the discovery tier to which the case is assigned under Rule 26.2(f). The Scheduling Order must also set either: (A) a trial date; or (B) a date for a Trial-Setting Conference under Rule 16(e) at which a trial date may be set. Absent leave of court, no trial may be set unless the parties certify that they engaged in a settlement conference or private mediation, or that they will do so by a date certain approved by the court. The Scheduling Order also may address other appropriate matters.

## APPENDIX B—Clean Version of Proposed Rules

- (5) ***Modification of Dates Established by Scheduling Order.*** The parties may modify the dates established in a Scheduling Order that govern court filings or hearings only by court order for good cause. Once a trial date is set, the parties may modify that date only under Rule 38.1.
- (6) ***Request for Discovery Tier.***
- (A) ***Stipulations.*** The parties may include in the Joint Report a proposed stipulation to a discovery tier, setting forth good cause for the requested tiering in compliance with Rule 26.2(c)(1)(A) and (B).
- (B) ***Motions; Timing.*** Any motion to vary the tier to which a case is deemed to be assigned under Rule 26.2(c)(3) must be made by the date on which the parties must file their Joint Report. Any such motion must be filed separately from the Joint Report and may not exceed three pages in length. Any responsive memorandum may not exceed three pages in length and must be filed within 5 days after service of the motion. No reply memorandum is permitted.
- (7) ***Forms.*** The parties must file the Joint Report and the Proposed Scheduling Order using the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13. They must use Forms 11(a) and (b) for Tier 1 cases, Forms 12(a) and (b) for Tier 2 cases, and Forms 13(a) and (b) for Tier 3 cases.
- (8) ***Applicability.*** The requirements of Rule 16(b) and (c) apply to all civil actions except:
- (A) the requirements of Rule 16(b) apply to actions subject to compulsory arbitration under Rule 72(b), but the requirements of Rule 16(c) do not. In actions subject to compulsory arbitration, no later than 14 days after the Early Meeting, the parties must file a Report of Early Meeting stating the date(s) on which the Early Meeting occurred, and containing either a proposed stipulation to a discovery tier, or the parties' positions regarding the appropriate discovery tier. The Report of Early Meeting must attach a good faith consultation certificate under Rule 7.1(h); and
- (B) the requirements of Rule 16(b) and (c) do not apply to actions seeking the following relief:
- (i) change of name;
  - (ii) forcible entry and detainer;
  - (iii) enforcement, domestication, transcript, or renewal of a judgment;
  - (iv) an order pertaining to a subpoena sought under Rule 45.1(e)(2);

## APPENDIX B—Clean Version of Proposed Rules

- (v) restoration of civil rights;
- (vi) injunction against harassment or workplace harassment;
- (vii) delayed birth certificate;
- (viii) amendment of birth certificate or marriage license;
- (ix) civil forfeiture;
- (x) distribution of excess proceeds;
- (xi) review of a decision of an agency or a court of limited jurisdiction;
- (xii) declarations of factual innocence under Rule 57.1 or factual improper party status under Rule 57.2; and
- (xiii) petitions under Rule 45.2(e).

**(d) Scheduling Conferences.** On a party's written request the court must—or on its own the court may—set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

- (1) determine what additional disclosures, discovery and related activities will be undertaken and establish a schedule for those activities;
- (2) discuss which form of Joint Report and Scheduling Order is appropriate under Rule 16(c)(7);
- (3) determine whether the court should enter orders addressing one or more of the following:
  - (A) setting forth any requirements or limits for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced and, if appropriate, the sharing or shifting of costs incurred by the parties in producing the information;
  - (B) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and
  - (C) adopting any agreements the parties reach for asserting claims of privilege or of protection for work-product materials after production;
- (4) determine a schedule for disclosing expert witnesses and whether the parties should be required to provide signed reports from retained or specially employed experts in compliance with Rule 26.1(d)(4);
- (5) determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(F);

## APPENDIX B—Clean Version of Proposed Rules

- (6) determine a date for disclosing nonexpert witnesses and the order of their disclosure;
  - (7) determine a deadline for filing dispositive motions;
  - (8) resolve any discovery disputes;
  - (9) eliminate nonmeritorious claims or defenses;
  - (10) permit amendment of the pleadings;
  - (11) assist in identifying those issues of fact that are still contested;
  - (12) obtain stipulations for the foundation or admissibility of evidence;
  - (13) determine the desirability of special procedures for managing the action;
  - (14) consider alternative dispute resolution and determine a deadline for the parties to participate in a settlement conference or private mediation;
  - (15) determine whether any time limits or procedures set forth in these rules or local rules should be modified or suspended;
  - (16) determine whether the parties have complied with Rule 26.1;
  - (17) determine a date for filing the Joint Pretrial Statement required by Rule 16(f);
  - (18) set a trial date and determine the anticipated number of days needed for trial;
  - (19) discuss any time limits on trial proceedings, juror notebooks, brief pre-voir dire opening statements, and preliminary jury instructions, and the effective management of documents and exhibits;
  - (20) determine how a verbatim record of future proceedings in the action will be made; and
  - (21) discuss other matters and enter other orders that the court deems appropriate.
- (e) **Trial-Setting Conference.**
- (1) **Generally.** If the court has not already set a trial date in a Scheduling Order or otherwise, the court must hold a Trial-Setting Conference—as set by the Scheduling Order—for the purpose of setting a trial date. The Conference must be attended in person—or telephonically, as permitted by the court—by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties. If a trial date is not set at the Trial-Setting Conference, the court must schedule another Trial-Setting Conference as soon as practicable for the setting of a trial date.

## APPENDIX B—Clean Version of Proposed Rules

(2) **Subject Matter.** In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:

- (A) the status of discovery and any dispositive motions that have been or will be filed;
- (B) a date for holding a Trial Management Conference under Rule 16(f);
- (C) imposing time limits on trial proceedings;
- (D) using juror questionnaires;
- (E) using juror notebooks;
- (F) giving brief pre-voir dire opening statements and preliminary jury instructions;
- (G) effective management of documents and exhibits; and
- (H) other matters that the court deems appropriate.

**(f) Joint Pretrial Statement; Trial Management Conference.**

(1) **Preparation of Joint Pretrial Statement.** Counsel or the unrepresented parties who will try the action and who are authorized to make binding stipulations must confer and prepare a written Joint Pretrial Statement, signed by each counsel or unrepresented party. The parties must file the Joint Pretrial Statement no later than 10 days before the date of the Trial Management Conference, or if no conference is scheduled, no later than 10 days before trial. A plaintiff must deliver its part of the Joint Pretrial Statement to all other parties no later than 20 days before the date the Statement must be filed. All other parties must deliver their part of the Joint Pretrial Statement to all other parties no later than 15 days before the date the Statement must be filed.

(2) **Contents of Joint Pretrial Statement.** The parties must prepare the Joint Pretrial Statement as a single document containing the following:

- (A) stipulations of material fact and applicable law;
- (B) contested issues of fact and law that the parties agree are material or applicable;
- (C) a separate statement by each party of other issues of fact and law that the party believes are material;
- (D) a list of witnesses each party intends to call to testify at trial, identifying those witnesses whose testimony will be presented solely by deposition. Each party must list any objection to a witness and the basis for that objection. Unless the court orders otherwise for good cause, no witness

## APPENDIX B—Clean Version of Proposed Rules

may testify at trial other than those listed;

- (E) each party's final list of exhibits to be used at trial for any purpose, including impeachment. Each party must list any objection to an exhibit and the basis for that objection. Unless the court orders otherwise for good cause, no exhibit may be used at trial other than those listed. The parties should identify any exhibits that they stipulate can be admitted into evidence, with such stipulations being subject to court approval;
  - (F) a statement by each party identifying any proposed deposition summaries or designating parts of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. The parties must designate deposition testimony by transcript page and line numbers. The parties must file with the Joint Pretrial Statement a copy of any proposed deposition summary and the written transcript of designated deposition testimony. Each party must list any objection to the proposed deposition summaries and designated deposition testimony and the basis for that objection. Unless the court orders otherwise for good cause, no deposition testimony may be used at trial other than that designated or counter-designated in the Joint Pretrial Statement or that used solely for impeachment purposes;
  - (G) a brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party must submit a separate statement for the court's consideration;
  - (H) requested technical equipment;
  - (I) requested interpreters;
  - (J) if the trial is to a jury, the number of jurors and alternates, whether the alternates may deliberate, and the number of jurors required to reach a verdict;
  - (K) whether any party is invoking Arizona Rule of Evidence 615 regarding the exclusion of witnesses from the courtroom;
  - (L) a brief description of settlement efforts; and
  - (M) how a verbatim record of the trial will be made.
- (3) ***Delivery of Exhibits.*** A plaintiff must deliver copies of all its exhibits to all other parties no later than 10 days before the date the Joint Pretrial Statement must be filed. All other parties must deliver copies of all their exhibits to all other parties no later than 5 days before the date the Joint Pretrial Statement must be filed. Any exhibit that cannot be reproduced

## APPENDIX B—Clean Version of Proposed Rules

must be made available for inspection to all other parties on or before these deadlines.

- (4) ***Additional Documents to File if Trial Is to a Jury.*** If the trial is to a jury, the parties must—on the same day they file the Joint Pretrial Statement—file: (A) an agreed-on set of jury instructions, verdict forms, and voir dire questions; and (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed on.
- (5) ***Juror Notebooks.*** A party intending to submit a notebook to the jurors must serve a copy of the notebook on all other parties no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.
- (6) ***Trial Memoranda.*** A party must file any trial memorandum no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.
- (7) ***Trial Management Conference.*** Any Trial Management Conference scheduled by the court should be held as close to the time of trial as is reasonable under the circumstances. The Conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by all unrepresented parties.
- (8) ***Modifications.*** Rule 16(f)'s provisions may be modified by court order.
- (g) **Pretrial Orders.** After any conference held under this rule, the court must enter an order reciting the action taken. This order controls the later course of the action unless modified by a later court order. The order entered after a Trial Management Conference under Rule 16(f) may be modified only to prevent manifest injustice.
- (h) **Sanctions.**
  - (1) ***Generally.*** Except on a showing of good cause, the court—on motion or on its own—must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney:
    - (A) fails to obey a scheduling or pretrial order or fails to meet the deadlines set in the order;
    - (B) fails to appear at a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference;
    - (C) is substantially unprepared to participate in a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference;

## APPENDIX B—Clean Version of Proposed Rules

- (D) fails to participate in good faith in a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference; or
  - (E) fails to participate in good faith in the preparation of a Joint Report and Proposed Scheduling Order or a Joint Pretrial Statement.
- (2) ***Award of Expenses.*** Unless the court finds the conduct substantially justified or that other circumstances make an award of expenses unjust, the court must—in addition to or in place of any other sanction—require the party, the attorney representing the party, or both, to pay:
- (A) another party’s reasonable expenses, including attorney’s fees, incurred as a result of the conduct;
  - (B) an assessment to the clerk; or
  - (C) both.
- (3) ***Trial Date.*** The fact that a trial date has not been set does not preclude sanctions under this rule, including the sanction of excluding from evidence untimely disclosed information.
- (i) **Alternative Dispute Resolution.** On motion—or on its own after consulting with the parties—the court may direct the parties to submit the dispute that is the subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.
- (j) **Time Limits.** The court may impose reasonable time limits on trial proceedings.

### State Bar Committee Note

#### 2008 Amendment to Rule 16(d) [Formerly Rule 16(b)]

[Rule 16(d) (formerly Rule 16(b))] was amended to clarify that a court has the power under Rule 16 to enter orders governing the disclosure and discovery of electronically stored information, the preservation of discoverable documents and electronically stored information, and the enforcement of party agreements regarding post-production assertions of privilege or work product protection. Because these issues typically arise at the beginning of a case, a court need not wait until the parties are ready to address other issues under Rule 16[d] before holding a hearing under this Rule on these and related subjects.

Orders regarding the disclosure or discovery of electronically stored information may specify the forms and manner in which such information shall be produced. The court also may enter orders limiting (or imposing conditions

## APPENDIX B—Clean Version of Proposed Rules

upon) the disclosure of such information, and may take into account the relative accessibility of the electronically stored information at issue, the costs and burdens on parties in making such information available, the probative value of such information, and the amount of damages (or the type of relief) at issue in the case. *See* CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 5 (approved August 2006) (noting that in determining discovery issues relating to electronically stored information, a court should consider these factors, among others).

Document retention and preservation issues are especially likely to arise with electronically stored information because the “ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information.” Fed. R. Civ. P. 26(f), Advisory Committee Notes on 2006 Amendment. A court has the power under this Rule to incorporate into an order any agreement the parties might reach regarding preservation issues or, absent an agreement, to enter an order in appropriate circumstances imposing such requirements and limitations. In considering such an order, a court should take into account not only the need to preserve potentially relevant evidence, but also any adverse effects such an order may have on a party’s on-going activities and computer operations. A preservation order entered over objections should be narrowly tailored to address specific evidentiary needs in a case, and *ex parte* preservation orders should issue only in exceptional circumstances. *Cf. id.* (stating that preservation orders should be narrowly tailored where objections are made and cautioning against “blanket” or *ex parte* preservation orders); CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 10 (approved August 2006) (“When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.”).

If the amount of documents and electronic data to be disclosed is voluminous, an agreement among the parties minimizing the risks associated with the inadvertent production of privileged or otherwise protected material may be helpful in lessening discovery costs and expediting the litigation. As with its counterpart in the Federal Rules of Civil Procedure, this Rule does not provide the court with authority to enter such an order without party agreement, or limit the court’s authority to act on motions to resolve privilege issues. *Cf.* Fed. R. Civ. P. 16(b), Advisory Committee Notes on 2006 Amendment (clarifying the rule’s scope).

**Comment**

**2014 Amendment to Rule 16(c)**

A primary goal of civil case management is the creation of public confidence in a predictable court calendar. Courts should avoid overlapping trial settings that necessitate continuances when the court is unable to hold a trial on the date scheduled. Continuances of scheduled trial dates impose unnecessary costs and inconvenience when counsel, parties, witnesses, and courts are required to engage in redundant preparation. Although early trial settings may be appropriate, a court should employ a case management system that ensures it will be in a position to conduct each trial on the date it has been set.

**APPENDIX B—Clean Version of Proposed Rules**

**Rule 16.3. Maricopa County Complex Civil Litigation Program Case Management Conference.** The Maricopa County Superior Court has established a complex civil litigation program, which is addressed in Maricopa County Local Rule 3.12. Maricopa County Local Rule 3.12 contains the text of former Arizona Rules of Civil Procedure 8(h) and 16.3. Maricopa County Local Rules, Forms 1–3 contain the text of Forms 10, 13(a), and 13(b), formerly found within Rule 84.

**Rule 26. General Provisions Governing Discovery**

**(a) Discovery Methods.** A party may obtain discovery by any of the following methods:

- (1) depositions by oral examination or written questions under Rules 30 and 31, respectively;
- (2) written interrogatories under Rule 33;
- (3) requests for production of documents or things or permission to enter onto land or other property for inspection and other purposes, under Rule 34;
- (4) physical and mental examinations under Rule 35;
- (5) requests for admission under Rule 36; and
- (6) subpoenas for production of documentary evidence or for inspection of premises under Rule 45(c).

**(b) Discovery Scope and Limits.**

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* The court may alter the limits in these rules on depositions, interrogatories, and requests for admission consistent with the procedures in Rule 26.2(g)(1)(A) and (B).

(B) *Specific Limits on Discovery of Electronically Stored Information.*

(i) *Generally.* A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense, including sources that are unduly burdensome or expensive to access because of the party's past good-faith operation of an electronic information system or good-faith and consistent application of a document retention policy. If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the

## APPENDIX B—Clean Version of Proposed Rules

requesting party shows good cause, considering the limits of Rule 26(b)(1). The court may specify conditions for the disclosure or discovery. Rule 26(e) applies in determining whether electronically stored information is not reasonably accessible as provided in this rule.

(ii) *Specific Limits.* A party is not entitled to obtain discovery of electronically stored information that is sought for purposes unrelated to the case. A party is not entitled to image or inspect an opposing party's data sources or data storage devices, or to discover electronically stored information that would require restoration of data through forensic means, unless the court finds: (1) that the information sought is relevant to a claim of fraud or other intentional misconduct; (2) that restoration is reasonably required to address prejudice arising from spoliation of evidence or a party's failure to comply with its obligation to preserve evidence under Rule 37(g); or (3) other good cause.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(D) *Contractual Limits.* In determining the permissible scope of discovery, the court must enforce any mutually and freely negotiated pre-litigation contract between business organizations (as defined in Experimental Rule 8.1(a)(3)) limiting the obligations of the contracting parties to preserve information, or to provide disclosure or discovery. Nothing in this subdivision impairs the rights of non-parties to the contract.

### (3) *Work Product and Witness Statements.*

(A) *Documents and Tangible Things Prepared in Anticipation of Litigation or for Trial.* Ordinarily, a party may not discover documents and tangible things that another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) prepared in

## APPENDIX B—Clean Version of Proposed Rules

anticipation of litigation or for trial. But, subject to Rule 26(b)(4), a party may discover those materials if:

- (i) the materials are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

**(B) *Protection Against Disclosure of Opinion Work Product.*** If the court orders discovery of materials under Rule 26(b)(3)(A), it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

**(C) *Discovery of Own Statement.*** On request and without the showing required under Rule 26(b)(3)(A), any party or other person may obtain his or her own previous statement about the action or its subject matter. If the request is refused, the party or other person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A statement discoverable under this rule is either:

- (i) a written statement that the party or other person signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, video, audio, or other recording—or a transcription of it—that recites substantially verbatim the party's or other person's oral statement.

### **(4) *Expert Discovery.***

**(A) *Deposition of an Expert Who May Testify.*** A party may depose any person who has been disclosed as an expert witness under Rule 26.1(d)(1).

**(B) *Trial Preparation Protection for Draft Reports or Disclosures.*** Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26.1(d), regardless of the form in which the draft is recorded.

**(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.*** Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert witness regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;

## APPENDIX B—Clean Version of Proposed Rules

- (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or
  - (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.
- (D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. A party may discover such facts or opinions only:
  - (i) as provided in Rule 35(d); or
  - (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
- (E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:
  - (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D), including the time the expert spends testifying in a deposition; and
  - (ii) for discovery under Rule 26(b)(4)(D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert’s facts and opinions, including—in the court’s discretion—the time the expert reasonably spends preparing for deposition.
- (F) *Number of Experts Per Issue.*
  - (i) *Generally.* Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue. When there are multiple parties on a side and those parties cannot agree on which expert to call on an issue, the court may designate the expert to be called or, for good cause, allow more than one expert to be called.
  - (ii) *Standard-of-Care Experts in Medical Malpractice Actions.* Notwithstanding the limits of Rule 26(b)(4)(F)(i), a defendant in a medical malpractice action may—in addition to that defendant’s standard-of-care expert witness—testify on the issue of that defendant’s standard of care. In such an instance, the court is not required to allow the plaintiff an additional expert witness on the issue of the standard of care.

## APPENDIX B—Clean Version of Proposed Rules

**(5) *Notice of Nonparty at Fault.*** No later than 150 days after filing its answer, a party must serve on all other parties—and should file with the court—a notice disclosing any person: (A) not currently or formerly named as a party in the action; and (B) whom the party alleges was wholly or partly at fault under A.R.S. § 12-2506(B). The notice must disclose the identity and location of the nonparty allegedly at fault, and the facts supporting the allegation of fault. A party who has served a notice of nonparty at fault must supplement or correct its notice if it learns that the notice was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties through the discovery process or in writing. A party must supplement or correct its notice of nonparty at fault under this rule in a timely manner, but in no event more than 30 days after it learns that the notice is materially incomplete or incorrect. The trier of fact may not allocate any percentage of fault to a nonparty who is not disclosed in accordance with this rule except on stipulation of all the parties or on motion showing good cause, reasonable diligence, and lack of unfair prejudice to all other parties.

**(6) *Claims of Privilege or Protection of Work-Product Materials.***

**(A) *Information, Documents, or Electronically Stored Information Withheld.***

- (i)** When a party withholds information, a document, or electronically stored information in response to a written discovery request on the claim that it is privileged or subject to protection as work product, the party must promptly identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that—without revealing information that is itself privileged or protected—will enable other parties to assess the claim.
- (ii)** The parties may stipulate to, or the court may order, alternate requirements to reduce the burden and expense of providing the information required by Rule 26(b)(6)(A)(i), such as identification by category or excluding certain categories of documents.
- (iii)** A party seeking alternative privilege log requirements must confer with the opposing party in an attempt to reach agreement. Disputes must be presented at the Rule 16(d) Scheduling Conference, or under Rule 26(d).

**(B) *Inadvertent Production.*** If a party contends that a document or electronically stored information subject to a claim of privilege or of protection as work-product material has been inadvertently produced in

## APPENDIX B—Clean Version of Proposed Rules

discovery, the party making the claim may notify any party who received the document or electronically stored information of the claim and the basis for it. After being notified, a party: (i) must promptly return, sequester, or destroy the specified document or electronically stored information and any copies it has; (ii) must not use or disclose the document or electronically stored information until the claim is resolved; (iii) must take reasonable steps to retrieve the document or electronically stored information if the party disclosed it before being notified; and (iv) may promptly present the document or electronically stored information to the court under seal for a determination of the claim. The producing party must preserve the document or electronically stored information until the claim is resolved.

### (c) Protective Orders.

- (1) **Generally.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or alternatively, on matters relating to a deposition, the court in the county where the deposition will be taken. 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). Subject to Rule 26(c)(4), the court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (A) forbidding the discovery;
  - (B) specifying terms and conditions, including time and place, for the discovery;
  - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
  - (D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;
  - (E) designating the persons who may be present while the discovery is conducted;
  - (F) requiring that a deposition be sealed and opened only on court order;
  - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

## APPENDIX B—Clean Version of Proposed Rules

- (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
- (2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on terms that are just, order that any party or person provide or permit discovery.
- (3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses on a motion for a protective order.
- (4) **Confidentiality Orders.**
- (A) **Burden of Proof.** Before the court may enter an order that limits a party or person from disclosing information or materials produced in the action to a person who is not a party to the action and before the court may deny an intervenor's request for access to such discovery materials: (i) the party seeking confidentiality must show why a confidentiality order should be entered or continued; and (ii) the party or intervenor opposing confidentiality must show why a confidentiality order should be denied in whole or in part, modified, or vacated. The burden of showing good cause for an order remains with the party seeking confidentiality.
- (B) **Findings of Fact.** When ruling on a motion for a confidentiality order, the court must make findings of fact concerning any relevant factors, including but not limited to: (i) any party's or person's need to maintain the confidentiality of such information or materials; (ii) any nonparty's or intervenor's need to obtain access to such information or materials; and (iii) any possible risk to the public health, safety, or financial welfare to which such information or materials may relate or reveal. No such findings of fact are needed if the parties have stipulated to such an order or if a motion to intervene and to obtain access to materials subject to a confidentiality order is unopposed. A party moving for entry of a confidentiality order must submit with its motion a proposed order containing proposed findings of fact.
- (C) **Least Restrictive Means.** An order restricting release of information or materials to nonparties or intervenors must use the least restrictive means necessary to maintain any needed confidentiality.
- (d) **Expedited Procedure for Resolving Discovery and Disclosure Disputes.**
- (1) **When Applicable.** Unless the court decides to permit full briefing, this procedure applies to all disputes between parties to the action that could properly be addressed in motions for protective order under Rule 26(c) or

## APPENDIX B—Clean Version of Proposed Rules

motions to compel discovery or disclosure under Rule 37(a). The filings in a Rule 26(d) proceeding are not motions.

- (2) ***Joint Statement of Discovery or Disclosure Dispute.*** When the parties have a dispute that could properly be addressed under Rule 26(c) or Rule 37(a), they must file with the court a joint statement of discovery or disclosure dispute. The joint statement must not exceed 3 pages of explanatory text, with each party entitled to submit one and one-half pages of that text. The parties must also attach a good faith consultation certificate complying with Rule 7.1(h) and may not attach exhibits. The purposes of the joint statement are to notify the court of the dispute, and to make a record of the discovery or disclosure sought. Briefing on the dispute is permitted only if ordered by the court.
  - (3) ***Expedited Hearing by the Court.*** Unless the court orders otherwise, the parties may jointly contact the court by telephone to request a hearing on the joint statement of discovery dispute. The court should schedule the matter at the earliest convenient time, whether by telephone or in person.
  - (4) ***Resolution by Minute Entry.*** The court must issue a minute entry setting forth the resolution of the discovery dispute. After resolution, a party may file with the court those materials necessary to create a record of the discovery or disclosure the court permitted or denied.
  - (5) ***Depositions.*** Nothing in Rule 26(d) limits the ability of the parties to seek the intervention of the court by telephone during a deposition without the necessity of filing a written statement of discovery dispute.
- (e) **Determining Whether Electronically Stored Information Is Reasonably Accessible.**
- (1) ***Generally.*** In deciding any motion or Rule 26(d) proceeding addressing whether sources of electronically stored information are not reasonably accessible because of undue burden or expense as provided in Rule 26(b)(2)(B)(i), the court must determine:
    - (A) whether the information sought is within the permissible scope of discovery, considering the limits of Rule 26(b)(1) and 26(b)(2)(B)(ii);
    - (B) whether the party or person opposing the discovery has shown that it would incur undue burden or expense; and, if so,
    - (C) if good cause is shown for the requested discovery or disclosure.
  - (2) ***Affidavit of Burden or Expense.*** A party or person contending that the disclosure or discovery of electronically stored information should be

## APPENDIX B—Clean Version of Proposed Rules

disallowed or limited because of undue burden or expense must file with their joint statement under Rule 26(d)(2) or their motion for protective order under Rule 26(c) an affidavit describing the burden and estimating the expense that would be incurred.

**(3) *Burden or Expense—Factors.*** In addition to the factors in Rule 26(b)(1), in determining whether the party or person opposing the discovery or disclosure would incur undue burden or expense, the court must consider:

- (A) the estimated expense of the discovery or disclosure;
- (B) the anticipated disruption of the responding party or person's normal business operations if the discovery or disclosure is ordered;
- (C) any efforts required to obtain data in the custody of another;
- (D) the difficulty and expense of any necessary review to separate confidential or privileged material;
- (E) whether the difficulty or expense of accessing the information is attributable to the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy, before a duty to preserve arose under Rule 37(g)(1);
- (F) whether the difficulty or expense of accessing the requested information is attributable to any violation of Rule 37(g) or to other purposeful action by the responding party or person to shield information from discovery; and
- (G) the party or person's interest in the action.

**(4) *Good Cause—Factors.*** In addition to the factors in Rule 26(b)(1), in determining whether good cause is shown, the court may consider:

- (A) the likelihood of finding relevant, responsive information that cannot be obtained from other, more accessible sources;
- (B) the extent to which the request has been narrowly tailored to discover relevant information;
- (C) the importance of the information to a fair resolution on the merits.

**(5) *Specifying Conditions.*** The court may impose conditions on the discovery or disclosure that include:

- (A) issuing any appropriate orders under Rule 26(c);

## APPENDIX B—Clean Version of Proposed Rules

- (B) requiring the party seeking discovery to pay some or all of the reasonable expenses that the responding party will incur in complying with the requested discovery or disclosure, which may include the reasonable fees charged by counsel, consultants, and vendors; and
  - (C) reimbursing the responding party or person for disruption to the responding party's or person's normal business operations, to the extent such cost is quantifiable and reimbursement is warranted by the facts and circumstances.
- (f) **Timing and Sequence of Discovery.** Unless the court orders otherwise for good cause:
- (1) a party may not seek discovery from any source—including nonparties—before that party serves its initial disclosure statement under Rule 26.1;
  - (2) methods of discovery may be used in any sequence; and
  - (3) discovery by one party does not require any other party to delay its discovery.
- (g) **Supplementing and Correcting Discovery Responses.**
- (1) **Generally.** A party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its response if it learns that the response was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties during the discovery process or in writing.
  - (2) **Timing.** A party must supplement or correct a discovery response under this rule in a timely manner, but in no event more than 30 days after it learns that the response is materially incomplete or incorrect.
- (h) **Sanctions.** The court may impose an appropriate sanction—including any order under Rule 16(h)—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with discovery.
- (i) **Requirement of Good Faith Consultation Certificate.** Any discovery or disclosure motion, or joint statement of discovery or disclosure dispute, must attach a good faith consultation certificate complying with Rule 7.1(h).

**Rule 26.1. Prompt Disclosure of Information**

**(a) Duty to Disclose; Disclosure Categories.** Within the times set forth in Rule 26.1(f) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

- (1) the factual basis of each of the disclosing party's claims or defenses;
- (2) the legal theory on which each of the disclosing party's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities;
- (3) the name, address, and telephone number of each witness whom the disclosing party expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony;
- (4) the name and address of each person whom the disclosing party believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess;
- (5) the name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements;
- (6) the anticipated subject areas of expert testimony;
- (7) a computation and measure of each category of damages alleged by the disclosing party, the documents and testimony on which such computation and measure are based, and the name, address, and telephone number of each witness whom the disclosing party expects to call at trial to testify on damages;
- (8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;
- (9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and
- (10) for any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to

## APPENDIX B—Clean Version of Proposed Rules

satisfy the judgment: (A) a copy—or if no copy is available, the existence and substance—of the insurance policy, indemnity agreement, or suretyship agreement; (B) a copy—or if no copy is available, the existence and basis—of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement; and (C) the remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement. A party need only supplement its disclosure regarding the remaining dollar limits of coverage upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial. Within 10 days after such a request is served, a party must supplement its disclosure of the remaining dollar limits of coverage. For purposes of this rule, an insurance policy means a contract of or agreement for or effecting insurance, or the certificate memorializing it—by whatever name it is called—and includes all clauses, riders, endorsements, and papers attached to, or a part of, it, but does not include an application for insurance. Information concerning an insurance policy, indemnity agreement, or suretyship agreement is not admissible in evidence merely because it is disclosed under this rule.

**(b) Disclosure of Hard-Copy Documents.** Subject to the limits of Rule 26(b)(1) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

**(c) Disclosure of Electronically Stored Information.**

**(1) Duty to Confer.** When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, taking into account the limitations of Rule 26(b)(1) and (2). At the conference, each party must have at least one representative (which may include counsel) available who is reasonably familiar with the party's systems containing electronically stored information. Disputes must be presented under Rule 26(d). The following topics should be addressed, as applicable:

## APPENDIX B—Clean Version of Proposed Rules

- (A) the location and types of systems that are reasonably likely to contain electronically stored information within the permissible scope of discovery;
  - (B) whether it is appropriate to conduct discovery of electronically stored information in phases or stages as a method of reducing costs and burden, and if so, what the parties will include in the first phase;
  - (C) sources of electronically stored information that are less likely to contain discoverable information, and from which the parties will postpone or avoid discovery;
  - (D) search protocols or methods that will be used to identify discoverable information and filter out information not subject to discovery;
  - (E) the form in which the information will be produced;
  - (F) sharing or shifting of costs incurred by the parties for disclosing and producing the information;
  - (G) agreements on the preservation of electronically stored information; and
  - (H) whether the parties will enter a stipulation addressing inadvertent production of privileged information or will seek an order under Rule 502(d) of the Arizona Rules of Evidence addressing inadvertent production.
- (2) ***Production of Electronically Stored Information.*** Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.
- (3) ***Presumptive Form of Production.*** Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.
- (4) ***Limits on Disclosure of Electronically Stored Information.*** Rule 26(b)(2) applies to the disclosure of electronically stored information.

## APPENDIX B—Clean Version of Proposed Rules

### (d) Disclosure of Expert Testimony.

- (1) ***In General.*** In addition to the disclosures required by Rule 26.1(a), a party must disclose the identity of any witness it may use at trial to present evidence under Rules 702, 703, or 705.
- (2) ***Form of Expert Disclosures.*** Unless the parties stipulate or the court orders otherwise, each party in an action assigned to Tier 3 must provide an expert report complying with Rule 26.1(d)(4) for any witness 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. On request of any party or on its own, the court may order an expert report in other actions if it determines that a written report will assist the court in determining if an expert's testimony satisfies the requirements of Ariz. R. Evid. 702. In all other cases, expert disclosures must comply with Rule 26.1(d)(3). Any party contending that an expert report should be required in connection with a Rule 702 determination must raise the issue promptly after learning of the alleged need for the report. Disputes over the form or sufficiency of expert disclosures must be presented at the Rule 16(d) Scheduling Conference, or under Rule 26(d).
- (3) ***Expert Witnesses Who Do Not Provide a Written Report.*** If an expert witness is not required to provide a written report, the disclosure must state:
  - (A) the expert's name, address, and qualifications;
  - (B) the subject matter on which the expert is expected to testify;
  - (C) the substance of the facts and opinions to which the expert is expected to testify;
  - (D) a summary of the grounds for each opinion;
  - (E) a statement of the compensation to be paid for the expert's work and testimony in the case; and
  - (F) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.
- (4) ***Expert Witnesses Who Must Provide a Written Report.*** If an expert is required to provide a signed written report, the report must contain:
  - (A) the expert's name, address, and qualifications, including a list of all publications authored in the previous 10 years;
  - (B) a complete statement of all opinions the expert will express and the basis and reasons for them;

## APPENDIX B—Clean Version of Proposed Rules

- (C) the facts or data considered by the expert in forming them;
- (D) any exhibits that will be used to summarize or support them;
- (E) identification of any publication within the scope of Ariz. R. Evid. 803(18) on which the expert intends to rely for any opinion;
- (F) a statement of the compensation to be paid for the expert’s work and testimony in the case; and
- (G) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.

### (e) Purpose; Scope.

- (1) **Purpose.** The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.
- (2) **Scope.** A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

### (f) Time for Disclosure; Continuing Duty.

- (1) **Initial Disclosures.** Unless the parties agree or the court orders otherwise, a party seeking affirmative relief must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 30 days after the filing of the first responsive pleading to the complaint, counterclaim, crossclaim, or third-party complaint that sets forth the party’s claim for affirmative relief. Unless the parties agree or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 30 days after it files its responsive pleading.
- (2) **Additional or Amended Disclosures.** The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the

## APPENDIX B—Clean Version of Proposed Rules

information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order—or in the absence of such a deadline, later than 60 days before trial—must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

**(g) Signature Under Oath.** Each disclosure must be in writing and signed under oath by the disclosing party.

**(h) Claims of Privilege or Protection of Work-Product Materials.**

**(1) *Information Withheld.*** When a party withholds information, a document, or electronically stored information from disclosure on a claim that it is privileged or subject to protection as work product, the party must promptly comply with Rule 26(b)(6)(A).

**(2) *Inadvertent Production.*** If a party contends that a document or electronically stored information subject to a claim of privilege or protection as work-product material has been inadvertently disclosed, the producing and receiving parties must comply with Rule 26(b)(6)(B).

**Rule 26.2. Tiered Limits to Discovery Based on Attributes of Cases**

- (a) **Generally.** This rule explains how much discovery a party may take in their case. The amount of discovery a party may take is limited by the tier to which their case is assigned. This rule explains how and when cases are assigned to one of three tiers, each of which has different limits.
- (b) **Criteria for Assigning Cases to Tiers.** Cases should be considered for assignment to a tier by case characteristics, consistent with the factors that define proportional discovery in Rule 26(b)(1). The following sets of characteristics are not exhaustive:
- (1) ***Tier 1: Case Characteristics.*** These are simple cases that can be tried in one or two days. Automobile tort, intentional tort, premises liability, and insurance coverage claims arising from those types of claims are generally Tier 1 cases, absent unusual circumstances. Cases with minimal documentary evidence and few witnesses are likely Tier 1 cases.
  - (2) ***Tier 2: Case Characteristics.*** These are cases of intermediate complexity. They are likely to have more than minimal documentary evidence and more than a few witnesses. They are likely to include, but may not include, expert witnesses. They are likely to involve multiple theories of liability, and may involve counterclaims or cross-claims. Cases that do not easily fit within Tiers 1 and 3 belong here.
  - (3) ***Tier 3: Case Characteristics.*** These are cases that are logistically or legally complex. Class actions, antitrust, multi-party commercial or construction cases, securities cases, environmental torts, construction defect cases, medical malpractice cases, products liability cases, and mass torts are among those cases that generally belong in Tier 3, absent unusual circumstances. Cases with voluminous documentary evidence, or with numerous pretrial motions raising difficult or novel legal issues, are likely Tier 3 cases. Cases requiring management of a large number of witnesses or separately represented parties, or which require coordination with related actions pending in other courts, are likely Tier 3 cases.
- (c) **How Courts Assign Cases to Tiers.** The tier to which a case is assigned is determined by either: (1) stipulation or motion, for good cause shown; (2) placement by the court based on the characteristics of the case; or (3) the sum of the relief sought in the complaint, and any counterclaims or crossclaims.
- (1) ***By Stipulation of Parties or on Motion.***
    - (A) ***Requirement of Good Cause.*** As provided in Rule 16(c)(6), all parties by stipulation or any party by motion may request that the court assign the

## APPENDIX B—Clean Version of Proposed Rules

case to a tier other than the one to which it would be assigned under Rule 26.2(c)(3), for good cause. A court must determine good cause to vary a tier with reference to the factors that define proportional discovery in Rule 26(b)(1). The court may reject any stipulation or joint motion requesting assignment under this rule.

**(B) Requirement of Assent to Placement in Higher Tier.** If a stipulation or motion asks the court to place a case in a tier higher than the tier to which it would be assigned under Rule 26.2(c)(3), that stipulation or motion must confirm that each party requesting that relief has:

- (i) received a statement from its counsel setting forth the anticipated additional discovery expense if the case is placed in a higher tier; and
- (ii) approved the stipulation.

**(2) Placement by Court.** The court may evaluate a case for assignment to a tier. The court has the discretion to assign a case to any tier, based on the totality of the circumstances of that case, consistent with the case characteristics set forth in Rule 26.2(b) and the factors that define proportional discovery in Rule 26(b)(1).

**(3) Monetary or Nonmonetary Relief Requested.** All cases not assigned a tier by the procedures in Rule 26.2(c)(1) or (2) are deemed to be assigned a tier based on the damages claimed in the action, as defined in Rule 26.2(e).

**(A) Tier 1.** Actions claiming \$50,000 or less in damages are permitted-standard discovery as described for Tier 1.

**(B) Tier 2.** Actions claiming more than \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for Tier 2.

**(C) Tier 3.** Actions claiming \$300,000 or more in damages are permitted standard discovery as described for Tier 3.

**(D) Certain Actions Claiming Nonmonetary Relief.** Actions claiming nonmonetary relief alone or in conjunction with claims for damages under \$300,000 are permitted standard discovery as described for Tier 2.

### **(d) When Courts Assign Cases to Tiers.**

**(1) By Monetary or Nonmonetary Relief Requested.** From the filing of the complaint until a court assigns a case to a different tier, the case is deemed to be assigned to the tier to which it would be assigned based on its monetary or nonmonetary relief requested under Rule 26.2(c)(3).

## APPENDIX B—Clean Version of Proposed Rules

- (2) ***By the Court's Own Evaluation.*** If a court evaluates a case for tiering under Rule 26.2(c)(2), it must assign the case to a tier no later than 20 days after the parties file their Joint Report under Rule 16(c)(1).
- (3) ***By Stipulation of Parties or Motion.*** If a court assigns a case a tier based on a stipulation or motion under Rule 26.2(c)(1), it should do so at the earliest practicable time. That notwithstanding, a later joined or later served party may promptly move the court to change the assigned tier.
- (e) **Definition of Damages in Tiering.** For purposes of determining the tier for standard discovery, the amount of damages claimed in an action includes all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings, but excludes claims for punitive damages, interest, attorney's fees in the case to be tiered, and costs.
- (f) **Limits on Discovery.** Discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is limited as stated below. The time to complete discovery runs from the date of the Early Meeting, subject to the court's power to extend the time for completion of discovery for good cause shown.
- (1) ***Tier 1.*** Each side in a Tier 1 case is permitted 5 total hours of fact witness depositions, 5 Rule 33 interrogatories, 5 Rule 34 requests for production, 10 Rule 36 requests for admission, and 120 days in which to complete discovery.
- (2) ***Tier 2.*** Each side in a Tier 2 case is permitted 15 total hours of fact witness depositions, 10 Rule 33 interrogatories, 10 Rule 34 requests for production, 10 Rule 36 requests for admission, and 180 days in which to complete discovery.
- (3) ***Tier 3.*** Each side in a Tier 3 case is permitted 30 total hours of fact witness depositions, 20 Rule 33 interrogatories, 10 Rule 34 requests for production, 20 Rule 36 requests for admission, and 240 days in which to complete discovery.
- (g) **Obtaining Discovery Beyond Tier Limits.**
- (1) ***Generally.*** To obtain discovery beyond the limits on discovery established in Rule 26.2(f), a party must file either:
- (A) a motion for discovery beyond tier limits setting forth why that discovery is necessary and proportional under Rule 26(b)(1), attaching that discovery, or in the case of a request for deposition, describing the anticipated discovery, certifying that the party has reviewed its counsel's

## APPENDIX B—Clean Version of Proposed Rules

statement of the anticipated additional expense from the additional discovery and has approved the motion, and attaching a good faith consultation certificate complying with Rule 7.1(h); or

- (B) a stipulation that, for each category of discovery for which the limit of discovery has been requested, that discovery beyond tier limits is necessary and proportional under Rule 26(b)(1), and that each party has reviewed its counsel's statement of the anticipated additional expense from the additional discovery and has approved the stipulation.
  - (2) **Timing.** A motion or stipulation under (1) must be filed before the close of standard discovery and before serving a discovery request that reaches or exceeds the limit imposed by Rule 26.2(f) on any category of discovery.
  - (3) **Effect of Stipulation.** A filed Stipulation To Overlimit Discovery complying with this rule authorizes the taking of the agreed additional discovery without the necessity for a court order. The court retains the power to disapprove any such stipulation.
- (h) Circumstances Requiring Additional Deposition Time or Written Discovery.** Despite the total limits on deposition hours set out in Rule 26.2(f)(1)-(3):
- (1) a party is entitled to a total number of fact witness deposition hours equal to the number of witnesses that party is entitled to depose under Rule 30(a)(1)(A) or (D)—excepting fictitious defendants and nominal party-spouses who are included in the suit for reasons of community property law—multiplied by two hours;
  - (2) additional examination time ordered for the reasons set forth in Rule 30(d) does not count against the tier limits;
  - (3) if there are so many parties on a side under Rule 26.2(f) who are actively participating in depositions that an individual party is prevented from engaging in necessary examination, the court may in the interests of justice enlarge that party's examination time; and
  - (4) if the configuration of sides as defined in Rule 26.2(f) provides more deposition time or written discovery to one group of parties with common interests than another group of parties with common interests, the court may for good cause adjust how Rule 26.2(f) allocates the totality of deposition time or written discovery it allows between those sides.
- (i) Variations in Expert Discovery by Tier.** Unless the parties agree or the court orders otherwise, expert disclosures in Tier 1 or Tier 2 cases are governed by

## APPENDIX B—Clean Version of Proposed Rules

Rule 26.1(d)(3), while expert disclosures in Tier 3 cases are governed by Rule 26.1(d)(4).

- (j) Required Report at Close of Fact Discovery.** At the conclusion of fact discovery, the parties must file a joint report on the amount of discovery that was taken in their case using Rule 84, Form 3 to permit the court to fashion such orders as may be appropriate under Rules 26(h) and 37(h).

### Comment

#### 2018 Comment on Rule 26.2

Rule 26.2 establishes a three-tiered system of case management to make discovery occur in a manner that is proportional under Rule 26(b)(1). If neither the parties nor the court seek to actively direct a case toward a tier, the case will receive a tier based upon the amount at issue in the case or requests for nonmonetary relief. However, parties can ask for a different tier, based on the proportionality factors in Rule 26(b)(1). And courts can actively manage cases and to assign a case to a tier at the start of the matter, on their own initiative or based upon their own review of the Rule 16(c) Joint Report, under Rule 26.2(c)(2). Rule 26.2(b) provides many factors for courts to use in determining the tier to which a case is best suited.

However, making discovery proportional is not an end in itself. Rules 8, 26, 26.1, 26.2, and 37, as now revised, work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Rule 26.2 now emphasizes keeping discovery proportional based on the understanding that proportional discovery follows up on robust initial disclosure under Rule 26.1. The 2018 amendments seek to make initial disclosure robust through a clearer mandate to impose sanctions under Rule 37 for failures to disclose relevant material and for abuses of discovery.

Further, Rule 26.2(h) ensures that in cases with large numbers of parties, there is enough deposition time to assure that all parties can be deposed. It is anticipated that Rule 26.2(h) will prove useful in multiparty Tier 1 cases, which under Rule 26.2(f)(1) are presumptively limited to five hours of fact witness testimony.

The way Rule 26.2(h) works is this. If a plaintiff files a case in which there are three other parties and one document custodian, the plaintiff is entitled under Rule 30(a)(1)(A) and (D) to depose all three other parties and the document custodian. Under Rule 26.2(h), one multiplies the number of those depositions (here, four) by two hours to derive the presumptive limit on the plaintiff's total number of deposition hours in the case—here, eight. The plaintiff may allocate that time any

## **APPENDIX B—Clean Version of Proposed Rules**

way they wish consistent with the limit of four hours per deposition in Rule 30(d). Thus, the plaintiff could choose to depose two of the four witnesses for three hours, and two of the four witnesses for one hour.

If, in that same case, there are two additional nonparty fact witnesses who the parties agree may be deposed (or whom the court orders to be deposed), the presumptive limit is still eight hours. Thus, the plaintiff would then have the right to allocate the eight hours among the six total witnesses—the three parties, the one document custodian, and the two third-party witnesses—in any way the plaintiff chooses, consistent with the four-hour limit in Rule 30(d).

**Rule 26.3. Exchange of Medical Records and Timing of Expert Disclosure in Medical Malpractice Actions**

**(a) Exchange of Medical Records.**

(1) **By Plaintiff.** Within 5 days after a defendant has filed an answer or a motion in response to the complaint, the plaintiff must serve on that defendant copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(2) **By Defendants.** Within 10 days after the plaintiff serves medical records under Rule 26.3(a)(1), a defendant must serve on the plaintiff copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(3) **Limitations.** The parties may agree to limit the records produced under this rule.

**(b) Timing of Expert Disclosure.** The parties must disclose the identities and opinions of standard of care and causation experts simultaneously, unless the parties agree or the court orders otherwise for good cause.

**APPENDIX B—Clean Version of Proposed Rules**

**Rule 29. Stipulations Regarding Discovery Procedure.** Unless the court orders otherwise, the parties may agree in writing to:

- (a) take a deposition before any certified reporter, at any time or place, on any notice, and in any manner specified, in which event it may be used in the same way as any other deposition; and
- (b) extend the time provided in Rules 33, 34, and 36 for responses to discovery, unless it interferes with a court-ordered deadline.

**Rule 30. Depositions by Oral Examination**

**(a) When a Deposition May Be Taken.**

- (1) *Depositions Permitted.* A party may depose: (A) any party; (B) any person disclosed as an expert witness under Rule 26.1(d)(1); (C) any treating physician in a medical malpractice action; and (D) any document custodian in order to secure production of documents and establish evidentiary foundation. Unless all parties agree or the court orders otherwise for good cause, a party may not depose any other person or depose a person who has already been deposed in the action.
- (2) *Depositions by Plaintiff Earlier Than 30 Days After Serving the Summons and Complaint.* A plaintiff must obtain leave of court to take a deposition earlier than 30 days after serving the summons and complaint on any defendant unless: (A) a defendant has served a deposition notice or otherwise sought discovery under these rules; or (B) the plaintiff certifies in the deposition notice, with supporting facts, that the deponent is expected to leave Arizona and will be unavailable for deposition after expiration of the 30-day period. If a party shows that it was unable, despite diligent efforts, to obtain counsel to represent it at a deposition taken under this Rule 30(a)(2), the deposition may not be used against that party.
- (3) *Incarcerated Deponents.* Subject to Rule 30(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.
- (4) *Compelling Attendance of Deponent.* A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 45. A party noticing the deposition of a party—or an officer, director, or managing agent of a party—need not serve a subpoena under Rule 45.

**(b) Notice of a Deposition; Method of Recording; Deposition by Remote Means; Deposition of an Entity; Other Formal Requirements.**

- (1) *Notice Generally.* Unless all parties agree or the court orders otherwise, a party who wants to depose a person by oral questions must serve written notice to every other party at least 10 days before the date of the deposition. The notice must state the date, time, and place of the deposition and, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

## APPENDIX B—Clean Version of Proposed Rules

(2) ***Producing Materials.*** If a subpoena for documents, electronically stored information, or tangible things has been or will be served on the deponent, the materials designated for production in the subpoena must be listed in the deposition notice or in an attachment to the notice. A deposition notice to a deponent who is a party to the action may be accompanied by a separate request under Rule 34 to produce documents, electronically stored information, or tangible things at the deposition. The procedures under Rule 34 apply to any such request.

(3) ***Method of Recording.***

(A) ***Permitted Methods.*** Unless all parties agree or the court orders otherwise, testimony must be recorded by a certified reporter and may also be recorded by audio or audiovisual means.

(B) ***Method Stated in the Notice.*** The party who notices the deposition must state in the notice the method for recording the testimony. Unless the parties agree or the court orders otherwise, the noticing party bears the recording costs.

(C) ***Additional Method.*** With at least two days prior written notice to the deponent and other parties, any other party may designate another method for recording the testimony in addition to that specified in the original notice. Unless the parties agree or the court orders otherwise, that party bears the expense of the additional recording.

(D) ***Notice of Recording by Audiovisual Means.*** Any notice of recording the testimony by audiovisual means must identify the placement of the camera(s).

(E) ***Transcription.*** Any party may request that the testimony be transcribed. If the testimony is transcribed, the party who originally noticed the deposition is responsible for the cost of the original transcript. Any other party may, at its expense, arrange to receive a certified copy of the transcript.

(4) ***By Remote Means.*** The parties may agree or the court may order that a deposition be taken by telephone or other remote means. For the purposes of this rule and Rules 28(a), 37(a)(2), 45(b)(3)(B), and 45(e), the deposition takes place where the deponent answers the questions. If the deponent is not in the officer's physical presence, the officer may nonetheless place the deponent under oath or affirmation with the same force and effect as if the deponent was in the officer's physical presence.

(5) ***Officer's Duties.***

## APPENDIX B—Clean Version of Proposed Rules

(A) *Before Deposition.* Unless the parties agree otherwise under Rule 29, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with a statement or notation on the record that includes:

- (i) the officer's name, certification number, if any, and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent;  
and
- (v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded by audio or audiovisual means, the officer must repeat the items in Rule 30(b)(5)(A)(i) through (iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance, voice, and demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of the deposition, the officer must state or note on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other relevant matters.

(6) *Notice or Subpoena Directed to an Entity.* In its deposition notice or subpoena, a party may name as the deponent a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity, and must then describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. If the entity designates more than one person to testify, it must set out the matters on which each designated person will testify. Each designated person must testify about information known or reasonably available to the entity. This Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

### (c) **Examination and Cross-Examination; Record of the Examination; Objections; Conferences Between Deponent and Counsel; Written Questions.**

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the

## APPENDIX B—Clean Version of Proposed Rules

Arizona Rules of Evidence, except for Rules 103 and 615. Any party not present within 30 minutes after the time specified in the notice of deposition waives any objection that the deposition was taken without its presence. After putting the deponent under oath or affirmation, the officer personally—or a person acting in the presence and under the direction of the officer—must record the testimony by the method(s) designated under Rule 30(b)(3).

(2) **Objections.** The officer must note on the record any objection made during the deposition—whether to evidence, to a party’s, deponent’s, or counsel’s conduct, to the officer’s qualifications, to the manner of taking the deposition, or to any other aspect of the deposition. An objection must be stated concisely, in a nonargumentative manner, and without suggesting an answer to the deponent. Unless requested by the person who asked the question, an objecting person must not specify the defect in the form of a question or answer. Counsel may instruct a deponent not to answer—or a deponent may refuse to answer—only when necessary to preserve a privilege, to enforce a limit ordered by the court, or to present a motion under Rule 30(d)(3). Otherwise, the deponent must answer, and the testimony is taken subject to any objection.

(3) **Conferences Between Deponent and Counsel.** The deponent and his or her counsel may not engage in continuous and unwarranted conferences off the record during the deposition. Unless necessary to preserve a privilege, the deponent and his or her counsel may not confer off the record while a question is pending.

(4) **Participating Through Written Questions.** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party who noticed the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

### **(d) Duration; Sanctions; Motion to Terminate or Limit.**

(1) **Duration.** Unless the parties agree or the court orders otherwise, a deposition is limited to 4 hours and must be completed in a single day. Depositions of fact witnesses are further limited by the total amount of time permitted for fact witnesses by a case’s tier assignment under Rule 26.2(f), which limit may not be extended except as provided in Rule 26.2(g). Notwithstanding those limits, the court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the

## APPENDIX B—Clean Version of Proposed Rules

deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) ***Sanctions.*** The court may impose appropriate sanctions—including any order under Rule 16(h)—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with a deposition including an unreasonable refusal to agree to extend a deposition beyond 4 hours.

(3) ***Motion to Terminate or Limit.***

(A) ***Grounds.*** At any time during a deposition, the deponent or a party may move to terminate or limit the deposition on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The deponent or party must file the motion in the court where the action is pending or the court where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) ***Order.*** The court may order that the deposition be terminated or that its scope and manner be limited as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) ***Award of Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(e) **Review by the Deponent; Changes.**

(1) ***Review; Statement of Changes.*** If requested by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign and deliver to the officer a statement listing the changes and the reasons for making them.

(2) ***Officer's Certificate to Attach Changes.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent made during the 30-day period.

(f) **Officer's Certification and Delivery; Documents and Tangible Things; Copies of the Transcript or Recording.**

## APPENDIX B—Clean Version of Proposed Rules

- (1) ***Certification and Delivery.*** The officer must certify in writing that the deponent was duly sworn by the officer and that the deposition accurately records the deponent’s testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked “Deposition of [witness’s name]” and must promptly deliver it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.
- (2) ***Documents and Tangible Things.***
- (A) ***Originals and Copies.*** Documents and tangible things produced for inspection during a deposition must, on a party’s request, be marked for identification and attached to the deposition—and any party may inspect and copy them—but if the person who produced them wants to keep the originals, the person may:
- (i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or
  - (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.
- (B) ***Order Regarding the Originals.*** On motion, the court may order that the originals be attached to the deposition until final disposition of the action.
- (3) ***Copies of the Transcript or Recording.*** Unless the parties agree or the court orders otherwise, the officer must retain the record of a deposition according to the applicable records retention and disposition schedules adopted by the Supreme Court. Upon payment of a reasonable charge, the officer must provide a copy of the transcript or recording to any party or to the deponent.
- (g) ***Failure to Attend a Deposition or Serve a Subpoena; Expenses.*** A party who attends a noticed deposition in person or by an attorney may recover reasonable expenses for attending, including attorney’s fees, if the noticing party failed to:
- (1) attend and proceed with the deposition; or
  - (2) serve a subpoena on a nonparty deponent, who did not attend as a result of the lack of service.

**Rule 31. Depositions by Written Questions**

**(a) When a Deposition May Be Taken.**

- (1) *Depositions Permitted.* A party may with leave of court, by written questions, depose: (A) any party; (B) any person disclosed as an expert witness under Rule 26.1(d)(1); and (C) any document custodian in order to secure production of documents and establish evidentiary foundation. Unless all parties agree or the court orders otherwise for good cause, a party may not, by written questions, depose any other person or depose a person who has already been deposed in the action.
- (2) *Service of Written Questions by Plaintiff Earlier Than 30 Days After Serving the Summons and Complaint.* Unless a defendant has served a deposition notice or otherwise sought discovery under these rules, a plaintiff must obtain leave of court to serve written questions under Rule 31(b) earlier than 30 days after serving the summons and complaint on that defendant.
- (3) *Incarcerated Deponents.* Subject to Rule 31(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.
- (4) *Compelling Attendance of Deponent.* A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 45. A party noticing the deposition of a party—or an officer, director, or managing agent of a party—need not serve a subpoena under Rule 45.

**(b) Notice; Service of Questions and Objections; Questions Directed to an Entity.**

- (1) *Service of Written Questions; Required Notice.* A party who wants to depose a person by written questions must serve them on all parties, with a notice stating, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.
- (2) *Service of Additional Questions.* Unless the parties agree or the court orders otherwise, any additional questions to the deponent must be served on all parties as follows: cross-questions, within 15 days after being served with the notice and direct questions; redirect questions, within 5 days after being served with cross-questions; and recross-questions, within 5 days after being served with redirect questions.

## APPENDIX B—Clean Version of Proposed Rules

- (3) ***Service of Objections.*** A party who objects to the form of a written question served under Rule 31(b)(1) or (2) must serve the objection in writing on all parties within the time allowed for serving the succeeding cross-, redirect, or recross-questions, or, if to a recross-question, within 5 days after service of the recross-questions.
- (4) ***Questions Directed to an Entity.*** In accordance with Rule 30(b)(6), a party may depose by written questions a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity.
- (c) **Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer designated in the notice a copy of the notice and copies of all the questions and objections served under Rule 31(b). The officer must promptly proceed in the manner provided in Rule 30(b), (c), (e), and (f) to:
- (1) take the deponent's testimony in response to the questions;
  - (2) prepare and certify the deposition; and
  - (3) deliver it to the party who noticed the deposition, attaching a copy of the notice, the questions, and the objections.

### Rule 33. Interrogatories to Parties

#### (a) Generally.

- (1) **Definition.** Interrogatories are written questions served by a party on another party.
- (2) **Number.** A party may serve on any other party interrogatories, subject to the numeric limits in Rule 26.2(f) and the procedures in Rule 26.2(g) for obtaining permission to exceed those limits. Each subpart of an interrogatory counts as one interrogatory, except that a uniform interrogatory and its subparts count as one interrogatory.
- (3) **Scope.** An interrogatory may ask about any matter allowed under Rule 26(b). An interrogatory is not improper merely because it asks for an opinion. An interrogatory may ask for a party's contention about facts or the application of law to facts, but the court may, on motion, order that such a contention interrogatory need not be answered until a later time.
- (4) **Uniform Interrogatories.** Rule 84, Forms 4, 5, and 6, contain uniform interrogatories that a party may use under this rule. A party may use a uniform interrogatory when it is appropriate to the legal or factual issues of the particular action, regardless of how the action or claims are designated. A party propounding a uniform interrogatory may do so by serving a notice that identifies the uniform interrogatory by form and number. A party may limit the scope of a uniform interrogatory—such as by requesting a response only as to particular persons, events, or issues—without converting it into a nonuniform interrogatory.

#### (b) Answers and Objections.

- (1) **Time to Respond.** Unless the parties agree or the court orders otherwise, the responding party must serve its answers and any objections within 30 days after being served with the interrogatories. Subject to compliance with Rule 26(f)(1) by the party serving discovery, a defendant may serve its answers and any objections within 60 days after service—or execution of a waiver of service—of the summons and complaint on that defendant.
- (2) **Answers Under Oath.** Subject to Rule 33(b)(3), an answering party must answer each interrogatory separately and fully in writing under oath. In answering an interrogatory, a party—including a public or private entity—must furnish the information available to it. It must also reproduce the text of an interrogatory immediately above its answer to that interrogatory.

## APPENDIX B—Clean Version of Proposed Rules

- (3) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. If a party states an objection, it must still answer the interrogatory to the extent that it is not objectionable.
- (4) **Signature.** The party who answers the interrogatories must sign them under oath. If the answering party is a public or private entity, an authorized representative with knowledge of the information contained in the answers, obtained after reasonable inquiry, must sign them under oath. An attorney who objects to any interrogatories must sign the objections.
- (c) **Use.** An answer to an interrogatory may be used to the extent allowed by the Arizona Rules of Evidence.
- (d) **Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of determining the answer will be substantially the same for either party, the responding party may answer by:
- (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
  - (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

### State Bar Committee Note

#### 1970 Amendment to Rule 33(d)

#### [Formerly Rule 33(c)]

[Rule 33(d) (formerly Rule 33(c))] is a new subdivision, adapted from Calif. Code Civ. Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision still has the protection available to him under new Rule 26(c)

## **APPENDIX B—Clean Version of Proposed Rules**

against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invoke the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

### **State Bar Committee Note**

#### **1983 Amendment to Rule 33(d)**

##### **[Formerly Rule 33(c)]**

A party who is permitted by the terms of [Rule 33(d) (formerly Rule 33(c))] to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence of Rule 33[d] is added to make it clear that a responding party has the duty to specify by category and location, the records from which answers to interrogatories can be derived or ascertained.

### **Committee Comment**

#### **2009 Amendment to Rule 33(a)(4) (Uniform Interrogatories)**

##### **[Formerly Rule 33.1]**

The uniform interrogatories stated in the Appendix of Forms under Rule 84 are for use in any litigation brought under the civil rules, and the category heading for each Form is suggestive in nature and not restrictive; no uniform interrogatory is limited by the nature of the cause of action. Further, in light of Rules 26.1 and 26.2 and their comments, use of the uniform interrogatories is presumptively deemed to not be harassing or overly broad, and their language is presumptively not vague or ambiguous. Disputes arising from the use of the interrogatories should be considered in light of the standard stated in Rule 26(b)(1).

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

**(a) Generally.** A party may serve on any other party a request within the scope of Rule 26(b):

**(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

**(A)** any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

**(B)** any designated tangible things; or

**(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

**(b) Procedure.**

**(1) *Number.*** Any party may serve on any other party requests for items or distinct categories of items, subject to the numeric limits in Rule 26.2(f) and the procedures in Rule 26.2(g) for obtaining permission to exceed those limits.

**(2) *Contents of the Request.*** The request:

**(A)** must describe with reasonable particularity each item or distinct category of items to be inspected;

**(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

**(C)** may specify the form or forms in which electronically stored information is to be produced.

**(3) *Responses and Objections.***

**(A) *Time to Respond.*** Unless the parties agree or the court orders otherwise, the party to whom the request is directed must respond in writing within 30 days after being served. Subject to compliance with

## APPENDIX B—Clean Version of Proposed Rules

Rule 26(f)(1) by the party serving discovery, a defendant may serve its responses and any objections within 60 days after service—or execution of a waiver of service—of the summons and complaint on that defendant.

- (B) *Responding to Each Item.*** For each item or distinct category of items, the response must either state that inspection and related activities will be permitted as requested or state the grounds for objecting with specificity, including the reasons.
  - (C) *Objections.*** An objection must state whether any responsive materials are being withheld on the basis of that objection. A party objecting to part of a request must specify the objectionable part and permit inspection of the other requested materials.
  - (D) *Responding to a Request for Production of Electronically Stored Information.*** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use, which must be native form or another reasonably usable form that will enable the requesting party to have the same ability to access, search, and display the information as the responding party.
  - (E) *Producing the Documents or Electronically Stored Information.*** Unless the parties agree or the court orders otherwise, these procedures apply to producing documents or electronically stored information:

    - (i)** a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
    - (ii)** if a request does not specify a form for producing electronically stored information, a party must produce it in native form or in another reasonably usable form that will enable the requesting party to have the same ability to access, search, and display the information as the responding party; and
    - (iii)** absent good cause, a party need not produce the same electronically stored information in more than one form.
- (c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

**Supplemental Note**

Rule 34 provides for the inspection and, if desired, copying of discoverable documents. The costs of copying should be borne by the party that requests that copies be made. If a party designates documents to be copied after a permitted inspection, or specifies in the request that copies of documents may be provided in response, that party should be responsible for any copying costs involved. If a party, in response to a request made under this rule, elects to furnish copies in lieu of permitting an inspection, that party should bear any copying or related costs incurred. Reference should be made to A.R.S. § 12-351 (costs of compliance with subpoena for production of documentary evidence; payment by requesting party; definitions) for guidelines as to what constitutes reasonable copying charges.

**Rule 35. Physical and Mental Examinations**

**(a) Examination on Order.**

(1) **Generally.** The court where the action is pending may order a party whose physical or mental condition is in controversy to submit to a physical or mental examination by a physician or psychologist. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) **Motion and Notice; Contents of the Order.** An order under Rule 35(a)(1):

(A) may be entered only on motion for good cause and on notice to all parties and the person to be examined;

(B) must specify the time, place, manner, conditions, and scope of the examination; and

(C) must specify the person or persons who will perform the examination.

**(b) Examination on Notice; Motion Objecting to Examiner; Failure to Appear.**

(1) **Notice.** When the parties agree that an examination is appropriate but do not agree on the examiner, the party seeking the examination may proceed by giving reasonable—and not fewer than 30 days—written notice to all other parties. The notice must:

(A) identify the party or person to be examined;

(B) specify the time, place, and scope of the examination; and

(C) identify the examiner(s).

(2) **Motion Objecting to Examiner.** After being served with a proper notice under Rule 35(b)(1), a party who objects to the examiner(s) identified in the notice may file a motion in the court where the action is pending. For good cause, the court may order that the examination be conducted by a physician or psychologist other than the one specified in the notice.

(3) **Failure to Appear.** Unless the party has filed a motion under Rule 26(c), the party must appear—or produce the person in the party's custody or legal control—for the noticed examination. If the party fails to do so, the court where the action is pending may, on motion, make such orders concerning the failure as are just, including those under Rule 37(f).

**(c) Attendance of Representative; Recording.**

(1) *Attendance of Representative.* Unless his or her presence may adversely affect the examination's outcome, the person to be examined has the right to have a representative present during the examination.

**(2) Recording.**

(A) *Audio or Video Recording.* The person to be examined or the party requesting the examination may audio-record or video-record any examination. On a showing that such recording may adversely affect the examination's outcome, the court may limit the recording, using the least restrictive means possible.

(B) *Copy of Recording.* A copy of a recording made of an examination must be provided to any party upon request.

**(d) Examiner's Report; Other Like Reports of Same Condition; Waiver of Privilege.**

(1) *Contents.* The examiner's report must be in writing and set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(2) *Request by the Party or Person Examined.* The party who is examined—or who produces the person examined—may request the examiner's report, like reports of the same condition, and written or recorded notes from the examination. If such a request is made, the party who moved for or noticed the examination must, within 20 days of the examination or request—whichever is later—deliver to the requestor copies of:

(A) the examiner's report;

(B) like reports of all earlier examinations of the same condition; and

(C) all written or recorded notes made by the examiner and the person examined at the time of the examination, and must provide access to the original written or recorded notes for purposes of comparing them with the copies.

(3) *Request by the Examining Party.* After delivering the materials required by Rule 35(d)(2), the party who moved for or noticed the examination is entitled, on its request, to receive from the party who was examined—or who produced the person examined—like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

## APPENDIX B—Clean Version of Proposed Rules

- (4) ***Waiver of Privilege.*** By requesting and obtaining the examiner’s report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony by any other person who has examined or who later examines the same condition.
- (5) ***Failure to Deliver a Report as Ordered.*** On motion, the court may order—on terms that are just—that a party deliver a report of an examination. If the report is not delivered as ordered, the court may exclude the examiner’s testimony at trial.
- (6) ***Scope.*** This Rule 35(d) applies to examinations conducted by agreement of the parties, unless the agreement states otherwise. This rule does not preclude a party from obtaining an examiner’s report, or deposing an examiner, under other rules.

## Rule 36. Requests for Admission

### (a) Scope and Procedure.

- (1) **Scope.** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b) relating to:
  - (A) facts, the application of law to fact, or opinions about either; and
  - (B) the genuineness of any described documents.
- (2) **Form; Copy of a Document.** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.
- (3) **Number.** Any party may serve on any other party requests for admission, subject to the numeric limits in Rule 26.2(f) and the procedures in Rule 26.2(g) for obtaining permission to exceed those.
- (4) **Time to Respond; Effect of Not Responding.** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. Subject to compliance with Rule 26(f)(1) by the party serving discovery, a defendant may serve its answers and any objections within 60 days after service—or execution of a waiver of service—of the summons and complaint on that defendant. A shorter or longer time for responding may be agreed to by the parties or ordered by the court.
- (5) **Answer.**
  - (A) **Generally.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.
  - (B) **Fairly Respond.** A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. An answer does not fairly respond to a request if it:
    - (i) responds to a request about a document by stating that “the document speaks for itself”;

## APPENDIX B—Clean Version of Proposed Rules

- (ii) responds to a request about a document by stating that one “denies any allegations inconsistent with the language of a document”; or
  - (iii) responds to a request by claiming that it states a legal conclusion.
- (C) *Lack of Knowledge or Information.* The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
- (6) *Objections.* The grounds for objecting to a request must be stated. A party may not object solely on the ground that the request presents a genuine issue for trial.
- (7) *Motion Regarding the Sufficiency of an Answer or Objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. If the court finds that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(e) applies to an award of expenses.
- (b) **Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16, the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

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

**(a) Motion for Order Compelling Disclosure or Discovery.**

(1) **Generally.** Subject to Rule 26(d), a party may move for an order compelling disclosure or discovery. The party must serve the motion on all other parties and affected persons and must attach a good faith consultation certificate complying with Rule 7.1(h).

(2) **Appropriate Court.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court in the county where the discovery is or will be taken.

**(3) Specific Motions.**

(A) **To Compel Disclosure.** If a party fails to make a disclosure required by Rule 26.1, any other party may move to compel disclosure and for appropriate sanctions.

(B) **To Compel a Discovery Response.** A party seeking discovery may move for an order compelling an answer, designation, production, or inspection if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(b)(4);

(iii) a party fails to answer an interrogatory served under Rule 33;

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34; or

(v) a person fails to produce materials requested in a subpoena served under Rule 45.

(C) **Related to a Deposition.** When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order to compel an answer.

(4) **Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this rule, the court may treat an evasive or incomplete disclosure, answer, or response as a failure to disclose, answer, or respond.

**(5) Payment of Expenses; Protective Orders.**

(A) **If the Motion or Rule 26(d) Relief Is Granted (or Disclosure or Discovery Is Provided After Filing).** In this situation, the court may, after giving

## APPENDIX B—Clean Version of Proposed Rules

an opportunity to be heard, require the party or person whose conduct necessitated the motion or Rule 26(d) request, the party or attorney advising that conduct, or both, to pay the movant's or requestor's reasonable expenses incurred in making the motion or request, including attorney's fees. But the court may not order this payment if:

- (i) the movant or requestor sought relief before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

**(B) *If the Motion or Rule 26(d) Relief Is Denied.*** In this situation, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, require the movant, the attorney filing the motion or Rule 26(d) request, or both, to pay the party or person who opposed the motion or request its reasonable expenses incurred in opposing the motion or request, including attorney's fees. But the court may not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

**(C) *If the Motion or Rule 26(d) Relief Is Granted in Part and Denied in Part.*** In this situation, the court may issue any protective order authorized under Rule 26(c) and may—after giving an opportunity to be heard—apportion the reasonable expenses, including attorney's fees, for the motion or Rule 26(d) request.

### **(b) Failure to Comply with a Court Order.**

**(1) *Sanctions by the Court in the County Where the Deposition Is Taken.*** If the court in the county where the deposition is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

**(2) *Sanctions by the Court Where the Action Is Pending.***

**(A) *For Not Obeying a Discovery Order.*** If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(b)(4)—fails to obey an order to provide or permit discovery, including an order under Rules 35 or 37(a), the court where the action is pending may enter further just orders, including without limitation the following:

## APPENDIX B—Clean Version of Proposed Rules

- (i) directing that the matters described in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
  - (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
  - (iii) striking pleadings in whole or in part;
  - (iv) staying further proceedings until the order is obeyed;
  - (v) dismissing the action or proceeding in whole or in part;
  - (vi) rendering a default judgment, in whole or in part, against the disobedient party; or
  - (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
- (B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i) through (vi), unless the disobedient party shows that it cannot produce the other person.
- (C) *Payment of Expenses.* Instead of or in addition to the orders above, the court may order the disobedient party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
- (c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.**
- (1) *Failure to Timely Disclose.* Unless the court specifically finds that such failure caused no prejudice or orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion. In appropriate circumstances, the court may also order any of the sanctions set forth in Rule 37(g)(2)(B) for the failure to disclose.
- (2) *Inaccurate or Incomplete Disclosure.* On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's

## APPENDIX B—Clean Version of Proposed Rules

fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

**(3) *Other Available Sanctions.*** In addition to or instead of the sanctions under Rule 37(c)(1) and (2), the court, on motion and after giving an opportunity to be heard:

**(A)** may order payment of the reasonable expenses, including attorney’s fees, caused by the failure;

**(B)** may inform the jury of the party’s failure; and

**(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i) through (vii) and Rule 37(g)(2)(B).

**(4) *Use of Information, Witness, or Document Disclosed After Scheduling Order or Case Management Order Deadline or Later Than 60 Days Before Trial.*** A party seeking to use information, a witness, or a document that it first disclosed later than the deadline set in a Scheduling Order or a Case Management Order, or—in the absence of such a deadline—60 days before trial, must obtain leave of court by motion. The motion must be supported by affidavit and must show that:

**(A)** the information, witness, or document would be allowed under the standards of Rule 37(c)(1); and

**(B)** the party disclosed the information, witness, or document as soon as practicable after its discovery.

**(5) *Use of Information, Witness, or Document Disclosed During Trial.*** A party seeking to use information, a witness, or a document that it first disclosed during trial must obtain leave of court by motion. The motion must be supported by affidavit and must show that:

**(A)** the party, acting with due diligence, could not have earlier discovered and disclosed the information, witness, or document; and

**(B)** the party disclosed the information, witness, or document immediately upon its discovery.

**(d) *Failure to Timely Disclose Unfavorable Information.*** If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may in its discretion impose any sanctions the court deems appropriate in the circumstances. The court’s discretion extends to imposing serious sanctions, up to and including dismissal of the action in whole or in part, or rendering a default judgment.

## APPENDIX B—Clean Version of Proposed Rules

(e) **Expenses on Failure to Admit.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves the matter true—including the genuineness of a document—the requesting party may move that the non-admitting party pay the reasonable expenses, including attorney’s fees, incurred in making that proof. The court must so order unless:

- (1) the request was held objectionable under Rule 36(a);
- (2) the admission sought was of no substantial importance;
- (3) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (4) there was other good reason for the failure to admit.

(f) **Party’s Failure to Attend Its Own Deposition or to Respond to Interrogatories or Requests for Production.**

(1) **Generally.**

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

- (i) a party or a party’s officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(b)(4)—fails, after being served with proper notice, to appear for his or her deposition; or
- (ii) a party—after being properly served with interrogatories under Rule 33 or requests for production under Rule 34—fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must attach a good faith consultation certificate complying with Rule 7.1(h).

(2) **Unacceptable Excuse for Failing to Act.** A failure described in Rule 37(f)(1)(A) is not excused or mitigated on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) **Types of Sanctions.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i) through (vii). Instead of or in addition to these sanctions, the court may require the party failing to act, the attorney advising that party, or both, to pay the reasonable expenses—including attorney’s fees—caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

**(g) Failure to Preserve Electronically Stored Information.**

**(1) Duty to Preserve.**

**(A) Generally.** A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

**(B) Reasonable Anticipation.** A person reasonably anticipates an action's commencement if:

- (i)** it knows or reasonably should know that it is likely to be a defendant in a specific action; or
- (ii)** it seriously contemplates commencing an action or takes specific steps to do so.

**(C) Reasonable Steps to Preserve.**

**(i)** A party must take reasonable steps to prevent the routine operation of an electronic information system or application of a document retention policy from destroying information that should be preserved.

**(ii)** Factors that a court should consider in determining whether a party took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy, the timeliness of the party's actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy.

**(2) Remedies and Sanctions.** If electronically stored information that should have been preserved is lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2)(B)(i). If the information cannot be restored or replaced through additional discovery, the court:

## APPENDIX B—Clean Version of Proposed Rules

- (A) upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or
  - (B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
    - (i) presume that the lost information was unfavorable to the party;
    - (ii) instruct the jury that it may or must presume the information was unfavorable to the party; or
    - (iii) upon also finding prejudice to another party, dismiss the action or enter a default judgment.
- (h) Orders to Achieve Proportionality.** Timely and full compliance with Rules 26, 26.1, and 26.2 being essential to the discovery process, achieving proportionality, and trial preparation, the court may make any order to require or prohibit disclosure or discovery to achieve proportionality under Rule 26(b)(1), including without limitation:
- (1) entry of any order permitted by Rule 26(c); and
  - (2) entry of any order allocating the costs, expenses, and attorney fees of discovery or disclosure among the parties as justice requires.

### Comment

#### 2018 Amendment to Rule 37

Rule 37 is amended in several ways, to increase the power of the court to promote full compliance with discovery and disclosure rules, and thus to help the parties and the court fulfill the important goals in Rule 1.

First, Rule 37 adds a new provision, Rule 37(h), that empowers the court to allocate “the costs, expenses, and attorney fees of discovery or disclosure among the parties as justice requires.” This amendment is meant to encourage courts to make sure the parties are making prompt and compliant disclosures under Rule 26.1. While it is expected that courts have a window into discovery and disclosure compliance in case management, Rule 37(h) works hand-in-glove with other 2018 amendments that provide the court with more information to enable it to supervise compliance. Rule 26.2(j) now requires the parties to report after discovery how much discovery they actually took, permitting the court to reallocate fees if a party has taken more discovery than it was entitled to take under the discovery tier to which it was assigned under Rule 26.2(f).

Second, the authority of the court to sanction is reinforced and broadened by a set of revisions to various subparts of Rule 37. Rule 37(c)(1) now requires that a court

## APPENDIX B—Clean Version of Proposed Rules

specifically determine that an untimely disclosure caused no prejudice before permitting use of the untimely-disclosed information. Rule 37(d) now contains language underscoring the court's discretion to impose any sanctions it deems appropriate in the circumstances, which in turn reinforces that the issuance of such sanctions is subject to review for abuse of discretion. Rule 37(f)(2) now explains that a failure to respond to discovery is neither mitigated nor excused by claims that the discovery sought was objectionable.

The 2018 revisions to Rules 8, 26, 26.1, 26.2, and 37 work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Rule 26.2 emphasizes keeping discovery proportional based on the understanding that discovery must be a followup to robust initial disclosure under Rule 26.1. These amendments seek to achieve robust initial disclosure through a stronger and clearer mandate to impose sanctions under Rule 37 where in the court's discretion it is warranted, both for failures to disclose relevant material and for abuses of discovery.

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

\*\*\*

**(b) Demand.** On any issue triable of right by a jury, a party may obtain a jury trial by filing and serving a written demand at any time after the action is commenced, but no later than the date on which the court sets a trial date or 10 days after the date a Joint Report and Proposed Scheduling Order under Rule 16(c) are filed, whichever occurs first. The demand may not be combined with any other motion or pleading filed with the court.

\*\*\*

**(d) Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly filed and served. A properly filed and served demand may be withdrawn only if all parties consent.

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

\*\*\*

**(d) Dismissal Calendar.**

(1) *Placing an Action on the Dismissal Calendar.* The clerk or court administrator must place a civil action on the Dismissal Calendar if 210 days have passed since the action was commenced, and:

(A) in an action other than an action assigned to arbitration, the parties have not filed a Joint Report and a Proposed Scheduling Order under Rule 16(c); or

(B) in an actions assigned to arbitration, the arbitrator has not filed a notice of decision under Rule 76.

(2) *Dismissal.* If an action remains on the Dismissal Calendar for 60 days, the court must dismiss it without prejudice and enter an appropriate order regarding any bond or other posted security, unless, before the 60-day period expires:

(A) the parties file a Joint Report and a Proposed Scheduling Order under Rule 16(c);

(B) in an action assigned to arbitration, the arbitrator files a notice of decision under Rule 76; or

(C) the court, on motion showing good cause, orders the action to be continued on the Dismissal Calendar for a specified period of time without being dismissed.

\*\*\*

## Rule 45. Subpoena

### (a) Generally.

(1) **Requirements—Generally.** Every subpoena must:

(A) state the name of the Arizona court from which it issued;

(B) state the title of the action, the name of the court in which it is pending, and its civil action number;

(C) command each person to whom it is directed to do the following at a specified time and place:

(i) attend and testify at a deposition, hearing, or trial;

(ii) produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or

(iii) permit the inspection of premises; and

(D) be substantially in the form set forth in Rule 84, Form 9.

(2) **Issuance by Clerk.** The clerk must issue a signed but otherwise blank subpoena to a party requesting it. That party must complete the subpoena before service. The State Bar of Arizona may also issue signed subpoenas on behalf of the clerk through an online subpoena issuance service approved by the Supreme Court.

### (b) Subpoena for Deposition, Hearing, or Trial; Duties; Objections.

(1) **Issuing Court.** A subpoena commanding attendance at a hearing or trial must issue from the superior court in the county where the hearing or trial is to be held. Except as otherwise provided in Rule 45.1, a subpoena commanding attendance at a deposition must issue from the superior court in the county where the action is pending.

(2) **Combining or Separating a Command to Produce or to Permit Inspection.** A command to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

(3) **Place of Appearance.**

(A) **Trial Subpoena.** Subject to Rule 45(e)(2)(B)(iii), a subpoena commanding attendance at a trial may require the subpoenaed person to travel from anywhere within the state.

## APPENDIX B—Clean Version of Proposed Rules

- (B) *Deposition or Hearing Subpoena.* A subpoena commanding a person who is neither a party nor a party's officer to attend a deposition or hearing may not require the subpoenaed person to travel to a place other than:
- (i) the county where the person resides or transacts business in person;
  - (ii) the county where the person is served with a subpoena, or within 40 miles from the place of service; or
  - (iii) such other convenient place fixed by a court order.
- (4) *Command to Attend a Deposition—Notice of Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.
- (5) *Objections; Appearance Required.* Objections to a subpoena commanding attendance at a deposition, hearing, or trial, must be made by timely motion under Rule 45(e)(2). Unless excused from doing so by the party or attorney serving a subpoena, by a court order, or by any other provision of this Rule 45, a person who is properly served with a subpoena must attend and testify at the date, time, and place specified in the subpoena.
- (c) **Subpoena to Produce Materials or to Permit Inspection; Duties; Objections.**
- (1) *Issuing Court.* If separate from a subpoena commanding attendance at a deposition, hearing, or trial, a subpoena commanding a person to produce designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, must issue from the superior court in the county where the production or inspection is to be made.
- (2) *Electronically Stored Information.*
- (A) *Specifying the Form for Electronically Stored Information.* A subpoena may specify the form or forms in which electronically stored information is to be produced.
  - (B) *Form for Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding may produce it in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person.

## APPENDIX B—Clean Version of Proposed Rules

- (C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.
- (D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or expense, including sources that are unduly burdensome or expensive to access because of the past good-faith operation of an electronic information system or good-faith and consistent application of a document retention policy. Any such objection must be made in the time and manner provided in Rule 45(c)(6). On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1) and (b)(2). The court may specify conditions for the discovery. Rule 26(e) applies to any motion to quash, motion for protective order, or motion to compel concerning an objection that electronically stored information is not reasonably accessible.
- (3) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless the subpoena also commands attendance at a deposition, hearing, or trial.
- (4) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the usual course of business, or organize and label them to correspond with the categories in the demand.

**(5) *Claiming Privilege or Protection.***

- (A) A person withholding subpoenaed information under a claim that it is privileged or subject to protection as work-product material must promptly comply with Rule 26(b)(6)(A), unless a timely objection is made under Rule 45(c)(6)(A) that providing the information required by Rule 26(b)(6)(A) would impose an undue burden or expense. If such an objection is made, the procedures in Rule 45(c)(6)(C) apply. On any such objection, unless the court orders otherwise for good cause, a subpoenaing party requesting a privilege log must pay the subpoenaed person's reasonable expenses in preparing the log.
- (B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as work-product material, the person making the claim and the receiving parties must comply with Rule 26(b)(6)(A) or, if applicable, Rule 26(b)(6)(B).

**(6) *Objection Procedures; Duty to Confer.***

**(A) *Form and Time for Objection.***

- (i) A person commanded to produce documents, electronically stored information, or tangible things, or to permit inspection, may serve a written objection to producing, inspecting, copying, testing, or sampling any or all of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested or from sources that are not reasonably accessible because of undue burden or expense, including sources that are unduly burdensome or expensive to access because of the past good-faith operation of an electronic information system or good-faith and consistent application of a document retention policy. The objection must state the basis for the objection, and must include the name, address, and telephone number of the person, or the person's attorney, serving the objection.
- (ii) The objection must be served on the party or attorney serving the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.
- (iii) A person served with a subpoena that combines a command to produce materials or to permit inspection, with a command to attend a deposition, hearing, or trial, may object to any part of the subpoena. A person objecting to the part of a combined subpoena that commands attendance at a deposition, hearing, or trial must attend and testify at

## APPENDIX B—Clean Version of Proposed Rules

the date, time, and place specified in the subpoena, unless excused as provided in Rule 45(b)(5).

### **(B) Procedure After Objecting.**

- (i) A person objecting to a subpoena to produce materials or to permit inspection need not comply with those parts of the subpoena that are the subject of the objection, unless ordered to do so by the issuing court. The objecting person also may move for a protective order or to modify or quash the subpoena.
- (ii) The party serving the subpoena may move under Rule 37(a) to compel compliance with the subpoena. The motion must comply with Rule 37(a)(1), and must be served on the subpoenaed person and all other parties under Rule 5(c).
- (iii) Any order to compel entered by the court must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

**(C) Duty to Confer.** Before bringing any motion to compel, motion to quash, or motion for protective order regarding compliance with a subpoena, the movant must attempt to resolve the dispute by good faith consultation with the opposing party or person. Any motion regarding compliance with a subpoena must be accompanied by a good faith consultation certificate under Rule 7.1(h). Absent agreement of the subpoenaed person, the expedited procedures in Rule 26(d) do not apply to motions under this rule.

**(7) Production to Other Parties.** Unless otherwise stipulated by the parties or ordered by the court, a party receiving documents, electronically stored information, or tangible things in response to a subpoena must promptly make such materials available to all other parties for inspection and copying, along with any other disclosures required by Rule 26.1.

### **(d) Service.**

**(1) General Requirements; Tendering Fees.** A subpoena may be served by any person who is not a party and is at least 18 years old. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law.

## APPENDIX B—Clean Version of Proposed Rules

- (2) ***Exceptions to Tendering Fees.*** Fees and mileage need not be tendered when the subpoena commands attendance at a trial or hearing or is issued on behalf of the State of Arizona or any of its officers or agencies.
- (3) ***Notice to, and Service on Other Parties.*** A copy of every subpoena and any proof of service must be served on every other party in accordance with Rule 5(c). If the subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party at least 2 days before it is served on the person to whom it is directed.
- (4) ***Service Within the State.*** A subpoena may be served anywhere within the state.
- (5) ***Proof of Service.*** Proof of service may not be filed except as allowed by Rule 5.1(c)(2)(A). Any such filing must be with the court clerk for the county where the action is pending and must include the server's certificate stating the date and manner of service and the names of the persons served.
- (e) **Protecting a Person Subject to a Subpoena; Motion to Quash or Modify.**
- (1) ***Avoiding Undue Burden or Expense; Sanctions.***
- (A) ***Generally.*** A party or an attorney responsible for serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. 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.
- (B) ***Subpoena to Produce Materials or to Inspect Premises.*** Unless otherwise ordered by the court for good cause, the party seeking discovery must pay the reasonable expenses incurred by the subpoenaed person in responding to a subpoena seeking the production of documents, electronically stored information, tangible things, or an inspection of premises. A subpoenaed person seeking payment of expenses other than routine clerical and per-page copying costs as allowed by statute must object on the grounds that the expenses will cause an undue burden without payment by the subpoenaing party, and must provide an advance estimate of those expenses. The procedures in Rule 45(c)(6) govern any such objection. On any dispute, the court may quash or modify the subpoena or may, in the alternative, specify conditions that include the payment of such additional expenses by the subpoenaing party and the payment of expenses in advance.

## APPENDIX B—Clean Version of Proposed Rules

(C) *Sanctions.* The issuing court must impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party, attorney, or person who fails to comply with Rule 45(e)(1)(A) or (B).

### (2) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court in the county where the case is pending or from which a subpoena was issued must quash or modify a subpoena if it:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party’s officer to travel to a location other than the places specified in Rule 45(b)(3)(B);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden or expense.

(B) *When Permitted.* On timely motion, the superior court in the county where the case is pending or from which a subpoena was issued may quash or modify a subpoena if:

- (i) it requires disclosing a trade secret or other confidential research, development, or commercial information;
- (ii) it requires disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party;
- (iii) it requires a person who is neither a party nor a party’s officer to incur substantial travel expense; or
- (iv) justice so requires.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(e)(2)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions, including any conditions and limits set forth in Rule 26(c), as the court deems appropriate:

- (i) if the party or attorney serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and
- (ii) if the person’s travel expenses or the expenses resulting from the production are at issue, the party or attorney serving the subpoena

## APPENDIX B—Clean Version of Proposed Rules

assures that the subpoenaed person will be reasonably compensated for those expenses.

- (D) *Time for Motion.* A motion to quash or modify a subpoena must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.
- (E) *Service of Motion.* Any motion to quash or modify a subpoena must be served on the party or the attorney serving the subpoena. The party or attorney who served the subpoena must serve a copy of any such motion on all other parties.
- (f) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. A failure to obey must be excused if the subpoena purports to require a person who is neither a party nor a party's officer to attend or produce at a location other than the places specified in Rule 45(b)(3)(B).

### Comment

#### 2017 Amendment

A.R.S. § 12-351 also addresses recoverable costs in connection with the production of documents in response to a subpoena. Additional costs are allowed under Rule 45(d)(1) for a subpoena that compels testimony. The court may specify additional conditions on the production of electronically stored information to guard against undue burden or expense, as allowed by Rule 45(c)(2)(D).

**Rule 45.2. Dispute Resolution Procedures Regarding Preservation Requests**

(a) **Generally; Scope.** This rule governs the resolution of disputes concerning the scope of a party's or nonparty's duty to preserve electronically stored information.

(b) **Definitions.** For purposes of this rule:

(1) A “preservation request” is a written notice to a party or nonparty requesting that the recipient preserve electronically stored information for possible use in pending or anticipated litigation. The preservation request may, but need not, relate to anticipated litigation against the nonparty.

(2) A “nonparty” is a person who receives a preservation request under this rule and is not a party to a pending action in which the request is made.

(3) A “requestor” is a person who makes a preservation request.

(4) A “petitioner” is a nonparty who files a petition under Rule 45.2(e).

(5) A “respondent” is a requestor who has been identified as a person expected to oppose a petition filed under Rule 45.2(e).

(c) **Objections.** A party or nonparty receiving a preservation request may serve a written objection on the requestor. Grounds for objection may include that there is no duty to preserve electronically stored information under Rule 37(g)(1), or that the requested preservation would impose an undue burden or expense. A party or nonparty does not waive an objection to a preservation request by failing to object in writing under this rule, but the dispute resolution procedures in Rule 45.2(d) and (e) apply only if a written objection is served.

(d) **Dispute Resolution Procedures—Pending Action.**

(1) **Parties.** If the parties to a pending action are unable to satisfactorily resolve any dispute regarding the preservation of electronically stored information and seek a resolution from the court, they must follow the procedures in Rule 26(d).

(2) **Nonparties.** If a preservation request is made to a nonparty in connection with an action pending in superior court, the nonparty may move for a Rule 26(c) protective order in the action. The motion must be accompanied by a Rule 7.1(h) good faith consultation certificate.

(e) **Dispute Resolution Procedures—No Pending Action.**

(1) **Content of Petition.** A nonparty may file a verified petition, asking the court to determine the existence or scope of any duty to preserve

## APPENDIX B—Clean Version of Proposed Rules

electronically stored information. The petition must be titled “Verified Rule 45.2 Petition.” Any petition must:

- (A) be accompanied by a Rule 7.1(h) good faith consultation certificate;
- (B) identify, by name and address, the respondent expected to oppose the petition;
- (C) identify—in separately numbered paragraphs—each issue on which the petitioner and the respondent were unable to reach agreement, and state the petitioner’s position on each issue;
- (D) if the petitioner contends that a preservation request imposes an undue burden or expense, describe the burden and provide an estimate of the expense likely to be incurred; and
- (E) state the specific relief requested.

(2) ***Service of Petition; Response; Reply.*** The petition must be served on the respondent in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable. The petition must be accompanied by a notice in the form set forth in Rule 84, Form 7. Proof of service must be made as provided in Rule 4(g). The requestor must serve and file any response within 20 days after service is complete, if service is made in Arizona, or within 30 days after service is complete, if service is made outside the State of Arizona. The response must be in the form of a memorandum. The petitioner may file a reply memorandum within 5 days after service of any response. The page limitations of Rule 7.1(a)(3) apply to any response or reply filed under this rule.

(3) ***Applicable Procedures; Hearing.*** The petition will be decided under the Rule 7.1 procedures governing motions. Unless the court orders otherwise for good cause, no discovery is permitted. Unless the petitioner and the respondent stipulate otherwise, the court must hold a hearing on the relief the petition seeks.

(f) **Determination.** The court may issue orders limiting a party or nonparty’s preservation obligation based on the factors set forth in Rule 26(b)(1) and 37(g). If the court finds that preservation would impose an undue burden or expense on the petitioner, preservation may be ordered only on such conditions as are just, which may include requiring the requestor to pay some or all of the reasonable costs of preservation. Reasonable expenses incurred in connection with a proceeding under this rule, including attorney’s fees, may be awarded as allowed by Rule 37(a)(5).

## APPENDIX B—Clean Version of Proposed Rules

- (g) Effect of Order.** A party or nonparty who complies with a preservation order obtained under this rule is deemed to have taken reasonable steps to preserve electronically stored information under Rule 37(g).
- (h) No Waiver or Prejudice.** No waiver or prejudice results from a party or nonparty's election not to invoke the dispute resolution procedures in Rule 45.2(d) or (e), as applicable. The election not to seek relief under this rule is not deemed to be a failure to take reasonable steps to preserve electronically stored information under Rule 37(g) or to otherwise preserve information or documents later requested in a pending action.

**APPENDIX B—Clean Version of Proposed Rules**

**Rule 74. General Proceedings and Prehearing Procedures**

\*\*\*

**(b) Initial Disclosure.** Unless the parties agree or the arbitrator orders otherwise, the parties must serve their initial disclosure required under Rule 26.1 no later than the deadline provided in Rule 26.1(f).

## **APPENDIX B—Clean Version of Proposed Rules**

### **Rule 84. Forms**

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity these rules contemplate.

#### **Comment**

#### **2018 Amendment**

Consistent with 1946 Advisory Committee Note accompanying Rule 84 of the Federal Rules of Civil Procedure, the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules from which they are drawn, and, in that event, the practitioner using them may rely on them. Unless these rules require or the court orders otherwise, however, a practitioner is not required to use such forms.

**Form 3. Joint Report of Discovery Conducted.**

In the Superior Court of Arizona

\_\_\_\_\_ County

Plaintiffs	)	Case number _____
	)	
v	)	<b>Joint Report of</b>
	)	<b>Discovery Conducted</b>
	)	
Defendants	)	(Tier ___ Case)
	)	
	)	Assigned to:

The parties signing below certify that this is a complete and accurate report of the discovery conducted in this matter. With regard to any issues upon which the parties could not agree, they have set forth their positions separately in item 6 below.

**1. Brief explanation of the case’s Tier assigned under Rule 26.2 and any changes to the Tier during the course of the case:**

**2. Discovery:** Under Rule 26.2(f), this case was limited to the following discovery:

- Total hours of fact witness deposition: \_\_\_\_\_
- Number of Rule 33 interrogatories: \_\_\_\_\_
- Number of Rule 34 requests for production: \_\_\_\_\_
- Number of Rule 36 requests for admission: \_\_\_\_\_
- Number of days to complete fact discovery: \_\_\_\_\_

**3. Conducted Fact Discovery:** The following discovery was conducted in this case:

- Total hours of fact witness deposition: \_\_\_\_\_
- Number of Rule 33 interrogatories: \_\_\_\_\_

**APPENDIX B—Clean Version of Proposed Rules**

- Number of Rule 34 requests for production: \_\_\_\_\_
- Number of Rule 36 requests for admission: \_\_\_\_\_
- Number of days to complete fact discovery: \_\_\_\_\_

**4. Discovery Beyond Tier Limits:** This case included additional discovery conducted beyond its Tier limits obtained pursuant to Rule 26.2(g) in the following category(ies) and for the following reason(s):

Total hours of fact witness deposition: \_\_\_\_\_

Number of Rule 33 interrogatories: \_\_\_\_\_

Number of Rule 34 requests for production: \_\_\_\_\_

Number of Rule 36 requests for admission: \_\_\_\_\_

Number of days to complete fact discovery: \_\_\_\_\_

Reason(s) for Discovery Listed Above Beyond Tier Limits:

\_\_\_\_\_

\_\_\_\_\_

**5. Variations in Expert Discovery:** This case varied from the procedures for expert discovery described in Rule 26.2(i) for the following reason:

\_\_\_\_\_

\_\_\_\_\_

**6. Special Considerations:** The parties request the court to consider at this time the following information concerning discovery in this case, including the reason(s) for any differences between discovery permitted by Rule 26.2(f) and the discovery actually conducted:

**7. Items Upon Which the Parties Do Not Agree:** The parties were unable in good faith to agree upon the following items in this report, and the position of each party as to each item is as follows:

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
For Plaintiff

\_\_\_\_\_  
For Defendant

**APPENDIX B—Clean Version of Proposed Rules**

---

For:

---

For:

**Form 5. Uniform Personal Injury Interrogatories**

\*\*\*

COMMITTEE COMMENT

If interrogatories are served with the complaint or an answer, and the party serving the discovery has complied with Rule 26(f)(1), responses to the interrogatories should be due on the same date as the Rule 26.1 disclosure of the party responding to the discovery. If the interrogatories *completely* respond to a Rule 26.1 disclosure requirement or if a Rule 26.1 disclosure requirement *completely* responds to an interrogatory, the answer or response may be incorporated by reference.

Counsel are encouraged to submit these uniform interrogatories by reference to their number simultaneously with submission of non-uniform interrogatories.

**Form 7. Notice of Petition: Preservation of Electronically Stored Information.**

**Notice of Verified Petition:**

**Preservation of Electronically Stored Information**

**THIS IS AN IMPORTANT NOTICE REGARDING YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY. IF YOU DO NOT UNDERSTAND IT, YOU MAY WISH TO CONTACT A LAWYER.**

**Nature of Proceeding.** You have been served with a Petition under Rule 45.2 of the Arizona Rules of Civil Procedure. The Petition asks the court to decide issues concerning the petitioner’s obligation to preserve electronically stored information for possible use in pending or anticipated litigation. You have been served with the Petition and this Notice because you are a person who requested that the petitioner preserve electronically stored information, and the petitioner has identified you as a respondent who may oppose the Petition.

**Your Obligation to Respond to the Petition.** You are required to file a written response to the Petition with the court, and to mail or hand-deliver a copy of your response to the petitioner, within the time required by Rule 45.2 of the Arizona Rules of Civil Procedure. **IF YOU ARE SERVED WITHIN THE STATE OF ARIZONA, YOUR RESPONSE MUST BE FILED WITHIN 20 DAYS AFTER YOU ARE SERVED, NOT COUNTING THE DAY OF SERVICE. IF YOU ARE SERVED OUTSIDE THE STATE OF ARIZONA, YOUR RESPONSE MUST BE FILED WITHIN 30 DAYS AFTER YOU ARE SERVED, NOT COUNTING THE DAY OF SERVICE. WITHIN THE SAME TIME PERIOD, YOU MUST ALSO MAIL OR HAND-DELIVER A COPY OF YOUR RESPONSE TO THE PETITIONER AT THE ADDRESS INDICATED IN THE UPPER LEFT-HAND CORNER OF THE VERIFIED PETITION.**

**Effect of Failing to Respond.** If you do not respond to the Petition within the time required, the court may issue orders and grant relief in your absence. Any such orders or relief granted by the court in connection with the Petition may impact your legal rights. Examples of the types of orders that the court may issue in ruling on the Verified Petition are described below.

**Court’s Orders on Petition.** In ruling on the Petition, the court may make orders as allowed by Rule 45.2 of the Arizona Rules of Civil Procedure, including:

- (a) determining the existence and scope of the petitioner’s obligation to preserve electronically stored information, including limiting the scope of the petitioner’s obligation or finding that the petitioner has no obligation to preserve electronically stored information;

## APPENDIX B—Clean Version of Proposed Rules

(b) determining that the preservation of the electronically stored information at issue would impose an undue burden or expense on the petitioner;

(c) imposing limits or conditions on any obligation of the petitioner to preserve electronically stored information, which may include requiring you (the respondent), to pay some or all of the petitioner's reasonable costs of preserving the information; and

(d) awarding reasonable expenses as allowed by Rule 45.2(f) of the Arizona Rules of Civil Procedure, which may include an award of attorney's fees, to the party who prevails in connection with the Verified Petition.

**Effect of Preservation Order.** A preservation order issued in connection with a Petition may impact your legal rights. A petitioner complying with a preservation order obtained in this proceeding is deemed to have taken reasonable steps to preserve electronically stored information as required by Arizona Rule of Civil Procedure 37(g). *See* Rule 45.2(g) of the Arizona Rules of Civil Procedure.

APPENDIX B—Clean Version of Proposed Rules

**Form 9. Form of Subpoena**

Name:

Address:

City:

State:

Phone:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF \_\_\_\_\_

_____	)	
Plaintiff	)	Case No.:
	)	
vs.	)	<b>SUBPOENA IN A CIVIL CASE</b>
	)	
_____	)	
Defendant	)	
	)	
	)	

---

**TO:** \_\_\_\_\_  
(Name of Recipient)

[Select one or more of the following, as appropriate:]

**For Attendance of Witnesses at Hearing or Trial**

**YOU ARE COMMANDED** to appear in the Superior Court of the State of Arizona, in and for the County of \_\_\_\_\_, at the place, date and time specified below to testify at  a hearing  trial in the above cause:

Judicial Officer:

Courtroom:

Address:

Date:

Time:

APPENDIX B—Clean Version of Proposed Rules

[ ] **For Taking of Depositions**

**YOU ARE COMMANDED** to appear at the place, date and time specified below to testify at the taking of a deposition in the above cause:

Place of Deposition:

Address:

Date:

Time:

Method of Recording:

[ ] **For Production of Documentary Evidence or Inspection of Premises**

**YOU ARE COMMANDED**, to produce and permit inspection, copying, testing, or sampling of the following designated documents, electronically stored information or tangible things, or to permit the inspection of premises:

[designation of documents, electronically stored information or tangible things, or the location of the premises to be inspected]

at the place, date, and time specified below:

Place of Production or Inspection:

Address:

Date:

Time:

[The following text must be included in every subpoena:]

**Your Duties in Responding To This Subpoena**

***Attendance at a Trial.*** If this subpoena commands you to appear at a trial, you must appear at the place, date and time designated in the subpoena unless you file a timely motion with the court and the court quashes or modifies the subpoena. *See* Rule 45(b)(5) and Rule 45(e)(2) of the Arizona Rules of Civil Procedure. *See also* “Your Right To Object To This Subpoena” section below. Unless a court orders otherwise, you are required to travel to any part of the state to attend and give testimony at a trial. *See* Rule 45(b)(3)(A) of the Arizona Rules of Civil Procedure.

***Attendance at a Hearing or Deposition.*** If this subpoena commands you to appear at a hearing or deposition, you must appear at the place, date and time designated in this subpoena unless either: (1) you file a timely motion with the court and the court quashes or modifies the subpoena; or (2) you are not a party or a party’s officer and this subpoena commands you to travel to a place other than:

## APPENDIX B—Clean Version of Proposed Rules

(a) the county where you reside or you transact business in person; or (b) the county where you were served with the subpoena or within forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order. *See* Rule 45(b)(3)(B) and Rule 45(e)(2)(A)(ii) of the Arizona Rules of Civil Procedure. *See also* “Your Right To Object To This Subpoena” section below.

***Production of Documentary Evidence.*** If this subpoena commands you to produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things, you must make the items available at the place, date, and time designated in this subpoena, and in the case of electronically stored information, in the form or forms requested, unless you provide a good faith written objection to the party or attorney who served the subpoena. You may object to the production of electronically stored information from sources that you identify as not reasonably accessible because of undue burden or expense, including sources that are unduly burdensome or expensive to access because of the past good-faith operation of an electronic information system or good-faith and consistent application of a document retention policy. *See* Rule 45(c)(2)(D) of the Arizona Rules of Civil Procedure. Other grounds for objection are described in the “Your Right To Object To This Subpoena” section below. If this subpoena does not specify a form for producing electronically stored information, you may produce it in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person, but you need not produce the same electronically stored information in more than one form. *See* Rule 45(c)(2)(B) and (C) of the Arizona Rules of Civil Procedure.

If the subpoena commands you to produce documents, you have the duty to produce the designated documents as they are kept by you in the usual course of business, or you may organize the documents and label them to correspond with the categories set forth in the subpoena. *See* Rule 45(c)(4) of the Arizona Rules of Civil Procedure.

***Inspection of Premises.*** If the subpoena commands you to make certain premises available for inspection, you must make the designated premises available for inspection on the date and time designated in this subpoena unless you provide a good faith written objection to the party or attorney who served the subpoena. *See* Rule 45(c)(6) of the Arizona Rules of Civil Procedure. *See also* “Your Right to Object to This Subpoena” section below.

***Combined Subpoena.*** You should note that a command to produce certain designated materials, or to permit the inspection of premises, *may* be combined with a command to appear at a trial, hearing, or deposition. *See* Rule 45(b)(2) of

## APPENDIX B—Clean Version of Proposed Rules

the Arizona Rules of Civil Procedure. You do not, however, need to appear in person at the place of production or inspection unless the subpoena *also* states that you must appear for and give testimony at a hearing, trial or deposition. *See* Rule 45(c)(3) of the Arizona Rules of Civil Procedure.

### **Your Right To Object To This Subpoena**

**Generally.** If you have concerns or questions about this subpoena, you should first contact the party or attorney who served the subpoena. The party or attorney serving the subpoena has a duty to take reasonable steps to avoid imposing an undue burden or expense on you. The superior court enforces this duty and may impose sanctions upon the party or attorney serving the subpoena if this duty is breached. *See* Rule 45(e)(1) of the Arizona Rules of Civil Procedure. Unless otherwise ordered by the court for good cause, the party seeking discovery from you must pay your reasonable expenses incurred in responding to a subpoena seeking the production of documents, electronically stored information, tangible things, or an inspection of premises. If you seek payment of expenses other than routine clerical and per-page copying costs as allowed by A.R.S. § 12-351, you must object on the grounds of undue burden to producing the materials without the subpoenaing party's payment, and send an advance estimate of those expenses to the subpoenaing party, before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. You need not comply with those parts of the subpoena that are the subject of the objection, unless the court orders you to do so. The court may enter an order conditioning your response to the subpoena on payment of your additional expenses, including ordering payment of those expenses in advance. *See* Rule 45(e)(1)(B).

**Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition.** If you wish to object to a subpoena commanding your appearance at a hearing, trial or deposition, you must file a motion to quash or modify the subpoena with the court to obtain a court order excusing you from complying with this subpoena. *See* Rules 45(b)(5) and 45(e)(2) of the Arizona Rules of Civil Procedure. The motion must be filed in the superior court of the county in which the case is pending or in the superior court of the county from which the subpoena was issued. *See* Rule 45(e)(2)(A) and (B) of the Arizona Rules of Civil Procedure. The motion must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(e)(2)(D) of the Arizona Rules of Civil Procedure. You must send a copy of any motion to quash or modify the subpoena to the party or attorney who served the subpoena. *See* Rule 45(e)(2)(E) of the Arizona Rules of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date, time, and place specified in the subpoena, unless excused from doing so—by the party or attorney serving the

## APPENDIX B—Clean Version of Proposed Rules

subpoena or by a court order—before the date and time specified for your appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

The court *must* quash or modify a subpoena:

(1) if the subpoena does not provide a reasonable time for compliance;

(2) unless the subpoena commands your attendance at a trial, if you are not a party or a party's officer and if the subpoena commands you to travel to a place other than: (a) the county where you reside or transact business in person; (b) the county where you were served with a subpoena, or within forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order; or

(3) if the subpoena requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(4) if the subpoena subjects you to undue burden.

*See* Rule 45(e)(2)(A) of the Arizona Rules of Civil Procedure.

The court *may* quash or modify a subpoena:

(1) if the subpoena requires you to disclose a trade secret or other confidential research, development or commercial information;

(2) if you are an unretained expert and the subpoena requires you to disclose your opinion or information resulting from your study that you have not been requested by any party to give on matters that are specific to the dispute;

(3) if you are not a party or a party's officer and the subpoena would require you to incur substantial travel expense; or

(4) if the court determines that justice requires the subpoena to be quashed or modified.

*See* Rule 45(e)(2)(B) of the Arizona Rules of Civil Procedure.

In these last four circumstances, a court may, instead of quashing or modifying a subpoena, order your appearance or order the production of material under specified conditions if: (1) the serving party or attorney shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (2) if your travel expenses or the expenses resulting from the production are at issue, the court ensures that you will be reasonably compensated. *See* Rule 45(e)(2)(C) of the Arizona Rules of Civil Procedure.

***Procedure for Objecting to Subpoena for Production of Documentary Evidence.*** If you wish to object to a subpoena commanding you to produce documents, electronically stored information or tangible items, or to permit the inspection of premises, you may send a good faith written objection to the party or

## APPENDIX B—Clean Version of Proposed Rules

attorney serving the subpoena that objects to: (1) producing, inspecting, copying, testing, or sampling any or all of the materials designated in the subpoena; (2) inspecting the premises; or (3) producing electronically stored information in the form or forms requested or from sources that are not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy. You also may object on the ground that the subpoena seeks the production of materials that have already been produced in the action or that are available from parties to the action. *See* Rule 45(e)(1)(A). If you seek payment of expenses other than routine clerical and per-page copying costs as allowed by A.R.S. § 12-351, you must object on the grounds of undue burden to producing the materials without the subpoenaing party's payment, and provide an advance estimate of those additional expenses. You must send your written objection to the party or attorney who served the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(c)(6)(A)(i) and (ii) of the Arizona Rules of Civil Procedure.

If you object because you claim the information requested is privileged, protected, or subject to protection as trial preparation material, you must express the objection clearly, and identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that—without revealing information that is itself privileged or protected—will enable the demanding party to assess the claim. *See* Rules 26(b)(6)(A) and 45(c)(5)(A) of the Arizona Rules of Civil Procedure. You may object to providing the information required by Rule 26(b)(6)(A) if providing the information would impose an undue burden or expense.

If you object to the subpoena in writing, you do not need to comply with the subpoena until a court orders you to do so. It will be up to the party or attorney serving the subpoena to first personally consult with you and engage in good faith efforts to resolve your objection and, if the objection cannot be resolved, to seek an order from the court to compel you to provide the documents or inspection requested, after providing notice to you. *See* Rule 45(c)(6)(B) and (C) of the Arizona Rules of Civil Procedure.

If you are not a party to the litigation, or a party's officer, the court will issue an order to protect you from any significant expense resulting from the inspection and copying commanded. *See* Rule 45(c)(6)(B) of the Arizona Rules of Civil Procedure.

**APPENDIX B—Clean Version of Proposed Rules**

Instead of sending a written objection to the party or attorney who served the subpoena, you also have the option of raising your objections in a motion to quash or modify the subpoena, or through a motion for protective order. *See* Rule 45(c)(6)(B) and (e)(2) of the Arizona Rules for Civil Procedure. The procedure and grounds for doing so are described in the section above entitled “Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition.”

If the subpoena *also* commands your attendance at a hearing, trial or deposition, sending a written objection to the party or attorney who served the subpoena does not suspend or modify your obligation to attend and give testimony at the date, time and place specified in the subpoena. *See* Rule 45(c)(6)(A)(iii) of the Arizona Rules of Civil Procedure. If you wish to object to the portion of this subpoena requiring your attendance at a hearing, trial or deposition, you must file a motion to quash or modify the subpoena as described in the section above entitled “Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition.” *See* Rule 45(b)(5) and 45(c)(6)(A)(iii) of the Arizona Rules of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date, time, and place specified in the subpoena, unless excused from doing so—by the party or attorney serving the subpoena or by a court order—before the date and time specified for your appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

**ADA Notification**

Requests for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding.

[Optional: this form may include the provisions of Rule 64.1(c)(2) of the Arizona Rules of Civil Procedure].

SIGNED AND SEALED this date

\_\_\_\_\_

\_\_\_\_\_, CLERK

By:

\_\_\_\_\_

Deputy Clerk

Certificate of service:

APPENDIX B—Clean Version of Proposed Rules

Form 11(a). Joint Report: Tier 1 Case

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	Case number _____
	)	
v	)	<b>Joint Report</b>
	)	<i>(Tier 1 case)</i>
Defendants	)	Assigned to:
	)	

The parties signing below certify that they have conferred about the matters contained in Rule 16(b)(2) and (c)(3), and they further certify that:

- (a) Every defendant has been served or dismissed, and every defendant who has not been defaulted has filed a responsive pleading;
- (b) There are no third party claims; and
- (c) This case is not subject to the mandatory arbitration provisions of Rule 72.

**Optional Summary of Rule 16(b) Early Meeting** (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary’s contents:

\_\_\_\_\_  
\_\_\_\_\_

With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 12 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

APPENDIX B—Clean Version of Proposed Rules

**1. Brief description of the case:**

\_\_\_\_\_.

- If a claimant is seeking other than monetary damages, specify the relief sought:

\_\_\_\_\_.

**2. Settlement:** The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

- The parties will be ready for a settlement conference or a private mediation by \_\_\_\_\_.
- If the parties will not engage in a settlement conference or a private mediation, state the reason(s): \_\_\_\_\_.

**3. Readiness:** This case will be ready for trial by \_\_\_\_\_.

**4. Jury:** A trial by jury is demanded. yes no

**5. Length of trial:** The estimated length of trial is \_\_\_ days.

**6. Summary jury:** The parties agree to a summary jury trial. yes no

**7. Short cause:** A non-jury trial will not exceed one hour. yes no

**8. Preference:** This case is entitled to preference for trial under this statute or rule:

\_\_\_\_\_.

**9. Special requirements:** At a pretrial conference or at trial, a party will require disability accommodations (specify)

\_\_\_\_\_

an interpreter (specify language)

\_\_\_\_\_

**10. Scheduling conference:** The parties request a Rule 16(d) scheduling conference. yes no

If requested, the reasons for having a conference are: \_\_\_\_\_

\_\_\_\_\_.

**11. Other matters:** Other matters that the parties wish to bring to the court's attention that may affect management of this case:

\_\_\_\_\_.

**APPENDIX B—Clean Version of Proposed Rules**

**12. Items upon which the parties do not agree:** The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

\_\_\_\_\_.

The parties must attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
For Plaintiff

\_\_\_\_\_  
For Defendant

Form 11(b). Proposed Scheduling Order: Tier 1 Case

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	Case number _____
	)	
v	)	<b>Proposed Scheduling Order</b>
	)	<i>(Tier 1 case)</i>
Defendants	)	Assigned to:

Upon consideration of the parties’ Joint Report, the court orders as follows:

**This case is assigned to discovery Tier 1, pursuant to Rule 26.2.**

**1. Initial disclosure:** The parties have provided their initial disclosure statements, or will provide them no later than \_\_\_\_\_.

**2. Witness disclosure:** The parties will disclose lay witnesses by \_\_\_\_\_. The parties will identify any expert witnesses and the experts’ areas of testimony, and will simultaneously disclose the opinions of those expert witnesses, by \_\_\_\_\_. (Alternative: Plaintiff will disclose an expert’s identity, area of testimony, and opinions by \_\_\_\_\_, and Defendant will disclose an expert’s identity, area of testimony, and opinions by \_\_\_\_\_.) The parties will simultaneously disclose the experts’ rebuttal opinions.

**3. Final supplemental disclosure:** Each party shall provide final supplemental disclosure by \_\_\_\_\_. This order does not replace the parties’ obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

**No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial if not disclosed in a timely manner, except for good cause shown or upon a written or an on-the-record agreement of the parties.**

**4. Discovery deadlines:** Tier 1 cases are permitted 120 days in which to complete discovery. The time to complete discovery runs from the date of the Early Meeting. The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by \_\_\_\_\_. The parties will complete the depositions of parties and lay witnesses by \_\_\_\_\_, and will complete the depositions of

**APPENDIX B—Clean Version of Proposed Rules**

expert witnesses by \_\_\_\_\_. The parties will complete all other discovery by \_\_\_\_\_. (“Complete discovery” includes conclusion of all depositions and submission of full and final responses to written discovery.)

**5. Settlement conference or private mediation:** [choose one]:

**Referral to ADR for a settlement conference:** The clerk or the court will issue a referral to ADR by a separate minute entry.

**Private mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by \_\_\_\_\_.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

**No settlement conference or mediation:** A settlement conference or private mediation is not ordered.

**6. Dispositive motions and trial:** The parties shall file all dispositive motions by \_\_\_\_\_. The parties propose a trial date of no later than \_\_\_\_\_, and anticipate the number of days for trial to be \_\_\_\_\_ days.

**7. Trial setting conference:** On \_\_\_\_\_ [the court will provide this date], the court will conduct a telephonic trial setting conference. Participants shall have their calendars available for the conference.

Plaintiff Defendant will initiate the conference call by arranging for the presence of all other attorneys and self-represented parties, and by calling this division at \_\_\_\_\_ [division’s telephone number] at the scheduled time.

**8. Firm dates:** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court’s consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

**APPENDIX B—Clean Version of Proposed Rules**

**9. *Further orders:*** The court further orders as follows:

---

---

---

APPENDIX B—Clean Version of Proposed Rules

Date \_\_\_\_\_ Judge of the Superior Court  
Form 12(a). Joint Report: Tier 2 Case

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs \_\_\_\_\_ )  
 ) Case number \_\_\_\_\_  
 )  
 v ) **Joint Report**  
 )  
 ) (*Tier 2 case*)  
 Defendants \_\_\_\_\_ )  
 ) Assigned to:

The parties signing below certify that they have conferred about the matters set forth in Rule 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

**Optional Summary of Rule 16(b) Early Meeting** (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary’s contents:

\_\_\_\_\_  
\_\_\_\_\_

**1. Brief description of the case:**

- \_\_\_\_\_
- If a claimant is seeking other than monetary damages, specify the relief sought

\_\_\_\_\_

**2. Current case status:** Every defendant has been served or dismissed. yes no

- Every party who has not been defaulted has filed a responsive pleading. yes no

APPENDIX B—Clean Version of Proposed Rules

- Explanation of a “no” response to either of the above statements: \_\_\_\_\_  
\_\_\_\_\_.

**3. Amendments:** A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

**4. Settlement:** The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by \_\_\_\_\_.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): \_\_\_\_\_.

**5. Readiness:** This case will be ready for trial by \_\_\_\_\_.

**6. Jury:** A trial by jury is demanded. yes no

**7. Length of trial:** The estimated length of trial is \_\_\_ days.

**8. Summary jury:** The parties agree to a summary jury trial. yes no

**9. Preference:** This case is entitled to a preference for trial pursuant to the following statute or rule:  
\_\_\_\_\_.

**10. Special requirements:** At a pretrial conference or at trial, a party will require disability accommodations (specify)  
\_\_\_\_\_

an interpreter (specify language)  
\_\_\_\_\_

**11. Scheduling conference:** The parties request a Rule 16(d) scheduling conference. yes no If requested, the reasons for having a conference are  
\_\_\_\_\_.

**12. Other matters:** Other matters that the parties wish to bring to the court’s attention that may affect management of this case:  
\_\_\_\_\_.

**13. Items upon which the parties do not agree:** The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:  
\_\_\_\_\_.

**APPENDIX B—Clean Version of Proposed Rules**

The parties must attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
For Plaintiff

\_\_\_\_\_  
For Defendant

Form 12(b). Proposed Scheduling Order: Tier 2 Case

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	Case number _____
	)	
v	)	<b>Proposed Scheduling Order</b>
	)	<i>(Tier 2 case)</i>
Defendants	)	Assigned to:
	)	

Upon consideration of the parties’ Joint Report, the court orders as follows:

**This case is assigned to discovery Tier 2, pursuant to Rule 26.2.**

**1. Initial disclosure:** The parties have exchanged their initial disclosure statements, or will exchange them no later than \_\_\_\_\_.

**2. Expert witness disclosure:** The parties shall simultaneously disclose areas of expert testimony by \_\_\_\_\_. (Alternative: Plaintiff shall disclose areas of expert testimony by \_\_\_\_\_, and Defendant shall disclose areas of expert testimony by \_\_\_\_\_.)

The parties shall simultaneously disclose the identity and opinions of experts by \_\_\_\_\_. (Alternative: Plaintiff shall disclose the identity and opinions of experts by \_\_\_\_\_, and Defendant shall disclose the identity and opinions of experts by \_\_\_\_\_.)

The parties shall simultaneously disclose their rebuttal expert opinions by \_\_\_\_\_.

**3. Lay (non-expert) witness disclosure:** The parties shall disclose all lay witnesses by \_\_\_\_\_. (Alternative: The parties shall disclose lay witnesses in the following order, and by the following dates: \_\_\_\_\_.)

**4. Final supplemental disclosure:** Each party shall provide final supplemental disclosure by \_\_\_\_\_. This order does not replace the parties’ obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

APPENDIX B—Clean Version of Proposed Rules

**No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.**

**5. Discovery deadlines:** Tier 2 cases are permitted 180 days in which to complete discovery. The time to complete discovery runs from the date of the Early Meeting. The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by \_\_\_\_\_. The parties will complete the depositions of parties and lay witnesses by \_\_\_\_\_, and will complete the depositions of expert witnesses by \_\_\_\_\_. The parties will complete all other discovery by \_\_\_\_\_. (“Complete discovery” includes conclusion of all depositions and submission of full and final responses to written discovery.)

**6. Settlement conference or private mediation:** [choose one]:

**Referral to ADR for a settlement conference:** The clerk or the court will issue a referral to ADR by a separate minute entry.

**Private mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by \_\_\_\_\_.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

**No settlement conference or mediation:** A settlement conference or private mediation is not ordered.

**7. Dispositive motions and trial:** The parties shall file all dispositive motions by \_\_\_\_\_. The parties propose a trial date of no later than \_\_\_\_\_, and anticipate the number of days for trial to be \_\_\_\_\_ days.

**8. Trial setting conference:** On \_\_\_\_\_ [the court will provide this date], the court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference.

Plaintiff Defendant will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at \_\_\_\_\_ [division’s telephone number] at the scheduled time.

**9. Firm dates:** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of

**APPENDIX B—Clean Version of Proposed Rules**

this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

**10. Further orders:** The court further orders as follows: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge of the Superior Court

APPENDIX B—Clean Version of Proposed Rules

Form 13(a). Joint Report: Tier 3 Case

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	Case number _____
	)	
v	)	<b>Joint Report</b>
	)	<i>(Tier 3 case)</i>
Defendants	)	Assigned to:
	)	

The parties signing below certify that they have conferred about the matters set forth in Rule 16(b)(2) and (c)(3). With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

**Optional Summary of Rule 16(b) Early Meeting** (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary’s contents:

\_\_\_\_\_  
\_\_\_\_\_

**1. Brief description of the case:**

- If a claimant is seeking other than monetary damages, specify the relief sought \_\_\_\_\_.

**2. Current case status:** Every defendant has been served or dismissed. yes no

- Every party who has not been defaulted has filed a responsive pleading. yes no
- Explanation of a “no” response to either of the above statements: \_\_\_\_\_

\_\_\_\_\_.

APPENDIX B—Clean Version of Proposed Rules

**3. Amendments:** A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

**4. Settlement:** The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by \_\_\_\_\_.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): \_\_\_\_\_.

**5. Readiness:** This case will be ready for trial by \_\_\_\_\_.

**6. Jury:** A trial by jury is demanded. yes no

**7. Length of trial:** The estimated length of trial is \_\_\_ days.

**8. Summary jury:** The parties agree to a summary jury trial. yes no

**9. Preference:** This case is entitled to a preference for trial pursuant to the following statute or rule:

\_\_\_\_\_.

**10. Special requirements:** At a pretrial conference or at trial, a party will require disability accommodations (specify)

\_\_\_\_\_

an interpreter (specify language)

\_\_\_\_\_

**11. Scheduling conference:** The parties request a Rule 16(d) scheduling conference. yes no If requested, the reasons for having a conference are

\_\_\_\_\_.

**12. Other matters:** Other matters that the parties wish to bring to the court's attention that may affect management of this case:

\_\_\_\_\_.

**13. Items upon which the parties do not agree:** The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

\_\_\_\_\_.

**APPENDIX B—Clean Version of Proposed Rules**

The parties must attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
For Plaintiff

\_\_\_\_\_  
For Defendant

Form 13(b). Proposed Scheduling Order: Tier 3 Case

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	Case number _____
	)	
v	)	<b>Proposed Scheduling Order</b>
	)	<i>(Tier 3 case)</i>
Defendants	)	Assigned to:
	)	

Upon consideration of the parties’ Joint Report, the court orders as follows:

**This case is assigned to discovery Tier 3, pursuant to Rule 26.2.**

**1. Initial disclosure:** The parties have exchanged their initial disclosure statements, or will exchange them no later than \_\_\_\_\_.

**2. Expert witness disclosure:** The parties shall simultaneously disclose areas of expert testimony by \_\_\_\_\_. (Alternative: Plaintiff shall disclose areas of expert testimony by \_\_\_\_\_, and Defendant shall disclose areas of expert testimony by \_\_\_\_\_.)

The parties shall simultaneously disclose the identity and opinions of experts by \_\_\_\_\_. (Alternative: Plaintiff shall disclose the identity and opinions of experts by \_\_\_\_\_, and Defendant shall disclose the identity and opinions of experts by \_\_\_\_\_.)

The parties shall simultaneously disclose their rebuttal expert opinions by \_\_\_\_\_.

**3. Lay (non-expert) witness disclosure:** The parties shall disclose all lay witnesses by \_\_\_\_\_. (Alternative: The parties shall disclose lay witnesses in the following order, and by the following dates: \_\_\_\_\_.)

**4. Final supplemental disclosure:** Each party shall provide final supplemental disclosure by \_\_\_\_\_. This order does not replace the parties’ obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

APPENDIX B—Clean Version of Proposed Rules

**No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.**

**5. *Discovery deadlines:*** Tier 3 cases are permitted 240 days in which to complete discovery. The time to complete discovery runs from the date of the Early Meeting. The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by \_\_\_\_\_. The parties will complete the depositions of parties and lay witnesses by \_\_\_\_\_, and will complete the depositions of expert witnesses by \_\_\_\_\_. The parties will complete all other discovery by \_\_\_\_\_. (“Complete discovery” includes conclusion of all depositions and submission of full and final responses to written discovery.)

**6. *Settlement conference or private mediation:*** [choose one]:

**Referral to ADR for a settlement conference:** The clerk or the court will issue a referral to ADR by a separate minute entry.

**Private mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by \_\_\_\_\_.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

**No settlement conference or mediation:** A settlement conference or private mediation is not ordered.

**7. *Dispositive motions and trial:*** The parties shall file all dispositive motions by \_\_\_\_\_. The parties propose a trial date of no later than \_\_\_\_\_, and anticipate the number of days for trial to be \_\_\_\_\_ days.

**8. *Trial setting conference:*** On \_\_\_\_\_ [the court will provide this date], the court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference.

Plaintiff Defendant will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at \_\_\_\_\_ [division’s telephone number] at the scheduled time.

**9. *Firm dates:*** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of

**APPENDIX B—Clean Version of Proposed Rules**

this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

**10. Further orders:** The court further orders as follows: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge of the Superior Court

APPENDIX B—Clean Version of Proposed Rules

**Form 14(a). Joint Report: Commercial Case**

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	-
	)	Case number _____
	)	
v	)	<b>Joint Report</b>
	)	(Commercial case)
Defendants	)	
	)	Assigned to:

The parties signing below certify that they have conferred about the matters set forth in Rules 8.1(f) and 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 14 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

***1. Brief description of the case:***

- 
- If a claimant is seeking other than monetary damages, specify the relief sought  
\_\_\_\_\_.
  - This is a commercial case under Rule 8.1 because (refer to the specific provisions of Rule 8.1 that apply):  
\_\_\_\_\_.

***2. Current case status:*** Every defendant has been served or dismissed. yes no

- Every party who has not been defaulted has filed a responsive pleading. yes no
- Explanation of a “no” response to either of the above statements: \_\_\_\_\_  
\_\_\_\_\_.

**APPENDIX B—Clean Version of Proposed Rules**

**3. Amendments:** A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

**4. Special case management:** Special case management procedures are appropriate: yes no If “yes,” the following case management procedures are appropriate because:\_\_\_\_\_.

**5. Commercial case management [Rule 8.1(f)]:**

**a. Approximate Amount in Controversy \$\_\_\_\_\_**

**b. The commercial court should assign this case to a tier other than Tier 3 for the following reasons:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**c. Anticipated Areas of Expert Testimony (not binding):**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**d. Electronically Stored Information**

The parties do not expect electronically stored information to be at issue in this case.

The parties do expect electronically stored information to be at issue in this case.

Have the parties reached an agreement regarding the discovery of electronically stored information?  yes  no

If yes, have the parties filed a stipulated order?  yes  no

Do the parties currently have disputes or anticipate particular disputes over electronically stored information?  yes  no

If yes, please describe the dispute(s):

**e. Privilege Issues and Protective Order**

**APPENDIX B—Clean Version of Proposed Rules**

Have the parties reached an agreement regarding the inadvertent production of privileged material pursuant to Rule 502 of the Rules of Evidence?  yes  no

If so, have the parties filed a stipulated order?  yes  no

Have any issues arisen or do you expect any issues to arise regarding claims of privilege or protection of trial preparation materials pursuant to Rule 26(b)(6) or Rule 26.1(h)?  yes  no

If so, have the parties filed a stipulated protective order?  yes  no

**6. Settlement:** The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by \_\_\_\_\_.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): \_\_\_\_\_.

**7. Readiness:** This case will be ready for trial by \_\_\_\_\_.

**8. Jury:** A trial by jury is demanded. yes no

**9. Length of trial:** The estimated length of trial is \_\_\_\_ days.

**10. Summary jury:** The parties agree to a summary jury trial. yes no

**11. Preference:** This case is entitled to a preference for trial under the following statute or rule:

\_\_\_\_\_.

**12. Special requirements:** At a pretrial conference or at trial, a party will require disability accommodations (specify)

\_\_\_\_\_

an interpreter (specify language)

\_\_\_\_\_

**13. Other matters:** Other matters that the parties wish to bring to the court's attention that may affect management of this case:

\_\_\_\_\_.

**APPENDIX B—Clean Version of Proposed Rules**

**14. *Items upon which the parties do not agree:*** The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

\_\_\_\_\_.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
For Plaintiff

\_\_\_\_\_  
For Defendant

**Form 14(b). Proposed Scheduling Order: Commercial Case**

In the Superior Court of Arizona  
\_\_\_\_\_ County

Plaintiffs	)	-
	)	Case number _____
	)	
v	)	<b>Proposed Scheduling Order</b>
	)	
Defendants	)	( <i>Commercial case</i> )
	)	
	)	Assigned to:

Upon consideration of the parties' Joint Report, the court orders as follows:

**1. Initial disclosure:** The parties have exchanged their initial disclosure statements, or will exchange them no later than \_\_\_\_\_.

**2. Expert witness disclosure:** The parties shall simultaneously disclose areas of expert testimony by \_\_\_\_\_. (Alternative: Plaintiff shall disclose areas of expert testimony by \_\_\_\_\_, and Defendant shall disclose areas of expert testimony by \_\_\_\_\_.)

The parties shall simultaneously disclose the identity and opinions of experts by \_\_\_\_\_. (Alternative: Plaintiff shall disclose the identity and opinions of experts by \_\_\_\_\_, and Defendant shall disclose the identity and opinions of experts by \_\_\_\_\_.)

The parties shall simultaneously disclose their rebuttal expert opinions by \_\_\_\_\_.

**3. Lay (non-expert) witness disclosure:** The parties shall disclose all lay witnesses by \_\_\_\_\_. (Alternative: The parties shall disclose lay witnesses in the following order, and by the following dates: \_\_\_\_\_.)

**4. Final supplemental disclosure:** Each party shall provide final supplemental disclosure by \_\_\_\_\_. This order does not replace the parties' obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

APPENDIX B—Clean Version of Proposed Rules

**No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.**

**5. Discovery deadlines:** The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by \_\_\_\_\_. The parties will complete the depositions of parties and lay witnesses by \_\_\_\_\_, and will complete the depositions of expert witnesses by \_\_\_\_\_. The parties will complete all other discovery by \_\_\_\_\_. (“Complete discovery” includes conclusion of all depositions and submission of full and final responses to written discovery.)

**6. Settlement conference or private mediation:** [choose one]:

**Referral to ADR for a settlement conference:** The clerk or the court will issue a referral to ADR by a separate minute entry.

**Private mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by \_\_\_\_\_.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

**No settlement conference or mediation:** A settlement conference or private mediation is not ordered.

**7. Dispositive motions:** The parties shall file all dispositive motions by \_\_\_\_\_.

**8. Trial setting conference:** On \_\_\_\_\_ [the court will provide this date], the court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference.

**9.** Plaintiff Defendant will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at \_\_\_\_\_ [division’s telephone number] at the scheduled time.

**10. Firm dates:** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court’s

**APPENDIX B—Clean Version of Proposed Rules**

consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

**11. *Further orders:*** The court further orders as follows: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge of the Superior Court

4839-0726-8426