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Petitioners

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION FOR
AMENDMENTS TO ARIZONA
RULES OF CIVIL
PROCEDURE 11 AND 26**

Supreme Court No. R-__ - ____

**Petition to Further Amend the
Arizona Rules of Civil Procedure
to Modify Rule 11 and Add Rule
26(b)(2)(D)**

***(Expedited Consideration
Requested)***

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Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petition this Court to adopt certain necessary amendments to the Arizona Rules of Civil Procedure on an expedited basis, as proposed in the attached Appendix A. These particular amendments were unanimously recommended by this Court's Committee on Civil Justice Reform (CCJR), but were left out of the Court's Order on the petition filed by that Committee. Though the amendments—which were key to the Court's mission for the CCJR—faced just a single comment in opposition during the entire Rule 28 process, they were not adopted. These amendments were aimed at, and necessary to, the goal of reducing the time and expense of civil litigation in Arizona's courts. One of them (the addition of Rule 26(b)(2)(D)) will likely reduce or prevent needless satellite litigation over the enforceability of pre-dispute, negotiated discovery, disclosure, and preservation terms in business contracts and transactions.

For the following reasons, the Court should reconsider these indispensable amendments before or as part of its December 2017 Rules Agenda and adopt them effective July 1, 2018, when most of the rest of

the CCJR's work takes effect. Petitioners¹ and the Arizona public have vested interests in reducing the time and costs involved in resolving litigation in Arizona's courts. The amendments proposed herein have that exact aim.

I. BACKGROUND OF THE PROPOSED AMENDMENTS

The Arizona Rules of Civil Procedure relevant to this Petition (Rules 11 and 26), as modified by this Court during its August 2017 Rules Agenda will take effect on July 1, 2018. Those revised rules were proposed by the CCJR and adopted as modified by this Court's Order on the CCJR Petition, R-17-0010. This Petition seeks the Court's reconsideration of two sets of crucial amendments left out of the Court's August 31, 2017, Order² on R-17-0010. The amendments were omitted despite their unanimous support within, and recommendation by, the CCJR, which proposed them to make "Arizona litigation more just, speedy, and inexpensive." (Pet'n R-17-0010, at 5.³) They were also

¹ Two of the undersigned, Mr. Hamer and Mr. Twist, were appointed to the CCJR by the Court's Administrative Order establishing that body.

² *Available at* <http://www.azcourts.gov/Portals/20/2017%20Rules/17-0010.pdf>.

³ *Available at*

omitted despite the Arizona Judicial Council’s due consideration and unanimous support. *Id.* These amendments are described below and set forth in context in blackline (Appendix A) and clean (Appendix B) portions of the Rules in the appendices filed with this Petition.

A. Small, Yet Crucial, Changes to Rule 11, Ariz. R. Civ. P.

As has its counterpart in the federal justice system, Rule 11, Ariz. R. Civ. P., is beginning to have its own tangled and storied history of debated revisions. In Arizona, this has stemmed mostly from removal of the word “shall” from the sanctions provisions of the rule, which change actually only recently occurred on the first day of this year. It has been hotly contested in earlier rules processing cycles whether “may” (a discretionary standard) ought to replace “shall,” or whether instead mandatory sanctions should responsibly persist via use of the word “must.”⁴

Yet, in this immediate past rules processing cycle, the debate over

<https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=4870>.

⁴ *See, e.g.*, Petitions, Comments, and Replies in R-15-0004 (Petition by State Bar of Arizona), R-15-0043 (Petition by Pima County Bar Association), and R-16-0010 (Petition of the Task Force on the Arizona Rules of Civil Procedure), *all available at* <https://www.azcourts.gov/Rules-Forum/aff/118>.

Rule 11 was decidedly less raucous, as discussed below. Tailored yet incisive revisions like those proposed by the CCJR would cement Arizona's model of Rule 11 as a leader in civil justice reform. Those CCJR proposals for Rule 11 that were not adopted should be. They include (1) modifications to the federal Rule 11(b) standards that are unique to Arizona but that better represent Arizona Rule 11 case law, and (2) a change making Rule 11 sanctions mandatory, rather than discretionary, when a violation is found, via use of the word "must" in Rule 11(c). The amendments are blacklined as follows, against the Rule 11 that will take effect on July 1, 2018, for ease of reference:

(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 nonfrivolouscolorable 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.

~~(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and~~

~~(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.~~

(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—may must impose on the person who signed it, a represented party, or both, an appropriate sanction.

For the good cause of reducing frivolous litigation, which is repugnant to civil justice reform, Petitioners ask that the Court reconsider and adopt the proposed Rule 11 amendments above.

B. The Important Addition of Rule 26(b)(2)(D)

Proposed Rule 26(b)(2)(D) would note the requirement that courts enforce pre-litigation contractual agreements “mutually and freely negotiated” between business organizations. The final language

proposed by the CCJR⁵ in the Rule 28 process provided the following to be inserted into the “Limitations on Frequency and Extent” portion of Rule 26(b), which deals with “Discovery Scope and Limits”:

(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))⁶ 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.

⁵*Available at*

<https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=5419>, (Appendix A to CCJR Reply in Support of Petition R-17-0010, at page 36).

⁶ Experimental Rule 8.1, Ariz. R. Civ. P., applies in counties that have established specialized courts for commercial cases. Ariz. R. Civ. P. 8.1(a). Rule 8.1(a)(3) defines a “business contract or transaction” as “one in which a *business organization* sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations.” (Emphasis added.)

A “business organization,” then, is defined for purposes of the civil rules as including “a sole proprietorship, corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, business trust, or a political subdivision or government entity that is a party to a business contract or transaction.”

To be clear, the definition of a business organization “excludes an individual, a family trust, or a political subdivision or government entity that is not a party to a business contract or transaction.”

Just as the trial court must give effect to pre-litigation jury trial waivers contained in business contracts or transactions, *see, e.g., BNCCORP, Inc. v. HUB Int'l Ltd.*, 769 Ariz. Adv. Rep. 4, 400 P.3d 157, 160, 162-64 (App. 2017) (affirming trial court ruling striking jury demand due to jury trial waiver in purchase and sale agreement that preceded litigation by more than five years), so should it enforce provisions in those same agreements that limit the scope of discovery or the duties to preserve information. Regrettably, there remain significant questions about whether courts will do so. *See Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, 393 P.3d 449, 461 ¶65 (2017) (Bolick, J., dissenting) (noting that “notwithstanding that freedom of contract is enshrined in our organic law,” questions still arise regarding the enforceability of pre-litigation contracts between business organizations); (*see also* CCJR Reply in Support of R-17-0010, at 13)⁷.

Thus, Petitioners also ask that the Court adopt the natural yet innovative provision that is Rule 26(b)(2)(D), which—like all

⁷ *Available at*

<https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=5416>.

amendments proposed herein—only a single comment opposed. Without it, satellite litigation may arise over whether the parties’ mutually and freely negotiated agreements control, or whether the newly revised court rules’ commanding limits on discovery and preservation trump the way business organizations have chosen to arrange their affairs.

II. ONLY A SINGLE COMMENT OPPOSED THE PROPOSED AMENDMENTS, WHICH WERE UNANIMOUSLY RECOMMENDED AND DULY PETITIONED BY THIS COURT’S COMMITTEE ON CIVIL JUSTICE REFORM.

The State Bar of Arizona (SBA or State Bar) filed a comment opposing the two sets of amendments above, as well as other portions of the CCJR’s work.⁸ The CCJR was the first to propose something like the addition of Rule 26(b)(2)(D), but for the Rule 11 amendments, the Bar’s sole comment actually represented a decrease in the volume of opposition to prior similar proposals. In recent years, oft-proposed and

⁸ The SBA might be described as somewhat lukewarm on the thrust of the CCJR proposals in general. Its comment notes that “[s]eparate and apart from misgivings about the CCJR’s tiering, there is some opposition to the proposed tiering reform centered around a preference for the existing rule-set.” Yet the Court largely adopted CCJR proposals anyway, with not-the-only-but-perhaps-the-most-notable exceptions being those proposals contained in this Petition.

oft-denied rule amendments have eventually been adopted⁹—once opposition has lessened or been mollified by revisions to proposed revisions. Petitioners submit, that for the Rule 11 amendments proposed herein, the time for adoption has come.

A. Any Opposition to the Proposed Changes to Rule 11 Only Appears to Have Lessened.

The State Bar petitioned for changes to Rule 11 in early 2015, seeking revisions including the use of “must” to impose mandatory sanctions for violations (*See* R-15-0004). The Pima County Bar Association later responded with its own petition (R-15-0043), seeking instead the use of “may” and permissive sanctions—which the State Bar eventually supported. Ultimately, this Court’s Task Force on the Arizona Rules of Civil Procedure weighed in and also (initially) sought “must” and mandatory sanctions (R-16-0010).¹⁰ In the end, this Court

⁹ The changes to Rule 111, of this Court’s rules, regarding citation of memorandum decisions (this Court’s order on Petition R-14-0004), are one example, and the experimental program now in effect allowing change of judge in eviction actions (this Court’s order on Petition R-16-0022) is another.

¹⁰ When the Task Force filed its Amended Petition and Reply, it proposed “may,” in the view that “the benefits of uniformity with Federal Rule 11 weigh in favor” of “may” in place of “must.” (*See* Am. Pet’n R-16-0010, *available at* <https://www.azcourts.gov/Rules-Forum/aft/578>.)

went with “may” in its orders on those petitions, leading to discretionary sanctions becoming the rule in Arizona this year.

However, when the CCJR weighed in this year and recommended “must,” *only the State Bar* commented in opposition. The Pima County Bar Association did not defend “may” in the comments on the CCJR’s petition, nor did any other commenters rush to its aid. Thus, two of this Court’s appointed bodies and the State Bar have, at least at one point, carefully considered and recommended mandatory sanctions. Given that and given that opposition to mandatory sanctions has certainly been tempered, if not withered, by sufficient time and thought, Petitioners respectfully submit that the time has come to use “must.”

B. The Single Comment in Opposition to the Addition of Rule 26(b)(2)(D) Opposed it Summarily and Without Support.

The State Bar was also the sole comment opposing the addition of Rule 26(b)(2)(D)’s subparagraph on the enforcement of pre-litigation contracts between business organizations that allocate the parties’ preservation, discovery, and disclosure obligations. The State Bar did so cursorily, however, and without citation to supporting authority. Instead, the commenter merely posited its concerns that the provision would “give rise to satellite litigation over the enforceability of such

agreements,” improperly limit the trial court’s discretion to manage discovery, and impact the rights of nonparties to information preservation. (SBA Cmt. on R-17-0010, at 12.) These concerns are, respectfully, unfounded.

Trial courts must already adjudicate motion practice regarding the enforceability of pre-litigation agreements as to jury trial waivers, arbitration, and a host of other issues. *See BNCCORP, Inc.*, 769 Ariz. Adv. Rep. 4, 400 P.3d at 162-64 (reviewing trial court’s ruling enforcing pre-litigation jury trial waiver contained in business contract); *see also* Jay Brudz & Jonathan M. Redgrave, *Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation*, 18 RICH. J. L. & TECH. 13, 25 (Summer 2012) (noting enforceability of near-ubiquitous venue, jury waiver, choice-of-law, and arbitration clause provisions). And this Court’s charge to the CCJR noted the importance of “rule amendments related to case management” in reducing “the time and expense of civil litigation.” (Admin. Order No. 2015-126 (appointing CCJR and setting forth its purpose).) Finally, the CCJR made changes and proposed supplemental rule language for Rule 26(b)(2)(D) in response to the State Bar

comment. These included the language that “[n]othing in this subdivision impairs the rights of non-parties to the contract.” (CCJR Reply, at 12-14.)

Because the State Bar comment was the sole comment in opposition to the addition of Rule 26(b)(2)(D),¹¹ because it was summarily entered, and because the CCJR incorporated all the rest of the State Bar discovery reform critiques during the iterative Rule 28 process (CCJR Reply, at 12), this Court should adopt Rule 26(b)(2)(D). As the CCJR Reply (at 13) pointed out, the provision would provide certainty to contracting-party business organizations that is currently lacking as case law catches up to e-discovery practices. *See* Brudz & Redgrave, 18 RICH. J. L. & TECH. at 25 (noting lack of established law on point). As discussed below, this Court’s recent adoption of new Rule 45.2

¹¹ Commenters on R-17-0010 included such diverse and sophisticated entities and persons as Aderant (a global entity providing business management software), the Civil Department Presiding Judge in Maricopa County, the Arizona Association for Justice’s own Committee on Civil Justice Reform, and Mutual Insurance Company of Arizona (MICA), among others. The MICA comment was signed by more than a dozen Arizona lawyers. No commenter other than the State Bar opposed the addition of Rule 26(b)(2)(D), and the State Bar comment was the second-to-last comment filed on the Petition, so it cannot be said that other commenters deferred to its opposition in lieu of bringing their own.

provides procedural certainty to parties and persons, including business organizations, faced with unreasonable preservation demands. The same should be provided to business organizations that have sought to cabin discovery, disclosure, and preservation obligations in advance.

III. THE CCJR’S PROPOSED RULE 11(b) STANDARDS ADHERE MORE CLOSELY TO ACTUAL ARIZONA STANDARDS FROM EXISTING CASE LAW.

In its proposed revisions to Rule 11(b), the CCJR sought to replace the word “nonfrivolous” with the word “colorable” in Rule 11(b)(4). In so proposing, the CCJR was innovating in view of experience—the term “colorable” is already well-memorialized in Arizona’s existing Rule 11 case law. *See, e.g., Villa de Jardines Ass’n v. Flagstar Bank*, 227 Ariz. 91, 96 (App. 2011) (“Rule 11 requires that attorneys have ‘a good faith belief, formed on the basis of . . . reasonable investigation, that a *colorable* claim exists”) (emphasis added) (quoting *Boone v. Superior Court*, 145 Ariz. 235, 241 (1985)). In contrast, the term “nonfrivolous” *still* does not appear in any Arizona civil Rule 11 case. The CCJR also noted that “nonfrivolous” implies a lesser standard than that previously governing Rule 11 proceedings in Arizona. (CCJR Reply, at 18-19.)

Given the thirty-plus-year installment of “colorable” in Arizona’s Rule 11 case law, using “colorable” in place of “nonfrivolous” would

reduce, not increase, confusion. Rather than defining claims by what they should not be, the positive, aspirational standard of “colorable” defines them by what they should. This is the exact idea and the essence of civil justice reform. (*See* Admin. Order 2015-0126 (“Civil justice reform efforts seek to ensure that courts are forums for the fair and efficient resolution of disputes without undue expense or delay.”) As a further protective measure, the CCJR had included the caveat that a “legal contention may be colorable even if it does not succeed on the merits,” and Petitioners similarly include that.

In the same set of Rule 11(b) revisions, the CCJR proposed to restore the standard requiring that factual allegations be “well grounded in fact.” The State Bar comment had argued that this would also create confusion. Yet newly amended Rule 11(b)(3), which provides that factual contentions need only have “evidentiary support after a reasonable opportunity for further investigation or discovery,” may well encourage numerous filings for which that evidentiary support never materializes. Again, the change proposed by this Petition (and first proposed by the CCJR) is aspirational toward the ends of true reform and simply incorporates the standard of the former Rule 11 and the

well-established case law applying it. *See Villa de Jardines Ass’n*, 227 Ariz. at 96 (upholding sanctions via “well grounded in fact” standard).

IV. TWENTY PERCENT OF STATES HAVE MANDATORY RULE 11 SANCTIONS AND CONGRESS HAS PREVIOUSLY CONSIDERED IMPLEMENTING THEM.

If the Court were to adopt a mandatory sanctions provision in Rule 11(c), as has been recommended twice now by its appointed rule-proposing bodies, Arizona would re-join the following ten states that maintain mandatory Rule 11 sanctions: Arkansas, Colorado, Iowa, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, Oklahoma, and Texas.¹² These states do so through use of the word “shall,”¹³ which Arizona’s Rule 11 contained until this year. According to Black’s Law

¹² With the exceptions of Arkansas and Louisiana, those states are all reciprocal jurisdictions to Arizona, meaning they allow for admission of Arizona lawyers on a basis similar to that on which Arizona admits lawyers on motion. Ariz. R. Supreme Ct. 34(f)(1)(A); *see also* “List of Reciprocal and Non-Reciprocal Jurisdictions with Arizona for Admission on Motion,” *available at* http://www.azcourts.gov/Portals/26/AOM/Reciprocal_AndNON2016JULY12.pdf. Given the certainty that a mandatory—rather than discretionary—sanctions regime would provide to both lawyers and clients in Arizona, the state should join its largely reciprocal brethren in maintaining the mandatory sanctions provision in its Rule 11(c).

¹³ *See* Ark. R. Civ. P. 11(c); Colo. R. Civ. P. 11(a); Iowa Code Ann. R. 1.413(1); Ky. Rule Civ. P. 11; La. Code Civ. P. art. 863(D); Mich. Ct. R. 2.114(E); Neb. Rev. St. § 25-824(4); North Carolina R. Civ. P. 11(a); 12 Okl. St. Ann. § 2011(C); Tex. R. Civ. P. 13.

Dictionary, the word “shall” in Arizona’s Rule 11 should have been replaced with “must”—not “may.” BLACK’S LAW DICTIONARY (10th ed. 2014) (listing five senses for “shall” and providing that “[o]nly sense 1 is acceptable under strict standards of drafting”).¹⁴

The “must” versus “may” debate also occurred and remains ongoing at the federal level. Less debatable, however, are the results in a May 1991 report of a Federal Judicial Center study, which surveyed 751 federal judges and found that: When federal rule 11 had a mandatory sanctions provision (from 1983 to 1993), “an overwhelming majority” of the judges “believed that Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the 1983 version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then current form (80.4%).” (*See* H.R. Rep. No. 115-16, at 3 (Feb. 24, 2017).)

¹⁴ Sense 1 is “Has a duty to; more broadly, is required to . . . This is the mandatory sense that drafters typically intend and that courts typically uphold.”

V. THE ADDITION OF RULE 26(b)(2)(D) WAS AT THE HEART OF THE CCJR'S MISSION AND IS ALIGNED WITH THE STATE CONSTITUTION, AS WELL AS GENERAL PRINCIPLES OF FREEDOM OF CONTRACT.

This Court charged the CCJR primarily with developing recommendations, “including rule amendments . . . to reduce the cost and time required to resolve civil cases in Arizona’s superior courts.” (Admin. Order, 2015-126, at 1.) The addition of the subparagraph Rule 26(b)(2)(D) would do just that. It would “enhance predictability in this developing area of the law,” in which it has become more common for business organizations, often those having “massive amounts of electronic data, to negotiate contract limits on their preservation and discovery obligations” in advance. (CCJR’s 10/1/16 Report, “A Call to Reform,” at 15.¹⁵) Predictability and certainty inure to reducing the costs and burdens of civil litigation as a whole.

Moreover, Arizona’s non-impairment of contracts constitutional doctrine, along with general principles of freedom of contract, underpin the CCJR’s proposed subparagraph. *See* ARIZ. CONST. art. 2, § 25; *see also* BLACK’S LAW DICTIONARY (10th ed. 2014), freedom of contract

¹⁵ *Available at* <http://www.azcourts.gov/Portals/74/CJRC/Master%20CJRC%20Final%20Report%20and%20Recommendations.pdf>.

“judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by undue external control such as governmental interference”); *Dobson Bay Club II DD, LLC*, 242 Ariz. 108, 393 P.3d at 458 ¶46 (Bolick, J., dissenting) (discussing freedom of contract and Arizona Constitution). Not adopting the subparagraph would invite needless litigation over enforceability of pre-dispute contract provisions governing disclosure, discovery, and preservation, and therefore would burden the courts with the same.

VI. THE ADDITION OF RULE 26(b)(2)(D) DOVETAILS WITH THE COURT’S RECENT ADOPTION OF RULE 45.2, ARIZ. R. CIV. P.

Finally, in its Order on Petition R-17-0010, the Court adopted the CCJR’s proposed new Rule 45.2, entitled “Dispute Resolution Procedures Regarding Preservation Requests.” It is believed to be the nation’s first procedural rule reining in unreasonable preservation demands regarding electronically stored information (ESI). The new rule may be used pre-litigation, once it takes effect next July. (*See* Attachment A to Order on Pet’n R-17-0010, at pages 96-98.) The Court generally adopts rule changes without explanation or comment, but presumably new Rule 45.2 was adopted in Arizona’s longstanding tradition of innovation in civil justice reform. Constraining

unreasonable ESI preservation demands via court order even before litigation begins is one way of reducing frivolous litigation and its penumbra of time and expense. The Court saw fit to procedurally innovate in Rule 45.2, toward the laudable ends of “protect[ing] parties and nonparties alike from unreasonably burdensome requests to preserve their ESI, and shifting costs to the requestor where appropriate.” (*See* “A Call to Reform,” at 2.) As the CCJR pointed out in its report, legal authority and civil rules already allow recipients of unreasonable preservation demands to object to them before the superior court, but first-of-its-kind Rule 45.2 memorializes the proper procedure for doing so. (*See* “A Call to Reform,” at 15.)

The correlating addition of Rule 26(b)(2)(D) should not be overlooked. Just as Rule 45.2 tracks the superior court’s expanded authority under newly adopted Rule 37(g),¹⁶ the addition of Rule 26(b)(2)(D) is another necessity for the trial court. The CCJR proposed such tools to empower judges to, as appropriate, “shift the costs of discovery and disclosure, to keep costs proportional, and to reward

¹⁶ Entitled “Failure to Preserve Electronically Stored Information,” and also proposed to be modified by the CCJR, which modifications were thereafter adopted by the Court.

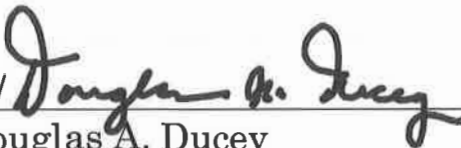
cooperative (and punish uncooperative) behavior.” (“A Call to Reform,” at 15.) The Court should not shrink from requiring that trial courts enforce pre-litigation contractual provisions negotiated by sophisticated business entities that have the same desired effects.

VII. CONCLUSION

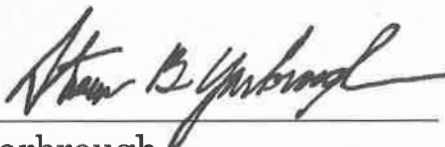
Respectfully, Petitioners submit that that subparagraph, as well as the key rule amendments to Rule 11 discussed herein, should have been adopted by this Court during its August 2017 Rules Agenda. They were unanimously approved by both this Court’s CCJR and the Arizona Judicial Council, and the Rule 28 process certainly did not reveal any sort of widespread opposition to them. Their omission from the Court’s Order on Petition R-17-0010 should be remedied by considered—yet just and speedy—action of this Court. Petitioners urge this Court to take that action before or during its Rules Agenda currently set for December 11, 2017, and adopt the proposed rule amendments on an expedited basis as submitted, to take effect on July 1, 2018, with the vast remainder of the Committee on Civil Justice Reform’s work.

RESPECTFULLY SUBMITTED this 19th day of October, 2017.


OFFICE OF THE ARIZONA GOVERNOR

By /s/  _____
Douglas A. Ducey


PRESIDENT OF THE ARIZONA SENATE

By /s/  _____
Steve Yarbrough

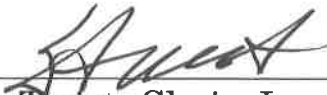
SPEAKER OF THE ARIZONA HOUSE

By /s/  _____
J.D. Mesnard

ARIZONA CHAMBER OF
COMMERCE & INDUSTRY

By /s/  _____
Glenn Hamer, President &
Chief Executive Officer

ARIZONA CHAMBER OF
COMMERCE & INDUSTRY

By /s/  _____
Steven Twist, Chair, Legal,
Regulatory, & Financial
Services Committee

Appendix A – Blackline of Proposed Amendments to Rules 11, 26

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 ~~nonfrivolous~~ colorable argument for extending, modifying, or

Appendix A – Blackline of Proposed Amendments to Rules 11, 26

reversing existing law or for establishing new law. A legal contention may be colorable even if it does not succeed on the merits.

- ~~(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and~~
- ~~(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.~~

(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—may 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

Appendix A – Blackline of Proposed Amendments to Rules 11, 26

(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.

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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) and (h).

(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

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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.

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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

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existing law or for establishing new law. A legal contention may be colorable even if it does not succeed on the merits.

(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

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insufficient, in which case the attorney must make an independent reasonable inquiry into the facts.

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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;
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- (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) and (h).

(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

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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.

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