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**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-17-0050

**Petitioner's Motion to Vacate or
Modify Procedural Order Entered
10/25/17**

***(Expedited Consideration
Requested)***

Pursuant to ARCAP 6(b)(2), Petitioner Steven Twist respectfully moves this Court to vacate or modify the procedural order entered in this matter on October 25, 2017, and attached hereto as Exhibit A (“the Order”). Petitioner is adversely affected by the Order and files this

Motion within 15 days after entry of the Order. ARCAP 6(b)(2).

I. BACKGROUND

The Order, Exhibit A, denied expedited consideration of Petition R-17-0050, which proposes rule changes that were unanimously recommended and petitioned for by this Court's Committee on Civil Justice Reform (CCJR), unanimously supported by the Arizona Judicial Council, and did not face widespread opposition during the 2017 Rule 28 public comment process.

This Court appointed its Committee on Civil Justice Reform nearly two years ago on December 23, 2015. Admin. Order No. 2015-126.¹ The full CCJR then met nine times before filing its rule change petition, R-17-0010, on January 10, 2017, with many, many subcommittee meetings also taking place before the filing. Before the filing with this Court, the actual substance of the CCJR's rule change proposals was refined and vetted no fewer than six times by the group itself—in meetings of several hours in length—over the five months between April 18, 2016, and September 13, 2016.

Both the Arizona Judicial Conference, on June 22, 2016, and the

¹ Petitioner is an appointed member of that group.

Arizona Judicial Council Leadership Conference, on October 27-28, 2016, considered, encouraged, and in the case of the latter conference, unanimously approved the CCJR's work. The Arizona Judicial Council issued that unanimous approval after the CCJR had completed its report to that body. The report is entitled "A Call to Reform," and was submitted October 1, 2016, pursuant to the administrative order of this Court establishing the CCJR. "A Call to Reform" included the substance of the proposals that Petition 17-0050 seeks to have adopted, which are certain changes to Rules 11 and 26. The changes were also included in R-17-0010.

The changes to Rule 11 are small, yet crucial, in that they strengthen the "Representations to the Court" section of the rule (11(b), Ariz. R. Civ. P.) and conform it to longstanding Arizona case law, including by using of the word "colorable" in place of "nonfrivolous." A change to Rule 11(c) would make sanctions mandatory—instead of permissive as they are now—if a violation of Rule 11 is found. The change to Rule 26 is the addition of subparagraph 26(b)(2)(D), dealing with discovery limits, to detail that trial courts must enforce pre-litigation contracts "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.”

Rule change petition R-17-0010, filed on January 10, 2017, included these proposals, and they were further refined in response to the comment of the State Bar of Arizona during the Rule 28 processing cycle. Notably, the State Bar of Arizona’s comment was the only comment in opposition to the changes to Rules 11 and 26 that are the subject of this filing.² The State Bar’s comment was filed on May 22, 2017, and the CCJR replied in support of its petition on June 29, 2017.

This matter—Petition R-17-0050—along with its accompanying Rule 28(G), Ariz. R. Supreme Court, Request for Expedited Consideration (“Rule 28(G) Request”) was filed on October 19, 2017. The procedural Order, Exhibit A, that is the subject of this Motion, was entered and filed on October 25, 2017. Because good cause exists such that the Order should be vacated or modified to allow for expedited

² Commenters on R-17-0010 included 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 of Arizona opposed the proposed rule changes that are now the subject of R-17-0050.

consideration of the amendments proposed by Petition 17-0050, Petitioner moves this Court to review the Order and reach that result.

II. GOOD CAUSE EXISTS FOR THE COURT TO VACATE OR MODIFY THE PROCEDURAL ORDER ENTERED.

Petitioner is adversely affected by the Order, as the proposed rule amendments are necessary to the goal of reducing the time and expense of civil litigation in Arizona’s courts and should be considered and adopted on an expedited basis. Petitioner, business entities in Arizona in general, and the Arizona public as a whole, would benefit from the changes now proposed by Petition R-17-0050. *See* Admin. Order No. 2015-126 (appointing the CCJR consistent with directives from the Arizona Judicial Branch’s Strategic Agenda to ‘promote access to justice’ and ‘improve court processes to better serve the public’).³

This Court, on Motion or on its own, may “independently review procedural motions granted” or denied by a single judge, an appellate clerk, or other court personnel. *See In re \$15,379 in U.S. Currency*, 241 Ariz. 462, 472 (App. 2016) (reviewing a motion and responsive order from an appellate clerk to determine if the motion was supported by

³*Available at*
<http://www.azcourts.gov/Portals/22/admorder/Orders15/2015-126.pdf>

good cause); *see also* ARCAP 6(b)(2). Here, the Rule 28(G) Request was properly addressed by the Duty Justice in the first instance. *See* ARCAP 6(b)(2) (“*Ruling and Later Review*. A single judge of the appellate court may act on a motion for a procedural order.”). And the same appellate rule provides for ‘later review’ by the Court of the denial of the Rule 28(G) Request. *See id.*

For good cause, Petitioner⁴ hereby moves the Court for that later review, incorporating by this reference all the arguments in the Petition and the Rule 28(G) Request in support of expedited consideration. That good cause includes that the Rule 28(G) factors are met, as further detailed in the Rule 28(G) Request filed with Petition R-17-0050; that the rest of the CCJR’s work will take effect on July 1, 2018; and that an expedited, or post-adoption, comment period would suffice, as the proposed rule changes have already undergone a full Rule 28 processing

⁴ Petitioner alone moves this Court due to the practical realities of time inherent in obtaining the consent of the other Petitioners, who are the Governor of Arizona, the President of the Arizona Senate, the Speaker of the Arizona House of Representatives, and the President and Chief Executive Officer of the Arizona Chamber of Commerce and Industry. Petitioner generally understands their positions to be in favor of expedited consideration and adoption of the proposed amendments, as they each individually signed the Rule 28(G) Request and Petition R-17-0050 itself.

cycle and more.

Specifically, Rule 28(G) of this Court provides as follows:

(1) If a rule change petition presents an urgent matter for which compelling circumstances render the annual rule processing cycle inadequate, a request to consider a rule change petition on an expedited basis may be filed with the petition.

(2) If the court determines that immediate action is necessary for the adoption or amendment of a rule, the court shall take the action required by the circumstances. Any rule adopted by the court pursuant to this section shall be opened for public comment in the manner provided in Rule 28(C), and comment may be made in the manner provided in Rule 28(D).

While Petitioner understands that such requests are very rarely granted,⁵ if any rule change petition presents such a matter requiring immediate action, he respectfully submits it would be one such as this.

Situations in which Rule 28(G) requests are granted are often those in which it becomes necessary, due to actions of the other two branches of government, to conform court rules to newly enacted legislation. One such situation occurred in the adoption of amendments

⁵ *See also* Order denying a request for expedited adoption of changes proposed by Petition R-17-0052, which seeks to make conforming changes to Rules 47, 48 and 58 of this Court, based on the CCJR's work.

Available at

<http://apps.supremecourt.az.gov/aacc/appella/ASC/R/R170052.PDF>.

proposed by Petition R-17-0041,⁶ which were proposed by the Administrative Office of the Courts to “amend Rule 11, Arizona Rules of Criminal Procedure to implement new statutory provisions concerning competency determinations in criminal cases.” The petition was filed on June 16, 2017, expedited consideration was immediately granted, and expedited adoption on an emergency basis was granted on July 28, 2017, with the rule amendments taking effect on August 9, 2017, when the new legislation also became effective. A largely post-adoption comment period followed.

While the CCJR changes to Rules 11 and 26 that are the subject of Petition R-17-0050 are not currently the subject of legislative enactments, the rest of the CCJR’s work product will become effective *on July 1, 2018*.⁷ Similarly, the Legislature could see fit to adopt statutory changes that would result in similar procedural changes to civil litigation. *See, e.g., Seisinger v. Siebel*, 220 Ariz. 85, 88-89 (2009) (“Although we have occasionally said that procedural rulemaking power

⁶ Available at <https://www.azcourts.gov/Rules-Forum/aft/728>; docket available at <http://apps.supremecourt.az.gov/aacc/appella/ASC/R/R170041.PDF>.

⁷ See Final Order for R-17-0010, available at <https://www.azcourts.gov/Rules-Forum/aft/680>.

is vested ‘exclusively’ in this Court, this statement is in some respects an oversimplification. . . . [I]t is more accurate to say that the legislature and this Court both have rulemaking power”) Conforming Rules 11 and 26 to reflect the full ambit of the CCJR’s work, and allowing the changes proposed by R-17-0050 to take effect *with* that work, would serve the interests of justice and of reducing the amount of time and expense required to do justice in Arizona civil cases.

As discussed above, and in the Rule 28(G) request, the rule changes here proposed have already been subject to an extended period of public comment, both during the CCJR’s process and during the normal, annual rule processing cycle, as they were part of the CCJR’s Petition R-17-0010. To the extent additional public comment is necessary, perhaps an expedited period or a post-adoption period would suffice, given that the changes to two rules proposed by Petition R-17-0050 both only got a single comment in opposition during the process they already underwent. Again, both sets of changes were also unanimously proposed by the CCJR and unanimously approved by the Arizona Judicial Council at its Leadership Conference.

Due consideration of the full Court should be given to the

possibility that the rules could and should take effect with the rest of the CCJR's work on July 1, 2018. If the Petition in this matter remains in the standard rule processing cycle, it would most likely not be heard by the Court until August 2018, and the rule changes could take effect sometime in 2019. *See* Rule 28(A)(1), Ariz. R. Supreme Ct. By then, the rest of the CCJR's work will have taken effect, and courts, counsel, and parties will still be acclimating to the considered changes of the past few years. While Petitioner does not seek to bar additional public comments—or even additional comment from the State Bar of Arizona—from being considered on these changes, he does believe an expedited comment period, or perhaps one post-adoption, like that accomplished for R-17-0041, would be appropriate.

Considering adoption of the amendments proposed for Rules 11 and 26 by the Petition now, on an expedited basis, and perhaps at the Court's December 11, 2017, Rules Agenda, is the only manner in which these crucial amendments might take effect with their CCJR-proposed brethren. With a landmark restyling of the Arizona civil rules taking effect the first of this year and with major civil justice reform amendments becoming operative imminently throughout 2018, the

Court should not wait. The proposed amendments have already been vetted for nearly a year after proposal by the CCJR and have already undergone the normal-length Rule 28 processing cycle. Petitioner respectfully submits that the full Court should consider expediting its consideration of, the comment period for, and the adoption of these changes.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court vacate or modify, as appropriate, the Order, Exhibit A, to allow expedited consideration and adoption of the proposed amendments. Whether during its December 2017 rules conference or at some other imminent and appropriate time, the Court should review the denial of the Rule 28(G), Ariz. R. Supreme Ct., Request for Expedited consideration, and vacate or modify it to grant that consideration.

RESPECTFULLY SUBMITTED this 9th day of November, 2017.

ARIZONA CHAMBER OF
COMMERCE & INDUSTRY

By /s/ Sara J. Agne with permission for
Steven Twist, Chair, Legal,
Regulatory, & Financial
Services Committee

SNELL & WILMER L.L.P.

By /s/ Sara J. Agne
Sara J. Agne (#026950)
Counsel for Petitioner
Steven Twist

EXHIBIT A

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-17-0050

FILED 10/25/2017

O R D E R

The Court has received the "Petition to Further Amend the Arizona Rules of Civil Procedure to Modify Rule 11 and Add Rule 26(b)(2)(D)" and the accompanying Request for Expedited Consideration filed under Rule 28, Rules of the Supreme Court. Upon consideration,

IT IS ORDERED denying the Request for Expedited Consideration. The Petition will be considered in the ordinary course of rule petitions in 2018.

DATED this 25th day of October, 2017.

_____/s/_____
ANN A. SCOTT TIMMER
Duty Justice

Arizona Supreme Court No. R-17-0050
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TO:
Doug Ducey
Steve Yarbrough
J D Mesnard
Glenn Hamer
Steven Twist
Rule 28 Distribution List