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

9 In the Matter of:

Supreme Court No. R-17-0050

10 **PETITION TO FURTHER AMEND**
11 **ARIZONA RULES OF CIVIL**
12 **PROCEDURE TO MODIFY RULE**
13 **11 AND ADD RULE 26(b)(2)(D)**

COMMENT OF THE
STATE BAR OF ARIZONA

14 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona (the “State Bar”) hereby submits the following as its Comment to the
16 above-captioned Petition.

17 The State Bar opposes the Petition’s proposed amendments to Rules 11 and
18 26(b). Essentially identical amendments that were proposed a year ago in a petition
19 filed by the Committee on Civil Justice Reform (“CCJR”), were opposed by the State
20 Bar in a comment, and were ultimately rejected by the Supreme Court. As pointed
21 out in that earlier comment, the proposed amendments to Rule 11 would move the
22 Rule further away from the language of federal Rule 11, undoing recent amendments
23 that brought our Rule into greater lockstep with the federal rule. And, as recognized
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1 by the Petition itself, the proposed amendments would push Arizona into the
2 minority and away from the recent trend regarding Rule 11 sanctions. With respect
3 to the Petition's proposed addition of Rule 26(b)(2)(D) mandating the enforcement
4 of pre-litigation contracts limiting preservation and disclosure obligations, the State
5 Bar understands the potential issues the Petition is seeking to solve, but the Petition
6 does not cite any case enforcing or even analyzing such contractual provisions. In
7 addition, the proposed rule provision could lead to several potential problems
8 discussed below.
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11 Background of Proposed Amendments

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13 As the Petition notes, its proposed amendments to Rule 11 and proposed
14 addition of Rule 26(b)(2)(D) are not the first time either proposal has been before
15 the Court. Accordingly, the State Bar believes some discussion of the history
16 leading up to the Petition's proposals would be helpful.
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18 On January 6, 2015, the State Bar filed a Petition (R-15-0004) proposing a
19 number of amendments to Rule 11, including federalizing the language regarding
20 the representations made by a signature on a pleading or other filing (Rule 11(b))
21 and changing the word "shall" to "must" regarding sanctions for a failure to comply
22 with the Rule 11 certifications (Rule 11(c)). Two comments were filed to that
23 Petition, one by the Pima County Bar Association ("PCBA") on May 15, 2015, and
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1 the other by the Arizona Chamber of Commerce (“Chamber”) on May 20, 2015.
2 The PCBA Comment supported the Petition’s proposed amendments with the
3 exception of changing the word “shall” to “must”. The PCBA advocated for
4 changing the word to “may” instead, noting that use of the word “may” would be
5 consistent with both federal Rule 11 and with Arizona case law reviewing Superior
6 Courts’ Rule 11 sanctions decisions under an abuse of discretion standard (citing
7 *Taliaferro v. Taliaferro*, 188 Ariz. 333, 341 (App. 1996)). In contrast, the
8 Chamber’s comment supported mandatory sanctions through use of the word
9 “must”. No comment was made regarding the federalization of the language of
10 11(b). At its August 26, 2015 meeting to consider pending rules petitions, the
11 Supreme Court continued its consideration of Petition R-15-0004, apparently in light
12 of the fact that the Court-appointed Task Force on the Arizona Rules of Civil
13 Procedure was at that time itself considering possible amendments to Rule 11
14 pursuant to its charge to “identify possible changes to conform to modern usage, to
15 clarify and simplify language, and to avoid unintended variation from language in
16 counterpart federal rules,” while “promot[ing] access to the courts and the resolution
17 of cases without unnecessary cost, delay, or complexity.” Admin. Order No. 2014-
18 116.
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24 On December 29, 2015, the PCBA filed a Petition (R-15-0043) in which it
25 asked the Court to amend Rule 11(c) to use the word “may” rather than “shall” or

1 “must”. In support of that position, the Petition discussed in some detail the history
2 of federal Rule 11 and the merits of its switch to the word “may” in Rule 11 in 1993.

3 On May 12, 2016, the State Bar filed a comment changing course from its prior
4 petition and coming out in support of the PCBA’s proposal to use the word “may”
5 instead of “must”. As the State Bar explained in that comment:
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7 Upon further review, the State Bar agrees with the wisdom of the
8 PCBA’s proposal. As a preliminary matter, the State Bar notes that its
9 Board of Governors considered the same proposal when it met
10 concerning what was eventually filed as Petition R-15-0004, and nearly
11 suggested at that time the very change the PCBA later suggested by its
comment on that Petition, and in Petition R-15-0043. There are many
reasons the State Bar is now persuaded that this approach is correct.

12 The State Bar then went on to explain in the comment that it favored the use of
13 “may” to achieve greater consistency with the federal rule, especially in light of the
14 lack of any empirical or anecdotal evidence suggesting that the permissive sanctions
15 approach utilized in the federal system for the past 25 years had been ineffective.
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17 On January 7, 2016, the Task Force on the Arizona Rules of Civil Procedure
18 filed a Petition (R-16-0010) in which it proposed a number of amendments to Rule
19 11, including the same changes previously proposed by the State Bar to federalize
20 the language of 11(b) regarding the certifications made by a signature on a pleading
21 or other filing and the same change of the word “shall” to “must” in 11(c). On April
22 1, 2016, the State Bar filed a comment in which it supported all of the proposed
23 changes to Rule 11 with the exception of using the word “may” instead of the word
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1 “must” in 11(c), referencing the comment it would be filing in support of the PCBA’s
2 Petition. In response to the State Bar’s comment and the PCBA’s petition, the Task
3 Force filed an Amended Petition on May 12, 2016, in which it agreed with the PCBA
4 and State Bar and proposed use of the word “may” in 11(c). On July 11, 2016, the
5 Chamber filed a comment to the Amended Petition in which it opposed the use of
6 “may” versus “must” and took the position that 11(b) should not be amended to
7 incorporate the federal language regarding the certifications made by a signature on
8 a pleading or other filing but should instead use the phrase “good faith and
9 reasonable argument” rather than “nonfrivolous” and use the phrase “well grounded
10 in fact” rather than “evidentiary support”.

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14 With all of these materials relating to petitions R-15-0004, R-15-0043, and R-
15 16-0010 in front of it, the Supreme Court at its August 2016 rules meeting adopted
16 in their entirety the amendments to Rule 11(b) and (c) proposed by the Task Force
17 in its amended petition.

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19 With that decision on Rule 11 having been made and having gone into effect
20 on January 1, 2017, another committee appointed by the Supreme Court — the
21 Committee on Civil Justice Reform (“CCJR”),¹ which was charged with developing
22 recommendations “to reduce the cost and time required to resolve civil cases in
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¹ The Chamber had a representative on the CCJR.

1 Arizona's superior courts" — filed a petition (R-17-0010) in which it proposed,
2 among other things: (1) amending Rule 11(b) such that a signature would certify that
3 a claim was "colorable" and "well grounded in fact" and amending Rule 11(c) to
4 make sanctions mandatory through use of the word "must" rather than "may"; and
5 (2) adding a provision in Rule 26(b)(2)(D) to presumptively enforce contracts
6 between businesses "limiting a party or person's obligation to preserve information,
7 or to provide disclosure or discovery." On May 22, 2017, the State Bar filed a
8 comment in which it supported many of the CCJR's proposals, but opposed the
9 proposed amendments to Rule 11 and the proposed addition of Rule 26(b)(2)(D).
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12 Again, with all these materials in front of it, the Arizona Supreme Court at its
13 August 2017 rules meeting declined to adopt the proposed amendments to Rule
14 11(b) and 11(c) and the proposed addition of Rule 26(b)(2)(D).
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16 Thus, the current pending Petition marks the third time in the last three years
17 that the Court has been asked to consider making sanctions mandatory under 11(c)
18 and changing the certifications of 11(b) to "colorable" and "well grounded in fact",
19 and the second time in the last two years it has been asked to add a provision in Rule
20 26(b)(2)(D) mandating enforcement of contracts limiting preservation and discovery
21 obligations.
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23 **I. The Petition's Proposed Amendments to Rule 11**

24 As did the CCJR's 2017 Petition, the current Petition proposes amending Rule
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1 11(c) to make sanctions mandatory and Rule 11(b) so that a signature would certify
2 a claim as “colorable” and “well grounded in fact” rather than “nonfrivolous” and
3 having “evidentiary support” or “likely hav[ing] evidentiary support after a
4 reasonable opportunity for further investigation or discovery.” As it did with these
5 proposals in the CCJR petition, the State Bar opposes the Petition’s proposed
6 amendments to Rule 11 for multiple reasons.
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9 First, the proposed amendments have been considered multiple times by this
10 Court in the past few years, and the State Bar does not believe that the current
11 Petition offers a basis for the Court to so quickly turn away from several years of
12 well-considered proposals that culminated in this Court’s January 1, 2017,
13 amendments to Rule 11.
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15 Second, the proposed amendments to Rule 11 would move our rule further
16 away from the language and principles of federal Rule 11, and this when our Rule
17 was amended by the Court less than two years ago so as to bring it into greater
18 harmony with the federal rule. As noted above, this Court just a few years ago
19 directed that Arizona’s rules should avoid unintended variations from language in
20 counterpart federal rules. Such consistency with the federal rules gives greater
21 guidance to litigants and the courts in interpreting the rules and also helps discourage
22 forum shopping between state and federal court. The State Bar does not believe
23 there is a justification for Arizona’s Rule 11 to vary from the federal rule as proposed
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1 by the Petition. While the Petition discusses a May 1991 report of a Federal Judicial
2 Center study showing judges to be supportive of the old federal Rule 11 and its
3 provision for mandatory sanctions, more recent discussion on this issue exists.
4 Namely, in 2015, the Committee on Rules of Practice and Procedure of the Judicial
5 Conference of the United States stated the following in opposition to a congressional
6 proposal to mandate Rule 11 sanctions in federal courts:
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9 The amended rule has produced a marked decline in Rule 11 satellite
10 litigation without any noticeable increase in frivolous filings. In June
11 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers
12 and 148 judges on the effects of the 1993 amendments. The Center
13 found general satisfaction with the amended rule, and that a majority of
14 the responding judges and lawyers did not favor a return to mandatory
15 sanctions when the rule is violated.

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17 In 2005, the Federal Judicial Center surveyed federal trial judges to get
18 a clearer picture of how the revised Rule 11 was operating.... The study
19 showed that judges on the front lines – those who must contend with
20 frivolous litigation and apply Rule 11 – strongly believe that the current
21 rule works well.

22 Committee on Rules of Practice and Procedure of the Judicial Conference of the
23 U.S., Letter to Bob Goodlatte (Apr. 13, 2015), at p.3, found at
24 <https://www.atj.org/wp-content/uploads/2015/04/Judicial-Conference-Letter.pdf>
25 (2005 survey was of 278 federal district court judges and showed that 80% found
Rule 11 to be “just right as it now stands,” 87% preferring it to the pre-1993 version,
91% opposing mandatory sanctions, and 85% believing that groundless litigation
had not grown since the 1993 amendment to Rule 11).

1 Third, the proposed amendments to Rule 11 should be rejected because they
2 would move Arizona out of the majority and into the small minority of states (10 out
3 of 50) mandating rule 11 sanctions. And not only would we move into the minority,
4 we would be ignoring the trend of states moving over the last 25 years to the federal
5 language of discretionary Rule 11 sanctions. See, e.g., UTAH R. CIV. P. 11
6 (amended in 1997 to conform to 1993 amendments to federal rule 11); Amendment
7 to WASH. S. CT. CIV. R. 11, 122 Wash. 2d 1102 (1993) (conforming to 1993 federal
8 amendments to rule 11). In fact, the 10 states still mandating rule 11 sanctions do
9 so through use of the old vernacular “shall” rather than the more modern usage of
10 “must.” There is no good reason for Arizona to ignore the trend and move back into
11 the minority regarding Rule 11 sanctions, especially in the absence of any evidence
12 that the move on January 1, 2017, to the word “may” in Rule 11(c) has led to any
13 increase in frivolous court filings.
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17 Fourth, the Petition’s argument that “colorable” and “well grounded in fact”
18 are more consistent with existing Arizona case law than “nonfrivolous” and having
19 “evidentiary support” or “likely hav[ing] evidentiary support after a reasonable
20 opportunity for further investigation or discovery” is belied by case law cited in the
21 Petition. For example, *Boone v. Superior Court*, 145 Ariz. 235 (1985), cited by the
22 Petition in support of the use of the word “colorable,” while using that word in its
23 discussion actually states the standard as being that Rule 11 “is violated by the filing
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1 of a pleading when the party or counsel knew, or should have known by such
2 investigation of fact and law as was reasonable and feasible under all the
3 circumstances, that the claim or defense was insubstantial, groundless, **frivolous**, or
4 otherwise unjustified.” *Id.* at 241 (emphasis added). Thus, *Boone* is in fact
5 consistent with the current “nonfrivolous” language.² Likewise, the current
6 language in 11(b) regarding evidentiary support is consistent with the case law.
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8 *Boone*, 145 Ariz. at 240 (stating that the “question is whether a reasonable attorney
9 could have concluded that facts supporting the claim *might be established*, not
10 whether such facts actually *had been established*” (quoting Olson & McConnell,
11 *Deterring and Defeating Frivolous and Abusive Litigation*, For The Defense 16
12 (Defense Res. Inst., Jan. 1985))); *see also, e.g., Osborne v. Hyams*, 2016 WL
13 5955849, at *6-7 (App. Oct. 13, 2016) (applying *Boone* standard).

16 Fifth, the State Bar does not believe that encouraging increased usage of Rule
17 11 will make litigation speedier or less expensive, but contrarily, that it will tend to
18 make it slower, costlier, more retributive, and harder to settle. *See, e.g.,* Edward D.
19 Cavanagh, *Mandating Rule 11 Sanctions: Here We Go Again*, 74 WASH. & LEE L.
20 REV. ONLINE 31, 39-40 (2017) (“Mandatory sanctions will increase—not decrease—

24 ² The Petition’s argument that “the term ‘nonfrivolous’ still does not appear in any
25 Arizona civil Rule 11 case” ignores the fact that the term “frivolous” does commonly
appear and has formed part of the Rule 11 standard.

1 litigation costs. The decade of experience under the 1983 version of Rule 11 amply
2 demonstrates that mandatory sanctions promote satellite litigation on the issue of
3 whether Rule 11 has been violated. Rule 11 motions take time and cost money to
4 prepare, litigate, and adjudicate. These motions thus add to the overall costs of
5 litigation and delay the resolution of a given controversy on the merits... Once a
6 Rule 11 motion is made, incentives among adversaries to cooperate, or even behave
7 civilly, diminish significantly; that, in itself, can impede the progress of the
8 litigation.”); *see also* Committee on Rules of Practice and Procedure of the Judicial
9 Conference of the U.S., Letter to Bob Goodlatte, at p.2 (pre-1993 federal rule 11
10 “generated wasteful satellite litigation that had little to do with the merits of cases”).
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13 For these reasons – and others discussed in the prior petitions and comments
14 filed with the Court on these issues over the last three years – the Court should again
15 reject the proposed changes to Rule 11.
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17 **II. The Petition’s Proposed Addition of Rule 26(b)(2)(D)**

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19 The Petition asks the Court to add a provision in Rule 26(b)(2)(D) requiring
20 courts to “enforce any mutually and freely negotiated prelitigation contract between
21 business organizations (as defined in Experimental Rule 8.1(a)(3)) limiting the
22 obligations of the contracting parties to preserve information, or to provide
23 disclosure or discovery.” The Petition argues that this provision “would ‘enhance
24 predictability in this developing area of the law,’ in which it has become more
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1 common for business organizations, often those having ‘massive amounts of
2 electronic data, to negotiate contract limits on their preservation and discovery
3 obligations’ in advance.” Petition at 17 (quoting CCJR’s 10/1/16 Report). While
4 these are worthy goals to seek to achieve, the State Bar continues to oppose the
5 provision for a number of reasons.
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7 While arguing that such contractual provisions have become common and that
8 predictability regarding their enforceability is needed, the Petition fails to cite any
9 decisions in Arizona or elsewhere enforcing or even analyzing such a contractual
10 provision. The lack of any such case law is particularly troubling given the potential
11 problems raised by the proposed rule provision. Namely:
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13 • The phrase “mutually and freely negotiated” is undefined in the
14 proposed rule provision, or in any case law,³ and is likely to lead to uncertainty and
15 a rise in satellite litigation. For example, does the phrase mean that the contract is
16 not one of adhesion that the contractual provision is not unconscionable, that the
17 parties actually jointly asked for and participated in the drafting of the provision, or
18 something else?
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25 ³ Based on a Westlaw search, the phrase does not appear in a single published
decision in any state or federal court, let alone in Arizona.

1 • Another area of concern is the unclear scope of the Rule. Will parties
2 be exempt from Rule 26.1 disclosure requirements and Rules 33-36 because they
3 have agreed to limit their obligations “to provide disclosure or discovery?” And,
4 what do those terms mean? Will they be specifically defined in the contract between
5 the parties? Will the court be called on to interpret terms that are not defined by the
6 Arizona Rules of Civil Procedure. There is simply no frame of reference for
7 answering any of these questions.
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10 • While seeking to limit the provision to “sophisticated” parties by
11 confining mandated enforcement to contracts between “business organizations,” the
12 term “business organizations” is broadly defined to include business entities no
13 matter how small they might be, including even “sole proprietorship[s].” In light of
14 that broad definition, it is not difficult to imagine situations involving starkly
15 disparate negotiating power falling within the provision’s reach (e.g., a small
16 business or sole proprietorship contracting with a company like Apple, Walmart, or
17 Amazon).
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20 • In addition to its broad reach to any and all business entities no matter
21 their size, the provision does not mandate that contractual limits on preservation and
22 discovery obligations be mutual and identical for both contracting parties. That is,
23 there is nothing preventing a larger company with stronger bargaining power from
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1 drafting such a provision so that it has more limited preservation and discovery
2 obligations than a smaller company with which it contracts.

3 • The provision on its face would permit parties to destroy highly relevant
4 evidence even after a lawsuit is filed, which would encourage parties to destroy
5 evidence harmful to their litigation position, an incentive wholly inconsistent with
6 Rule 37(d) (authorizing sanctions for a party’s failure “to make a timely disclosure
7 of damaging or unfavorable information”) and with the judicial preference that cases
8 be decided on their merits. *See, e.g., Hilgeman v. Am. Mortgage Sec., Inc.*, 196
9 Ariz. 215, 218, □ 7 (App. 2000).

10 Mandating the Superior Court to enforce such contractual provisions in the
11 face of these – and likely other – problems, especially when their enforceability has
12 never been litigated in this state or elsewhere, would be imprudent. This is
13 particularly true given the fact that the problems the Petition tries to solve with Rule
14 26(b)(2)(D) can already be handled in other ways. For example, with respect to
15 preservation obligations, businesses are free to institute document retention policies
16 in which they limit the amount of data they retain (e.g., automatic deletion of emails
17 after a set amount of time, short retention cycles for back-up tapes, etc.); they only
18 have an obligation to preserve relevant data once a lawsuit is commenced or
19 reasonably anticipated (a term defined in Rule 37(g)(1)(B)), and the rules even give
20 a company the ability to litigate the scope of its preservation obligations before a
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1 lawsuit is filed. *See* ARIZ. R. CIV. P. 45.2. And even then, one of the factors in
2 determining whether reasonable preservation steps were taken includes “whether the
3 information was lost as a result of the good-faith routine operation of an electronic
4 information system or the good-faith and consistent application of a document
5 retention policy.” ARIZ. R. CIV. P. 37(g)(1)(C)(ii). With respect to the scope of a
6 company’s discovery and disclosure obligations, production is already limited to that
7 which is “proportional to the needs of the case.” ARIZ. R. CIV. P. 26(b)(1) & 26.1(b)
8 & (c). In addition, the court is empowered to shift the costs of production to the
9 requesting party if appropriate. ARIZ. R. CIV. P. 16(d)(3)(a) & 26.1(c)(1).

12 Finally, the Court should reject the requested addition of Rule 26(b)(2)(D)
13 because it is inconsistent with the longstanding principle in Arizona that the trial
14 court is vested with “broad discretion in matters of discovery.” *Lewis v. Ariz. Dep’t*
15 *of Econ. Sec.*, 186 Ariz. 610, 616 (App. 1996).

17 Not only have Arizona courts repeatedly recognized the need for judicial
18 discretion in case management, but the emphasis on the need for judicial discretion
19 is expanding. For example, in 2017, Rule 26(b)(1)(A) was amended to require the
20 court to consider proportionality in exercising its discretion in determining the scope
21 of discovery. And Rule 37(h) was modified to allow the court to “make any order
22 to require or prohibit disclosure or discovery to achieve proportionality under Rule
23 26(b)(1).”
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1 Further, such discretion is fundamental to fulfilling the goals of the
2 commercial court. As outlined by the Business Court Advisory Committee, the
3 mandate of the commercial court includes “process[ing] commercial cases
4 efficiently and reducing litigation costs.” The Committee also observed that “the
5 success of a business court is ultimately dependent, first, on the quality of the judges
6 who are assigned to the court, and, second, on early and active judicial case
7 management.” Business Court Advisory Committee Report to the Arizona Judicial
8 Council December 11, 2014.
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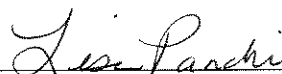
11 If one party to litigation were to challenge whether a prelitigation contract
12 limiting their preservation and discovery obligations was “mutually and freely
13 negotiated,” proposed Rule 26(b)(2)(D), by its terms, would require the Court to
14 adjudicate the issue—perhaps even holding an evidentiary hearing—which would
15 result in extensive delays and increased costs, the polar opposite of the increasing
16 focus on the need to control costs and expedite litigation.
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19 It is one thing to contract out of the judicial system entirely as a means of
20 dispute resolution—*i.e.*, through private arbitration provisions—it is quite another
21 to require a court to allow parties to essentially draft their own discovery and
22 disclosure rules, which will deprive judges of the long-recognized discretion
23 accorded to them to manage their cases and achieve the goals of proportionality, cost
24 limitation, and expeditious resolution of cases.
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3 **CONCLUSION**

4 As it did a year ago, the State Bar continues to oppose the proposed
5 amendments to Rule 11 and the proposed addition of Rule 26(b)(2)(D). For the
6 reasons discussed above, the Court should reject the proposed amendments.

7 RESPECTFULLY SUBMITTED this 21st day of May, 2018.

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10 _____
11 Lisa M. Panahi
12 General Counsel

13 Electronic copy filed with the
14 Clerk of the Arizona Supreme Court
15 this 21st day of May, 2018.

16 by: 
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