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9 **IN THE SUPREME COURT**  
10 **STATE OF ARIZONA**

11 In the Matter of:

12 Supreme Court No. R-18-0033

13 **PETITION TO PERMANENTLY**  
14 **ADOPT AND AMEND RULE 8.1,**  
15 **ARIZONA RULES OF CIVIL**  
16 **PROCEDURE**

17 **COMMENT**

18 This Comment suggests two edits to the Rule 8.1 proposed by Petition R-18-  
19 0033 (“the Petition”), to eliminate a potential source of confusion, and separately,  
20 to eliminate redundancy. First, the introductory clause to proposed Rule 8.1(e)  
21 suggests a conflict with Rule 26.2(d)(1) that will no longer exist if this Court adopts  
22 the Petition’s draft. For this reason, that clause would create confusion and should  
23 be eliminated. Second, if this Court agrees with deleting that clause, the first four  
24 lines of introductory text of proposed Rule 8.1(e) also merely restate what Rule  
25 26.2 already says. For that reason, those further lines of text should be eliminated  
26 as surplusage that may also confuse the reader by suggesting that something  
different or autonomous is going on in Rule 8.1 when it is not. Both changes  
suggested below would harmonize Rule 8.1 with Rule 26.2. By way of more  
specific explanation of these two recommended edits to the Petition’s proposed  
Rule 8.1:

1           1.     This Court enacted Rule 8.1 as an experimental Rule effective July 1,  
2 2015 in Administrative Order No. 2015-15, for a term of three years.

3           2.     In December 2015, this Court appointed the Committee on Civil  
4 Justice Reform (“the CCJR”). The CCJR proposed Rule 26.2, the tiering rule. At  
5 its summer 2017 Rules Agenda, this Court enacted Rule 26.2, making it effective  
6 on July 1, 2018.

7           3.     Two features of Rule 26.2 are relevant to Rule 8.1 and to this  
8 Comment:

9                   (a)    Under Rule 26.2, from the time a case is filed until a court  
10                   assigns the case to a different tier, the case is assigned by default  
11                   to “the tier to which it would be assigned based on its monetary  
12                   or nonmonetary relief requested under Rule 26.2(c)(3).” Ariz.  
13                   R. Civ. P. 26.2(d)(1).

14                   (b)    Under Rule 26.2, the court has the authority to assign a case to  
15                   any tier, regardless of the amount at issue in that case. Ariz. R.  
16                   Civ. P. 26.2(c). That happens either by stipulation or motion  
17                   approved by the court, or by the court’s own evaluation of the  
18                   case. Ariz. R. Civ. P. 26.2(c)(1)-(2).

19           4.     When the Court enacted Rule 26.2, at the urging of the State Bar, this  
20 Court also added language to Rule 8.1(f) (treated as Rule 8.1(e) in the Petition’s  
21 proposed Rule 8.1) to clarify that cases in the commercial court were deemed from  
22 their filing to be assigned to Tier 3 unless and until reassigned. *See* Order on  
23 Petition No. R-17-0010, at 14 of 151. Available at  
24 <https://www.azcourts.gov/Portals/20/2017%20Rules/17-0010.pdf> (last visited on  
25 September 23, 2018).  
26

1           5.     To clarify that, Rule 8.1(f) contains five lines of explanatory text:

2                     **Notwithstanding any contrary language in Rule 26.2(d)(1),**  
3                     from the filing of the complaint unless and until the commercial  
4                     court assigns the case to a different tier after the Rule 16(d)  
5                     scheduling conference, cases in the commercial court are  
6                     deemed to be assigned to Tier 3.

6     Ariz. R. Civ. P. 8.1(f) (**emphasis added**).

7           6.     Rule 8.1(f)'s treatment of cases as defaulting to Tier 3 from their filing  
8           differs from how Rule 26.2(d) treats cases outside the commercial court. In all  
9           other parts of the superior court, cases default upon filing to Tier 1, Tier 2, or Tier 3  
10          depending on how much monetary relief is requested in them. Ariz. R. Civ. P.  
11          26.2(d)(1).

12          7.     The Petition proposes the permanent adoption of a modified Rule 8.1,  
13          which would restrict commercial court cases to those cases in which monetary  
14          damages are sought in an amount equal to or exceeding \$300,000. *See* Appendix to  
15          Petition, at Rule 8.1(c). That salutary change makes all of the above-excerpted  
16          introductory language in Rule 8.1(f) unnecessary, and makes the first part of it  
17          arguably confusing. The undersigned sympathizes with revising Rule 8.1's  
18          interaction with Rule 26.2, which is concededly complex, reticulated, and brand  
19          new, and intends no disrespect to the Petition by making the suggestions in this  
20          Comment.

21          8.     The Petition's restriction of commercial court cases to those seeking  
22          damages of \$300,000 or more calls for striking the lines of proposed Rule 8.1(e)  
23          noted in Paragraph 5 of this Comment. *See* Redline of Proposed Rule 8.1(e),  
24          Attached Hereto.

25          9.     The phrase "Notwithstanding any contrary language in Rule  
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1 26.2(d)(1)” was inserted into Rule 8.1(f) to clarify that even cases under \$300,000  
2 were considered Tier 3 cases unless reclassified by the commercial court. But  
3 under the Petition’s proposed Rule 8.1(c), there are no cases seeking monetary  
4 damages under \$300,000 that will be in the commercial court in the first place.  
5 Accordingly, all cases in the commercial court seeking monetary damages will  
6 already be considered Tier 3 cases by default from the moment of their filing, just  
7 like every other case filed in the superior court seeking \$300,000 or more in  
8 damages. *See* Ariz. R. Civ. P. 26.2(d)(1).

9 10. For this reason, there is no “contrary language in Rule 26.2(d)(1),” as  
10 proposed Rule 8.1(e) suggests. Instead, the Petition’s proposed Rule 8.1(e) aligns  
11 perfectly with Rule 26.2(d)(1). Moreover, if the language “Notwithstanding any  
12 contrary language in Rule 26.2(d)(1)” remains, readers will look in vain for the  
13 conflict suggested by that phrase. There being none, users of the rule will be  
14 confused. This Court should simplify Rule 8.1(e) by deleting the language.

15 11. Separately, the entire remainder of the introduction to Rule 8.1(e)  
16 excerpted in the above Paragraph 5 of this Comment is now merely redundant of  
17 Rule 26.2 and should be removed. To repeat that language, Rule 8.1 then states:  
18 “from the filing of the complaint unless and until the commercial court assigns the  
19 case to a different tier after the Rule 16(d) scheduling conference,” the case is in  
20 Tier 3.

21 12. But that merely restates the power of the court in Rule 26.2(c)(1) and  
22 (2) to assign a case to the most suitable tier. This verbiage at the start of proposed  
23 Rule 8.1(e) thus implies that there is something different or more complicated about  
24 tiering in the commercial court as compared to Rule 26.2(c). There is not. If this  
25 Court adopts the Petition’s proposed Rule 8.1, tiering will function in the  
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1 commercial court just as it does in all other courts in the state. This Court should  
2 simplify Rule 8.1(e) and eliminate the language in question.

3 **CONCLUSION**

4 WHEREFORE, the undersigned respectfully urges adoption of the Petition's  
5 proposed changes with the minor modifications suggested herein, set forth in the  
6 attached Appendix A (Clean Version of Petition's Appendix With Comment's  
7 Recommended Edits) and Appendix B (Blackline Version of Petition's Appendix  
8 With Comment's Recommended Edits).

9  
10 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of September, 2018.

11  
12 /s/ Andrew M. Jacobs

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17 Electronic copy filed with the  
18 Clerk of the Arizona Supreme Court  
19 this 24th day of September, 2018.

20 by: Nicole Whitney  
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