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

9 In the Matter of:

Supreme Court No. R-19-0031

10 **PETITION TO AMEND RULE**
11 **45(a)(2) and (b)(1) OF THE**
12 **ARIZONA RULES OF CIVIL**
13 **PROCEDURE**

14 **COMMENT OF THE**
15 **STATE BAR OF ARIZONA**

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

19 The proposed amendment would permit attorneys licensed to practice in
20 Arizona to issue and sign subpoenas without obtaining a signed subpoena from the
21 clerk. As explained in the Petition, the basis for the proposed amendment is to
22 “allow parties to bypass the clerk’s fee charged to issue a subpoena” and to expedite
23 the process for obtaining a Subpoena. [Petition at I, p. 1.]

24 The proposed amendment would align Arizona’s Rule 45 with similar
25 provisions of federal Rule 45, which provide that in addition to the clerk, “[a]n
attorney also may issue and sign a subpoena if the attorney is authorized to practice

1 in the issuing court.” Fed. R. Civ. P. 45(a)(3).

2 The Court previously rejected a similar petition from the State Bar (see Rule
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Petition R-04-0004) (the “2004 Petition”) after concerns were raised about the
impact of the proposed amendment on county revenues. The Court later adopted a
different amendment (see Rule Petition R-06-0025) (the “2006 Petition”) permitting
the State Bar to “issue signed subpoenas on behalf of the clerk through an online
subpoena issuance service approved by the Supreme Court.” Ariz. R. Civ. P.
45(a)(2). That amendment, which remains in effect today, alleviated concerns about
lost county revenues because the State Bar remits a portion of the subpoena fees it
receives to the counties.¹

While there is some merit in changing Arizona’s Rule 45 to more closely track
the federal rule, the State Bar recognizes that other concerns previously raised in
response to the 2004 Petition are still present. Those continuing concerns recognize
the impact an amendment would have on county revenues. Additionally, as noted in
the Comment from the Administrative Office of the Courts (AOC), there is an issue
of a rule change overriding the legislative intent to provide significant funding for

¹ The State Bar’s 2006 Petition is available on the Court’s Rules Forum. Because
the 2004 Petition and related Comment are no longer available online, copies of
those documents are attached at Appendix 1 (2004 Petition) and 2 (Comment) to this
Comment.

1 state and local programs through this service fee. These funds, as noted, “assist
2 victims of child abuse and domestic violence, confidential intermediaries and
3 fiduciaries, alternative dispute resolution, collection of court-ordered monetary
4 obligations, court automation initiatives, and the elected officials’ retirement plan”
5 (AOC Comment, pp. 1-2, March 25, 2019).
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7 The State Bar defers to the stated funding impact addressed by the AOC and
8 other stakeholders with a more direct interest in this issue. Accordingly, the State
9 Bar therefore takes no position on the merits of the Petition, and instead provides a
10 discussion of the relevant historical context that is not included in the current
11 petition. Section I, below. If the Court is inclined to adopt the proposed amendment,
12 the State Bar proposes simplified language that tracks its 2004 proposal and more
13 closely mirrors the corresponding federal rule. Section II, below.
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16 **I. THE CURRENT PETITION AND PAST SIMILAR PETITIONS**
17 **FROM THE STATE BAR.**

18 **A. The Current Petition.**

19 To issue a subpoena in Arizona, Rule 45(a)(2) currently requires a party to
20 obtain a signed subpoena from the clerk, either directly or through the State Bar’s
21 website:
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23 *Issuance by Clerk:* The clerk must issue a signed but otherwise blank
24 subpoena to a party requesting it. That party must complete the
25 subpoena before service. The State Bar of Arizona may also issue
signed subpoenas on behalf of the clerk through an online subpoena
issuance service approved by the Supreme Court.

1 Ariz. R. Civ. P. 45(a)(2). Regardless of the method, a party must pay a fee of \$30.00
2 for the issuance of a subpoena in a civil case. (Superior Court Filing Fees,
3 <https://www.azcourts.gov/courtfilingsfees/Superior-Court-Filing-Fees> (effective
4 May 16, 2018).) For subpoenas issued through the State Bar’s service, the State
5 Bar collects the \$30.00 subpoena fee, which is remitted to the applicable county, and
6 an additional processing fee of \$10.00, which is retained by the State Bar.
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9 The Petition proposes to amend Rule 45 to allow an attorney to issue and sign
10 a subpoena without obtaining a signed subpoena from the clerk if the attorney (1)
11 holds an active Arizona bar license; (2) is appearing in the matter; and (3) “signs a
12 statement” in the subpoena that the attorney issued the subpoena “as an officer of
13 this Court” and that the subpoena is “fully valid without signature of the Clerk of the
14 Court.” [Petition, at 1-2.] The Petition also states that an unrepresented party or a
15 party with “a limited representation attorney” would still be required to obtain signed
16 subpoenas from the clerk. [*Id.* at 2.]
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19 **B. Previous State Bar Petitions Leading to the Current Version of**
20 **Rule 45(a)(2).**

21 The amendments proposed in the Petition are similar to those proposed by the
22 State Bar in its 2004 Petition. The State Bar’s 2004 Petition, among other things,
23 advocated for a change to then Rule 45(a)(3) to provide that “[a]n attorney as an
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1 officer of the court may also issue and sign a subpoena on behalf of any court in the
2 state.” [Appendix 1 (2004 Petition), at 4.]

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4 In response to the 2004 Petition, the Clerk of the Superior Court for Maricopa
5 County submitted a comment noting that the service charge (then \$18.00) for a
6 clerk’s issuance of a subpoena provided approximately \$582,000 to Maricopa
7 County in fiscal year 2003. If the Court approved the amendment, that revenue
8 would decrease significantly because only unrepresented parties would have to pay
9 the fee.
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12 Before deciding the 2004 Petition, the Court asked the State Bar to comment
13 on the impact the amendment would have on county revenue and suggestions for
14 how to remediate the lost-revenue problem. The State Bar’s Comment (at
15 Appendix 2) detailed that Arizona county governments would lose approximately
16 \$776,000 statewide if the proposal was adopted. The Court denied the 2004
17 Petition’s proposal related to the issuance of subpoenas. [See 6/1/2005 Order of
18 Supreme Court (denying petition in relevant part).] That financial impact, as noted
19 in the AOC Comment, is even greater today.
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22 In 2006, the State Bar submitted another Petition (R-06-0025) urging an
23 amendment to Rule 45’s issuance requirements. The proposed amendment, which
24 the Court adopted and which remains in force, allows the State Bar to provide an
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1 online service to issue and sign subpoenas on behalf of the Clerks of the Superior
2 Court. Using the online service, members of the State Bar can obtain issued
3 subpoenas without the need to travel to court, but still must pay the clerk's service
4 fee. In addition to the clerk's service fee, a party using the State Bar's service must
5 also pay a nominal convenience fee.
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7 **II. THE STATE BAR'S POSITION ON THE CURRENT PETITION**

8 **A. The State Bar Continues to Believe There are Valid Reasons to** 9 **Amend Rule 45 But Takes No Position on the Petition.**

10 When the State Bar first sought an amendment to allow attorneys to issue
11 subpoenas, its Petition noted several reasons for the change:
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- 13 • The amendment would not cause a substantive change because Rule 45
14 already gave an attorney the right to obtain from the clerk a "signed but
15 otherwise [] blank" subpoena upon request.
- 16 • The amendment removes an unnecessary step to obtaining a subpoena
17 and reduces overall litigation expense by eliminating the costs
18 associated with obtaining a subpoena from the clerk directly (such as
19 the clerk's service fee, messenger services, parking).
- 20 • The amendment would bring Arizona's rule in line with the federal
21 rule 45, which since 1991 has allowed attorneys to issue and sign
22 subpoenas.

23 The State Bar believes that but-for the potential financial impact on counties,
24 these same reasons support the current Petition.
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1 On the other hand, the proposed amendment raises some access-to-justice
2 concerns. There is some unfairness in allowing represented parties to issue a
3 subpoena without cost while still requiring self-represented parties to pay a service
4 fee to obtain a subpoena from the clerk. Such a change would increase the already-
5 disparate treatment between represented and self-represented parties who, in
6 addition to paying a service fee, already must physically go to the clerk to obtain a
7 subpoena while attorneys may obtain a subpoena remotely. Although the proposed
8 amendment would treat represented and self-represented parties differently, the
9 proposed rule does not impose any additional burdens on self-represented parties
10 beyond the current rules. Moreover, self-represented parties (if not themselves
11 licensed attorneys) are not subject to the State Bar's oversight and cannot sign
12 compulsory process such as a subpoena as an officer of the court. The State Bar thus
13 recognizes that the efficiency and reduced costs are a valid basis to adopt the
14 proposed change to Rule 45, but for the statutory purpose and structure behind the
15 fees.

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20 Merits aside, the State Bar does not take a position on whether the Court
21 should adopt the proposed amendment. The same revenue-generation issues that
22 concerned the Court in 2004-2005 are still present. In fact, the decrease in county
23 revenues would be greater than in 2004-2005 because the clerk's service fee has
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1 increased from \$18.00 to \$30.00 per subpoena. The State Bar anticipates that other
2 parties with a stake in the revenue generated from the clerk's fee will take a position
3 on this aspect of the Petition.²
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5 **B. If the Court is Inclined to Amend Rule 45, the Proposed Language**
6 **in the Petition Should be Simplified.**

7 If the Court is inclined to amend Rule 45 to permit attorneys to issue and sign
8 subpoenas, it should consider modifying the proposed language in the Petition,
9 which is unnecessarily complex and departs substantially from the language in
10 federal Rule 45. The State Bar instead suggests the following language, which tracks
11 that in the current federal rule (additions are underlined, and deletions are shown
12 with ~~strike-through~~):³
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14 (2) ~~Issuance by Clerk.~~ Issued by Whom.⁴ The clerk must issue a signed but
15 otherwise blank subpoena to a party requesting it. That party must complete the
16 subpoena before service. The State Bar of Arizona may also issue signed subpoenas
17 on behalf of the clerk through an online subpoena issuance service approved by the
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22 ² The State Bar also obtains some revenue from the service fee charged to parties
23 using its online subpoena service. Based on State Bar Records, those fees ranged
24 from approximately \$32,000.00 in 2015, to approximately \$51,000.00 in 2018.

25 ³ An amendment to Rule 45 would also require an amendment to Form 9, Arizona
Rules of Civil Procedure.

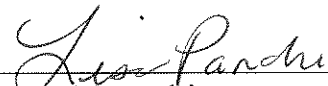
⁴ The subdivision title is taken from Fed. R. Civ. P. 45(a)(3).

1 Supreme Court. An attorney also may issue and sign a subpoena if the attorney is
2 authorized to practice before the issuing court.⁵
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4 **CONCLUSION**

5 Although there are valid reasons to modify Rule 45(a)(2), in light of the
6 concerns in the AOC Comment and as above the State Bar does not take a position
7 on whether the Court should adopt Petition R-19-0031. If the Court is inclined to
8 adopt the proposed amendments, however, it should modify the proposed language
9 so that it more closely tracks the language of federal Rule 45.
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13 RESPECTFULLY SUBMITTED this 1st day of May, 2019.

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16 Lisa M. Panahi
17 General Counsel
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19 Electronic copy filed with the
20 Clerk of the Supreme Court of Arizona
21 this 1st day of May, 2019.

22 by: 
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⁵ The proposed additional sentence tracks the language of Fed. R. Civ. P. 45(a)(3).