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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of: **PETITION FOR TECHNICAL AND CLARIFYING AMENDMENTS TO RULES 7, 8.1, 16, 37, 55, AND RULE 84 FORMS 11(a), 12(a), 13(a), AND 14(a), OF THE ARIZONA RULES OF CIVIL PROCEDURE**	Supreme Court No. R-20-_____ **Petition for Technical and Clarifying Amendments to Rules 7, 8.1, 16, 37, 55, and Rule 84 Forms 11(a), 12(a), 13(a), and 14(a), of the Arizona Rules of Civil Procedure**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petitions this Court to adopt certain technical and other minor clarifying amendments to the Arizona Rules of Civil Procedure, as proposed in the attached Appendices. Appendix A contains a clean copy of the impacted rules and forms with the proposed amendments. Appendix B contains a blackline showing additions with underlining and deletions with ~~strikethrough.~~ Given the scope and nature of the changes, which are minor in nature but impact multiple rules, this rule change Petition is the most efficient method of accomplishing these changes.

Section I, below, addresses the following proposed amendments that are purely technical in nature:

(1) Correcting erroneous cross-references in Rule 55 and Rule 84 Form 14(a), which were recently identified as a result of the extensive rule amendments that took effect in 2017 and 2018; and

(2) Modifying the title of Rule 7 to correspond to the content of the rule as amended effective January 1, 2017.

Section II, below, addresses the following proposed amendments to clarify the apparent intent of the rules and/or to simplify aspects of the rules following the 2017 and 2018 amendments:

(1) Revising Rule 8.1 to include a former provision providing that "[n]otwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3." As explained below, it appears that this language was deleted when Rule 8.1 was permanently adopted based on an assumption that with the adoption of the $300,000 monetary limitation in Rule 8.1(c), all commercial court cases would presumptively qualify for Tier 3 pursuant to Rule 26.2(c)(3)(C). As explained below, however, this is not strictly the case, as some cases that qualify

for a commercial court assignment may fall under Tier 2—specifically, those seeking only nonmonetary relief alone or in conjunction with damage claims under $300,000. *See* Ariz. R. Civ. P. 26.2(c)(3)(D). The proposed amendments will clarify that all cases in commercial court are deemed assigned to Tier 3, unless and until the commercial court assigns a different tier during the Rule 16 scheduling conference;

(2) Revising Rule 37(g) to clarify that certain portions of that rule should apply to both persons (nonparties) and to parties, and to clarify when a duty to preserve arises under Rule 37(g)(1)(C)(i);

(3) Revising Rule 16(h) to eliminate the term "Comprehensive Pretrial Conference," as that term is no longer used in the current version of Rule 16;

(4) Revising Rule 16 and related portions of Forms 11(a), 12(a), 13(a), and 14(a) to eliminate the requirement that parties file a separate Rule 7.1 certificate and to reinforce that the Joint Report must itself contain the parties' certification that they conferred in good faith, either in person or by telephone as required by Rule 7.1(h), on the required topics; and

(5) Revising Form 11(a), Items 7 and 8 relating to "short causes" and trial preferences, to eliminate a reference to a "one hour" limit on short causes. The one-hour definition of short causes was eliminated from Ariz. R. Civ. P. 38.1 in approximately 2014 and is now governed by local court rules, which specify varying hour limitations on a "short cause."

The changes described herein and set forth in the Appendices were identified by Petitioner, or in some cases brought to Petitioner's attention by other members of the Bar, over the course of her work as a member of and current Chair of the State Bar of Arizona's Committee on the Rules of Civil Practice and Procedure.[1]

[1] This Petition was not submitted through the State Bar of Arizona's petition process due to timing constraints and the minor nature of the proposed amendments.

I. PROPOSED TECHNICAL AMENDMENTS

A. Correcting Erroneous Cross-Reference in Rule 55

Rule 55(c) provides that "[t]he court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(c)."

Following the 2017 restyling amendments, however, Rule 60(c) was renumbered and restyled as Rule 60(b) ["Grounds for Relief from a Final Judgment, Order, or Proceeding"]. In an apparent oversight, a corresponding amendment was not made to Rule 55(c)'s cross-reference. Accordingly, the Petition proposes to correct the erroneous cross reference in Rule 55(c) so that it references Rule 60(b), and not Rule 60(c). *See* Appendices A (clean) and B (blackline) for proposed amendment.

B. Correcting Erroneous Cross-Reference in Rule 84, Form 14(a)

Rule 84, Form 14(a) references Rule 8.1(f) in Item 5 ("Commercial case management [Rule 8.1(f)])." With the Supreme Court's adoption of Rule 8.1 on a permanent basis with amendments, former subdivision (f) of Rule 8.1 was renumbered as subdivision (e) ["Case Management"]. [*See* Order Permanently Adopting and Amending Experimental Rule 8.1, No. R-18-0033 (12/13/2018)] A corrective order was issued that amended the erroneous cross-reference to Rule 8.1(f) appearing in the first sentence of Form 14(a), but that order inadvertently omitted a necessary correction to the similar reference appearing under Item 5. Accordingly, the Petition proposes to update Item 5's cross-reference so that it refers to Rule 8.1(e), and not Rule 8.1(f). *See* Appendices A (clean) and B (blackline) for proposed amendment.

C. Modifying the Title of Rule 7 to Correspond to its Content

Rule 7 was amended as part of the 2017 restyling to conform in part to Rule 7 of the Federal Rules of Civil Procedure. At that time, its title was amended to read:

"Pleadings Allowed; Form of Motions and Other Documents," corresponding to the title of Federal Rule 7. However, Arizona's Rule 7 only addresses allowed pleadings, and does not address the form of motions and other documents, which are addressed in other rules (including, for example, Rule 7.1 governing motions). The Petition proposes to amend the title of Rule 7 so that it reads, "Pleadings Allowed," which was its title before the 2017 amendments and corresponds to its current content. *See* Appendices A (clean) and B (blackline) for proposed amendment.

II. PROPOSED AMENDMENTS TO CLARIFY AND SIMPLIFY ASPECTS OF THE RULES

A. Amending Rule 8.1 to Clarify that Commercial Court Cases are Deemed to be Assigned to Tier 3, Unless and Until the Commercial Court Assigns a Different Tier

On its permanent adoption effective January 2019, Rule 8.1 deleted a provision contained in former Experimental Rule 8.1, which had provided that "[n]otwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3."

This provision initially was retained in the Petition to Permanently Adopt and Amend Rule 8.1 (No. R-18-0033), *see* Appendix A at Rule 8.1(e). Thereafter, one Commenter recommended deleting this language, noting that it was no longer necessary, and was potentially confusing, based on the Petition's proposed "restriction of commercial court cases to those seeking damages of $300,000 or more." *See* Comment of A. Jacobs (9/24/2018), Items 7 & 8 at p. 3. The Reply in support of the Petition adopted this recommendation and the former language was stricken in the final version of Rule 8.1 adopted by the Court. *See* Order Permanently Adopting and Amending Experimental Rule 8.1 (filed 12/13/2018), at Rule 8.1(e).

As permanently adopted, however, the language of Rule 8.1 did not restrict commercial court cases to those seeking damages of $300,000 or more. Rather, it now provides that "[a] case that seeks *only* monetary relief in an amount less than $300,000 is not eligible for the commercial court" (emphasis supplied). While this difference is subtle, as adopted the $300,000 damages threshold only applies to cases that seek "*only*" monetary relief. The language as adopted does not preclude otherwise-eligible case types seeking nonmonetary relief alone or in conjunction with damages of less than $300,000. Under Rule 26.2(c)(3)(D), such cases are deemed to be assigned to Tier 2 (unless otherwise ordered), not Tier 3.

Based on the history of Rule 8.1 as outlined above, it was clearly intended that commercial court cases should be deemed assigned to Tier 3, even if those cases would otherwise fall under Tier 2 if not in commercial court. Indeed, this intent is still reflected in Rule 8.1(e)(3)(E), which provides that the parties' Joint Report must address "whether the commercial court should assign the case to a tier other than Tier 3" and if so, "why." *See* Ariz. R. Civ. P. 8.1(e)(3)(E). Likewise, Rule 84 Form 14(a), also continues to reflect the former rule's presumption that a commercial court case is deemed to be assigned to Tier 3 unless otherwise ordered by the court.[2] The Petition thus proposes to add back the identical language of former Experimental Rule 8.1(e) [now (f)], which provides: "Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3." The proposed

[2] Form 14(a) thus contains a provision allowing the parties to request a tier *other than* Tier 3, providing as follows: "The commercial court should assign this case to a tier other than Tier 3 for the following reasons…." If the amendment to Rule 8.1 proposed in this Petition is not adopted, Form 14(a) should be modified to reflect that some commercial court cases may presumptively be Tier 2 cases, and not Tier 3 cases.

revisions are shown in Appendices A (clean) and B (blackline).

B. Amendments to Rule 37(g) to Clarify the Application of Certain Provisions to Persons *and* Parties and to Clarify Provisions of Rule 37(g)(1)(C)(i)

Rule 37(g), added by the 2017 amendments, addresses the duties of a "party or person" to preserve electronically stored information and provides remedies and sanctions if such information "that should have been preserved is lost."

The Petition proposes, first, to clarify that certain aspects of Rule 37(g) extend both to "parties" and to "persons." As adopted, the duty to preserve in Rule 37(g)(1)(A) extends by its terms to both parties and "persons" (i.e., those not yet parties to an action). Rule 37(g)(1)(A) thus provides that "[a] *party or person* has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement" (emphasis supplied).

Notwithstanding the Rule's imposition of a duty to preserve on a "party or person," however, subparts (B) and (C), which define what constitutes "Reasonable Anticipation" and "Reasonable Steps to Preserve," only use the term "party" and omit the term "person." While it can be argued that these definitions are subject to the general provisions of Rule 37(g)(1)(A) which clearly provide that the duty to preserve applies both to parties and to persons (not yet parties), to avoid uncertainty on this important topic, the Petition proposes to amend Rule 37(g)(1)(B) and (C)(i) and (ii) to make clear that the duties therein apply both to persons and to parties. The proposed amendments are shown in Appendices A (clean) and B (redline), attached hereto.

The Petition also proposes to clarify Rule 37(g)(1)(C)(i), which provides that a party or person "must take reasonable steps to prevent the routine operation of an

electronic information system or application of a document retention policy from destroying information that should be preserved." The foregoing duty only comes in to play if the threshold requirements of Rule 37(g)(1)(A), which trigger a duty to preserve, exist. While this limitation is arguably implicit in Rule 37(g)(1)(C)(i), given the serious consequences that flow from a violation of Rule 37(g), Petitioner believes the rule should be clarified to expressly state that the obligation in (C)(i) only applies where there is a duty to preserve under Rule 37(g)(1)(A).

Accordingly, the Petition proposes the following amendment to the language of Rule 37(g)(1)(C)(i) (additions are shown by underlining, and deletions are shown by ~~strike-throughs~~):

(i) If Rule 37(g)(1)(A) applies, a ~~A~~ party or person must take reasonable steps to prevent the routine operation of an electronic information system or application of a document retention policy from destroying information that should be preserved.

The foregoing proposed amendments are set forth in Appendices A (clean) and B (redline), attached hereto.

C. Amendments to Clarify and Simplify Rule 16 and Related Provisions of Rule 84 Joint Report Forms 11(a), 12(a), 13(a), and 14(a)

The Petition proposes two modest amendments to clarify and simplify Rule 16:

First, Rule 16(h) ["Sanctions"] uses the term "Comprehensive Pretrial Conference" in three places, *see* Rule 16(h)(1)(B), (C), and (D), providing for sanctions if a party or attorney fails to appear or to participate in good faith at a Rule 16 Comprehensive Pretrial Conference. The term "Comprehensive Pretrial Conference" is outdated and no longer applicable under current Rule 16. The term was last used in the pre-2017 version of Rule 16(e), which addressed the timing and

requirements for setting a "comprehensive pretrial conference" in medical malpractice actions. The current version of Rule 16 instead sets forth requirements for Scheduling Conferences, Trial-Setting Conferences, and Trial Management Conferences that apply to all actions. Accordingly, the Petition proposes to delete the three outdated references to a "Comprehensive Pretrial Conference" that appear in Rule 16(h).

Second, Rule 16(c)(2), governing the content of the Joint Report, requires that in addition to attaching the proposed Scheduling Order, the parties must "attach a good faith consultation certificate under Rule 7.1(h) and certify that the parties conferred regarding the subjects set forth in Rule 16(b)(2) and (c)(3)." The Petition proposes to delete the requirement that parties must file a separate Rule 7.1(h) certificate along with their Joint Report, because it is superfluous and adds an unnecessary layer of additional paperwork for the parties and for the court. Instead, the Petition proposes to replace this requirement with the following modified language:[3] "The Joint Report must certify that the parties conferred in good faith, either in person or by telephone as required by Rule 7.1(h), regarding ~~attach a good faith consultation certificate under Rule 7.1(h) and certify that the parties conferred regarding~~ the subjects set forth in Rule 16(b)(2) and (c)(3)."

If the Court adopts the foregoing amendment to Rule 16(c)(2), Forms 11(a), 12(a), 13(a), and 14(a) also should be modified to add the language "in good faith, either in person or by telephone as required by Rule 7.1(h)," to the parties' certification appearing in the first line of each of those forms, which reinforces the Rule's requirement of good faith consultation. Forms 11(a), 12(a), and 13(a) also should be modified to delete the last sentence, which states that "[t]he parties must

[3] Additionally, it appears that parties are not consistently filing the separate Rule 7.1(h) certificate in any event.

attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report." (This sentence does not appear in Form 14(a), making this proposed amendment unnecessary with respect to that form.) The proposed amendments are shown in Appendices A (clean) and B (redline).

D. Changes to Rule 84 Form 11(a) on "Short Causes"

Before 2014, Rule 38.1 provided that "short causes" were entitled to a trial-setting preference. The rule also defined a "short cause" as an action that could be heard in one hour or less. The rule's definition of "short cause" was later deleted, but the reference to "short causes" remained. Current Rule 38.1 thus provides that "preference is given to short causes and actions that are entitled to priority by statute, rule, or court order."

Although a "short cause" is no longer defined in Rule 38.1, a number of local court rules contain varying definitions of what constitutes a "short cause" entitled to a trial preference. *Cf.* Rule 13, Cochise County Superior Court Local Rules (specifying a "short cause" is any civil case that can be heard in 3 hours or less) *with* Rule 1.5, Pima County Superior Court Local Rules (specifying a short cause is any civil case that can be heard in 1 hour or less).

Rule 84, Form 11(a) contains an Item 7 that continues to reference the now-obsolete one-hour limitation on a short cause. The Petition proposes to eliminate the one-hour reference and to modify the language of Item 7 as follows (changes shown with ~~strike-through~~/underlining), with a corresponding amendment to Item 8:

7. Short cause: ~~A non-jury trial will not exceed one hour. Yes no.~~ This case is a short cause entitled to a preference for trial pursuant to [identify statute or rule]. The anticipated length of trial is ____ hours.

CONCLUSION

The Court should adopt the proposed technical and clarifying amendments for the reasons stated herein.

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Respectfully submitted,

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