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

9 In the Matter of:

Supreme Court No. R-20-

10 **PETITION TO AMEND RULES 12**
11 **AND 8.1 OF THE ARIZONA**
12 **RULES OF CIVIL PROCEDURE**

PETITION

13 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (“State Bar”) hereby petitions the Court to amend Rules 12 and 8.1 of the
15 Arizona Rules of Civil Procedure to require parties to consult in good faith before
16 filing four types of Rule 12 motions:
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- 18 • Rule 12(b)(3) motion for improper venue;
- 19 • Rule 12(b)(6) motion for failure to state a claim upon which relief can
20 be granted;
- 21 • Rule 12(c) motion for judgment on the pleadings; and
- 22 • Rule 12(f) motion to strike.
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1 Appendix A contains the blackline version showing the proposed changes,
2 and Appendix B contains the clean version.

3 **I. INTRODUCTION AND BACKGROUND**

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5 This Petition is based on the axiom that, when lawyers talk to each other, they
6 have a better chance of resolving, narrowing, or clarifying disputes before burdening
7 the court with motion practice. The trend in Arizona's state and federal courts is to
8 increasingly require parties to confer before filing motions. Advance conferral
9 creates several potential benefits: (1) the parties may narrow or even resolve the
10 dispute, thus avoiding the time and cost of motion practice for both the court and the
11 litigants; (2) even if the parties cannot avoid the dispute, the parties may better
12 understand their respective positions and thus better target the briefing to the key
13 issues; and (3) the conferral process may encourage the parties to litigate more
14 openly rather than by ambush.
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17 The Arizona Rules of Civil Procedure already have applied this reasoning to
18 Rule 12(b)(6) motions in commercial cases. The Commercial Court requires that any
19 "motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation
20 certificate complying with Rule 7.1(h) certifying that the parties have been unable
21 to agree that the pleading is curable by a permissible amendment." Ariz. R. Civ. P.
22 8.1(e)(4).
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1 Similarly, the District of Arizona’s Local Rule of Civil Procedure 12.1
2 requires a conferral before a Rule 12(b)(6) or a Rule 12(c) motion. *See* D. Ariz.
3 LRCiv 12.1 (“No motion to dismiss for failure to state a claim or counterclaim,
4 pursuant to Federal Rule of Civil Procedure 12(b)(6), or motion for judgment on the
5 pleadings on a claim or counterclaim, pursuant to Federal Rule of Civil Procedure
6 12(c), will be considered or decided unless the moving party includes a certification
7 that, before filing the motion, the movant notified the opposing party of the issues
8 asserted in the motion and the parties were unable to agree that the pleading was
9 curable in any part by a permissible amendment offered by the pleading party. The
10 movant may comply with this rule through personal, telephonic, or written notice of
11 the issues that it intends to assert in a motion. A motion that does not contain the
12 required certification may be stricken summarily.”).

16 Apart from dispositive motions, the Arizona Rules of Civil Procedure also
17 require that the parties attach a Rule 7.1(h) “good faith consultation certificate,”
18 certifying that the parties consulted in good faith by telephone or in person to try to
19 resolve the issue, for a wide range of disputes and issues. These include the
20 following:
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- 22 • Virtually any discovery dispute, including a request for relief through
23 Rule 26 joint statement of discovery or disclosure dispute (Rule
24 26(d)(2); Rule 26(i)); motion for an order compelling disclosure or
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1 discovery (Rule 37(a)(1)); motion for sanctions for failing to respond
2 to discovery (Rule 37(f)(1)(B)); report on the appropriate discovery tier
3 (Rules 11(a), 12(a), 13(a)); and motion to take discovery beyond the
4 tiering limits (Rule 26.2(g));

- 5 • Motion to seal (Rules 5.4(d)(3), 5.4(g));
- 6 • Motion for Rule 11 sanctions (Rule 11(c)(3)(C));
- 7 • Proposed scheduling order and report, including any “motions [the
8 parties] expect to file, so that the parties can determine whether any of
9 the motions can be avoided by stipulations, amendments, or other
10 cooperative activity” and “any agreements that could aid in the just,
11 speedy, and inexpensive resolution of the case” (Rule 16(b)-(c));
- 12 • Motion regarding compliance with a subpoena (Rule 45(c)(6));
- 13 • Motion by a nonparty for a protective order from a preservation request
14 (Rule 45.2(d)(2)); and
- 15 • Motion for Rule 56(d) relief (Rule 56(d)(1)(B)).

16 The proposed rule requiring advance conferral for certain Rule 12 motions
17 aligns with this trend of encouraging parties to talk through issues before bringing
18 them to the court.
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1 **II. OVERVIEW OF PROPOSED AMENDMENTS**

2 **A. Proposed Changes to Arizona Rule of Civil Procedure 12**

3 The State Bar proposes adding new subsection (j) to Rule 12 to require parties
4 to try to resolve disputes before bringing motions under Rule 12(b)(3) (improper
5 venue), Rule 12(b)(6) (failure to state a claim), Rule 12(c) (judgment on the
6 pleadings), and Rule 12(f) (motion to strike). Specifically, proposed Rule 12(j)
7 would require any motion brought under Rule 12(b)(3), (b)(6), (c), or (f) to include
8 a “good faith consultation certificate complying with Rule 7.1(h).” See Appendices
9 A and B. The cross-referenced “good faith consultation certificate” is a “separate
10 statement certifying and demonstrating that the movant has tried in good faith to
11 resolve the issue by conferring with—or attempting to confer with—the party or
12 person against whom the motion is directed.” Ariz. R. Civ. P. 7.1(h). The moving
13 party also must confer either “in person or by telephone, and not merely by letter or
14 email.” *Id.*

15 The proposed amendment’s new personal conferral requirement will garner
16 two related benefits. First, the parties may avoid the need for a motion entirely, such
17 as if the nonmoving party agrees to amend its pleading to avoid the motion, if the
18 moving party decides that a motion would be fruitless, or if the parties realize that
19 the potential motion was based on a misunderstanding of the facts or law. Second,
20 even when the parties cannot avoid a motion entirely, a personal conferral can make
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1 the motions that are filed better. Those motions are more likely to be narrowed and
2 targeted to the issues that remain in dispute after the conferral and are more likely to
3 account for the nonmoving party's positions and arguments.
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5 The District of Arizona's Local Rule of Civil Procedure 12.1 requires a
6 conferral before a Rule 12(b)(6) or a Rule 12(c) motion. *See* D. Ariz. LRCiv 12.1
7 ("No motion to dismiss for failure to state a claim or counterclaim, pursuant to
8 Federal Rule of Civil Procedure 12(b)(6), or motion for judgment on the pleadings
9 on a claim or counterclaim, pursuant to Federal Rule of Civil Procedure 12(c), will
10 be considered or decided unless the moving party includes a certification that, before
11 filing the motion, the movant notified the opposing party of the issues asserted in the
12 motion and the parties were unable to agree that the pleading was curable in any part
13 by a permissible amendment offered by the pleading party. The movant may comply
14 with this rule through personal, telephonic, or written notice of the issues that it
15 intends to assert in a motion. A motion that does not contain the required certification
16 may be stricken summarily.").

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20 Meanwhile, the new conferral requirement would add only minimal time and
21 cost before a motion is filed—merely the time needed to talk on the phone and
22 prepare for the call. In the long run, both parties and courts are likely to save time
23 and costs by avoiding, narrowing, and clarifying their disputes before investing
24 substantial time on motion practice. The District of Arizona has had noticeable
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1 success increasing the conferral requirements before motions to dismiss. During the
2 investigation for this rule change, the State Bar’s Civil Practice and Procedure
3 Committee spoke with multiple federal judges, who reported that increased conferral
4 requirements for motions to dismiss and other motions appear to have decreased the
5 number of disputes and narrowed the disputes that parties bring to the court.
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7 Further, because personal conferrals can avoid or narrow motions in a plethora
8 of ways, the proposed amendment does not limit the conferral to situations in which
9 the nonmoving party can avoid the motion by amending its pleading. Although
10 current Rule 8.1(e)(4) governing commercial cases requires only that the good faith
11 consultation certificate accompanying a Rule 12(b)(6) motion state that the parties
12 were “unable to agree that the pleading is *curable by a permissible amendment*,” the
13 State Bar proposes a more fulsome conferral to allow the parties the broadest chances
14 to address their disputes. *See* Ariz. R. Civ. P. 8.1(e)(4).
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17 Finally, while conferral before motion practice is almost always valuable, this
18 Petition focuses on four Rule 12 motions for which advance conferral is particularly
19 likely to avoid or reduce the need for motion practice. For example, Rule 12(b)(6)
20 and Rule 12(c) motions argue that the pleadings have failed to state a claim, and thus
21 amended pleadings may resolve the dispute. Rule 12(f) motions to strike similarly
22 argue that pleadings contain improper defenses or other allegations, and thus
23 conferrals may resolve disputes over those portions of the pleadings. Conferrals also
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1 may resolve Rule 12(b)(3) motions for improper venue by clarifying the facts about
2 where parties are located and how corporate defendants are related. The Civil
3 Practice and Procedure Committee discussed whether to petition to require conferral
4 for all motions or all Rule 12 motions, but the Committee decided to take a more
5 cautious approach and to evaluate possible additional conferral requirements in the
6 future.
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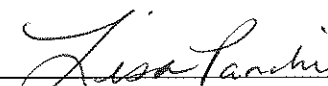
8 **B. Proposed Changes to Arizona Rule of Civil Procedure 8.1**
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10 The petition would delete current Rule 8.1(e)(4) as unnecessary considering
11 the proposed revisions to Rule 12. Current Rule 8.1(e)(4) requires a good faith
12 consultation certificate before filing a Rule 12(b)(6) motion in *commercial* cases.
13 Under the proposed amendment requiring advance conferral for Rule 12(b)(6)
14 motions in *any* case, current Rule 8.1(e)(4) becomes duplicative.
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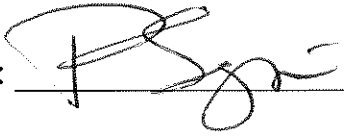
17 **CONCLUSION**

18 For the foregoing reasons, the State Bar respectfully petitions this Court to
19 amend Rules 12 and 8.1, Ariz. R. Civ. P. as set forth in the attached Appendix B.
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21 RESPECTFULLY SUBMITTED this 9th day of January, 2020.
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24 _____
25 Lisa M. Panahi
General Counsel

1 Electronic copy filed with the
2 Clerk of the Supreme Court of Arizona
3 this 10th day of January, 2020.

4 by:  _____
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Appendix A (Clean Copy of Relevant Portions of Rules 12 and 8.1 with Proposed Amendments)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing

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- (j) Good Faith Consultation Certificate.** A good faith consultation certificate complying with Rule 7.1(h) must accompany any motion brought under (b)(3), (b)(6), (c), or (f) of this rule.

Rule 8.1. Assignment and Management of Commercial Cases

* * *

- (e) Case Management.** Rules 16(a) through 16(j) apply to cases in the commercial court, except:

* * *

- (3) Joint Report and Proposed Scheduling Order.** The parties' Rule 16(b) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and 14(b), including:

- (A) whether the parties expect electronically stored information to be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;
- (B) whether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to Arizona Rule of Evidence 502, and, if so, whether they have filed a stipulated order;
- (C) whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under Rules 26(b)(6) and 26.1(h); and
- (D) whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order.

(f) Motions. With notice to the parties, a commercial court judge may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.

(g) Cases Not in the Commercial Court. The case management procedures in Rule 8.1(e) are available to any judge who finds those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.

**Appendix A (Blackline Copy of Relevant Portions of Rules 12 and 8.1
with Proposed Amendments)**

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing

* * *

(j) Good Faith Consultation Certificate. A good faith consultation certificate complying with Rule 7.1(h) must accompany any motion brought under subsection (b)(3), (b)(6), (c), or (f) of this Rule.

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- (C) whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under Rules 26(b)(6) and 26.1(h); and
- (D) whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order.

~~(4) *Motions to Dismiss.* Any motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation certificate complying with Rule 7.1(h) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.~~

(f) Motions. With notice to the parties, a commercial court judge may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.

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