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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:
**PETITION TO AMEND RULES OF
CRIMINAL PROCEDURE 16.3,
18.3, 18.4 & 18.5; RULES OF CIVIL
PROCEDURE 16 & 47; JUSTICE
COURT RULE OF CIVIL
PROCEDURE 134; RULE OF
PROCEDURE FOR EVICTION
ACTIONS 12**

Supreme Court No. R-21-_____

PETITION
(Expedited consideration requested)

**PETITION TO AMEND RULES OF CRIMINAL PROCEDURE 16.3, 18.3,
18.4 & 18.5; RULES OF CIVIL PROCEDURE 16 & 47; JUSTICE COURT
RULE OF CIVIL PROCEDURE 134; and RULE OF PROCEDURE FOR
EVICTION ACTIONS 12**

Pursuant to Rule 28(a), Ariz. R. Sup. Ct., Petitioner respectfully requests this Court to Amend Rules of Criminal Procedure 16.3, 18.3, 18.4 & 18.5; Rules of Civil Procedure 16 & 47; Justice Court Rule of Civil Procedure 134; and Rule of Procedure for Eviction Actions 12.

I. Purpose of the Proposed Amendment.

The Task Force on Jury Data Collection, Practices, and Procedures was created on March 10, 2021, by Administrative Order No. 2021-35 (“AO 2021-35”). Before the Task Force submitted its initial report on October 4, 2021, the Arizona

Supreme Court adopted R-21-0020 to eliminate the use of peremptory challenges beginning January 1, 2022.¹ Given this change, the Arizona Supreme Court referred to the Task Force the responsibility of reviewing the various sets of Arizona court rules to assess whether additional changes may be appropriate.

To respond to the Supreme Court’s directive, a subgroup of members of the Task Force agreed to participate on the Statewide Jury Selection Workgroup (“SJSW”). Additional members were added to the SJSW to ensure representation from various stakeholder groups, including lawyers with diverse practice areas in urban and rural counties, lawyers with civil and criminal experience, as well as individuals with practice area specialization.

This petition proposes amendments to various rules of procedure to provide for robust jury selection procedures designed to ensure a fair and impartial jury is selected.

II. Explanation of the Proposed Amendments.

The proposed amendments are attached in the Appendix to this Petition. The appendices reflect the rule changes effective January 1, 2022 resulting from the Supreme Court’s eliminating peremptory challenges.

A. Arizona Rules of Civil and Criminal Procedure

Both the Criminal and the Civil Rules of Procedure currently authorize case-specific questionnaires, yet neither set of rules emphasizes their use. Jury selection requires prospective jurors to identify and publicly discuss sensitive and personal beliefs, attitudes, opinions, and life experiences. Research indicates that juror questionnaires, including electronically administered questionnaires, increase prospective jurors’ willingness to provide complete and candid answers to

¹ See Order R-21-0020 amending the Rules of Civil and Criminal Procedure ([R-21-0020 Final Rules Order \(1\).pdf](#)) and subsequent order amending Rules of Procedure for Eviction Actions and Justice Court Rules of Civil Procedure ([Follow up Order \(abolition of peremptory strikes\) R-21-0020.pdf](#)).

questions.² The use of written and online questionnaires provide prospective jurors with a greater sense of privacy and comfort than answering questions in open court.³

The proposed amendments encourage the use of case-specific questionnaires in more types of cases after the abolition of peremptory challenges. But rather than mandating the use of case-specific written questionnaires, the proposed amendments maintain judicial discretion and flexibility in determining when to use such questionnaires while also encouraging their use by incorporating procedures to propose and approve specific questions at pretrial conferences.

In certain courts, questionnaires can be provided to prospective jurors at the time the individuals are summoned. Before jury selection begins, the court and parties can review the responses and identify prospective jurors who are unable to be fair and impartial. Those prospective jurors can be released without the inconvenience and expense of coming to the court. Moreover, answers to written questionnaires will allow the court and parties to have meaningful information regarding prospective jurors' relevant attitudes, opinions, beliefs, and life experiences to further discuss with the prospective jurors during oral voir dire.⁴

The proposed rule amendments also memorialize the need for liberal and comprehensive oral voir dire to ensure the court and parties have a sufficient

² Jeffrey T. Frederick, *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury* (4th ed. 2018); Jessica M. Salerno, et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 Law & Hum. Behav. 336, 352 (2021) (“Notwithstanding the limitations of our studies, our findings are important in that they suggest the potential value of voir dire questionnaires that probe specific predispositions and biases directly relevant to civil litigation regarding medical malpractice and bad faith cases.”).

³ Frederick *supra*; Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristic, Evaluation, Anxiety, and Expectancy on Jury Honesty During Voir Dire*, 120 J. Psychol. 205 (1986); see generally Alan Chaikin & Valerian Derlega, *Self-Disclosure*, in *Contemporary Topics in Social Psychology* (Thibaut & Carson eds. 1976).

⁴ See Salerno, et al., *supra* at 352 (“Although having potential jurors complete an extensive voir dire questionnaire takes some time, if the questionnaires were administered in advance of the trial, or just prior to voir dire questioning, it might actually save time.”).

opportunity to question prospective jurors to identify those that could not render a fair and impartial verdict.⁵

The existing civil and criminal rules have substantively similar standards for voir dire and for-cause challenges; therefore, the proposed amendments to both the civil and criminal rules are substantively identical and are discussed jointly below, with notable textual differences identified in the explanations.

The SJSW concluded that case-specific written questionnaires and the scope of oral voir dire should be discussed during pretrial conferences. The proposed amendments broadly amend existing provisions to expressly incorporate written questionnaires and to address the scope of oral voir dire.

a. Civil Rule 16(d).

Civil Rule 16(d)(19) addresses time limits on trial proceedings, juror notebooks, brief pre-voir dire opening statements, preliminary jury instructions, and the effective management of documents and exhibits as possible topics for the court and parties to discuss at the Rule 16 Scheduling Conference. If set, a Scheduling Conference typically occurs very early in the case, shortly after the Early Meeting required in Rule 16(b) of the Civil Rules. The SJSW concluded the Scheduling Conference occurs too early in the case for the court and parties to meaningfully discuss voir dire. Therefore, the SJSW proposes eliminating Rule 16(d)(19).

⁵ See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?*, 92 Colum. L. Rev. 725, 771 (1992); Salerno, et al., *supra*, at 350 (“The findings from the present research suggest that generic questions requiring jurors to spontaneously and explicitly acknowledge that they cannot be impartial are unlikely to aid attorneys or presiding judges in that task.”).

b. Civil Rule 16(e).

Civil Rule 16(e)(2) presently allows the parties to discuss “using juror questionnaires” and “giving brief pre-voir dire opening statements” in two separate subdivisions.⁶ The SJSW proposes consolidating the existing references to juror questionnaires and pre-voir dire opening statements into proposed Rule 16(e)(2)(D) to read: “the court may discuss at the Trial-Setting Conference . . . the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on written or oral examination, and whether to permit the parties to give brief pre-voir dire opening statements.”

To provide flexibility, proposed Rule 16(e)(2)(D) includes both written and oral voir dire. The court and parties can discuss either written, oral, or both forms of voir dire where appropriate for the case.

c. Civil Rule 16(f).

Civil Rule 16(f) governs the Pretrial Conference and specifies the items the parties must provide in a pretrial statement.⁷ The Rule also requires that parties file a separate document that lists “oral voir dire questions.”⁸ Rather than alter the contents of the pretrial statement, the SJSW proposes amending Rule 16(f)(4) to require the parties to file both agreed-upon and disputed questions for a case-specific written questionnaire.

d. Criminal Rule 16.3(c).

Criminal Rule 16.3 allows the court to require the parties to “confer and submit memoranda” in advance of a Pretrial Conference. Consistent with the approach taken for Civil Rule 16(f), the SJSW proposes amending Criminal Rule

⁶ Ariz. R. Civ. P. 16(e)(2)(D) & (F).

⁷ Ariz. R. Civ. P. 16(f)(2).

⁸ Ariz. R. Civ. P. 16(f)(4).

16.3(c) to allow the court to require that the parties submit written and oral voir dire questions before a Pretrial Conference.

e. Criminal Rule 16.3(d).

Like existing Civil Rule 16(e)(2), Rule 16.3(d) of the Rules of Criminal Procedure allows the court and parties to discuss “giving brief voir dire opening statements” at a pretrial conference. The SJSW proposes amending Criminal Rule 16.3(d) by adding new subparagraph (4) that is identical to the proposed amendment to Civil Rule 16(e)(2)(D) that references both written and oral examination and brief pre-voir dire opening statements.

f. Civil Rule 47(b) and Criminal Rule 18.3.

The SJSW’s proposed amendment to increase the use of case-specific written questionnaires in turn created juror privacy concerns. Case-specific written questionnaires will necessarily elicit personal and sensitive information that prospective jurors may be reluctant to share in writing unless they know how the information will be used and whether the information will become public. Completed case-specific written questionnaires are part of voir dire and must be maintained as part of the case file, distributed to the parties and their respective staff for purposes of jury selection, and may be used to challenge prospective jurors, on the record, in written motions, and on appeal. The SJSW concluded that completed questionnaires should be maintained confidentially as permitted by Rule 123, Arizona Rules of the Supreme Court, and state and federal constitutions to encourage complete, candid answers. In this aid of confidentiality, courts may decide to make findings necessary to seal the questionnaires or personal identifying information in them.⁹

⁹ Ariz. R. Sup. Ct. 123(e)(10) (Juror Records. The home and work telephone numbers and addresses of jurors, *and all other information obtained by special screening questionnaires or in voir dire proceedings*

Both the civil and criminal rules contain provisions that require the court to obtain certain eligibility and biographical information before trial.¹⁰ The forms that collect that information are currently identified as questionnaires in some instances and biographical information forms in others.¹¹ These eligibility and biographical forms are not part of voir dire and will have document retention and confidentiality requirements differing from case-specific written questionnaires.

To distinguish eligibility and biographical information from a juror's answers to case-specific questionnaires, the SJSW proposes amending both Civil Rule 47(b) and Criminal Rule 18.3 to distinguish between the two types of information solicited from prospective jurors by creating different provisions for "eligibility and biographical information" and "case-specific written questionnaires." The proposal retains the existing privacy protections for "eligibility and biographical information" and sets forth the requirements for the court and parties to receive, use, and retain the jurors' answers to case-specific questionnaires.

g. Civil Rule 47(b)(1) and Criminal Rule 18.3(a).

The SJSW proposes minor amendments to Civil Rule 47(b)(1) and Criminal Rule 18.3(a). First, the SJSW proposes clarifying that that juror eligibility and biographical information be given to the parties before oral voir dire. Second, the SJSW proposes for clarity the current provisions requiring that juror eligibility and biographical information be kept confidential be moved to new paragraphs, which would become Civil Rule 47(b)(2) and Criminal Rule 18.3(b).

h. Civil Rule 47(b)(2) and Criminal Rule 18.3(b).

The SJSW proposes that Civil Rule 47(b)(2) become a new paragraph that incorporates the existing privacy protections for juror eligibility and biographical

that personally identifies the juror summoned for service, except the names of jurors on the master jury list, are confidential unless disclosed in open court or otherwise opened by order of the court.).

¹⁰ Ariz. R. Civ. P. 47(b)(2); Ariz. R. Crim. P. 18.3(a)-(b).

¹¹ See Ariz. Code of Jud. Admin. §§ 2-101(D)(15)(b)(1)-(2), (D)(15)(c)(1), (D)(15)(d); 5-203(C)(1)-(2).

information. This change would conform proposed Rules of Civil Procedure 47(b)(1) and (2) to proposed Rules of Criminal Procedure 18.3(a) and (b), to ensure that juror eligibility and biographical information remains protected.

i. Civil Rule 47(b)(3) and Criminal Rule 18.3(c).

The SJSW proposes substantial edits to Civil Rule 47(b)(3) and creation of a new paragraph in proposed Criminal Rule 18.3(c) that would match proposed Civil Rule 47(b)(3). The proposed amendment clarifies that this paragraph applies to case-specific written questionnaires. It requires that the questionnaires and answers provided by the prospective jurors be maintained as part of the case file in a manner and form approved by the court. The proposed amendment also requires that each party receives the prospective jurors' responses to case-specific questionnaires before conducting oral voir dire.

The SJSW also proposes the court inform prospective jurors of the level of privacy applied to their responses to the written questionnaires. The SJSW believes the proposed amendments will make case-specific written questions more effective by encouraging prospective jurors to give more thoughtful and candid answers.

To reinforce privacy concerns, the SJSW also proposes that the parties be allowed to use case-specific written questionnaires “only to the extent necessary for the proper conduct of the case.” After jury selection, the questionnaires must either be returned or destroyed, as directed by the court. Because the responses are maintained in the case file, the parties would have access to case-specific questionnaires if necessary.

j. Civil Rule 47(c) and Criminal Rule 18.5(a)-(c).

The SJSW proposes four substantive changes to the above-referenced Rules to: (1) ensure that case-specific written questionnaires are either sworn or affirmed to be truthful; (2) provide prospective jurors an explanation of the purpose of voir dire before both written and oral voir dire, (3) explain how the parties will use the

information, and who may have access to the information; and (4) urge courts and parties to use case-specific written questionnaires.

Both existing Civil Rule 47(c)(1) and Criminal Rule 18.5(a) require that prospective jurors swear or affirm that their answers during voir dire will be truthful. The SJSW proposes both Rules require that prospective jurors must either swear or affirm that their answers on a case-specific written questionnaire are truthful. Case-specific written questionnaires are part of voir dire and subject to both statutory and rule-based requirements to provide an oath or affirmation.¹² Additionally, requiring that case-specific questionnaires be sworn or affirmed, will underscore for prospective jurors the importance of providing thorough, complete, and candid answers.

Proposed Civil Rule 47(c)(1) differs from proposed Criminal Rule 18.5(a), because Civil Rule 47(c)(1) already includes the specific oath within the Rule. Because the proposed amendments establish the importance of conveying to prospective jurors the need for truthful answers, the workgroup decided that it was unnecessary to make the Rules identical.

Based primarily on existing Criminal Rule 18.5(c) and American Bar Association Jury Selection principles, the SJSW proposes adding in new paragraphs to both the civil and criminal rules, requiring that courts explain before both written and oral examination the purpose of voir dire, how the parties will use prospective juror information, and who may access that information.¹³

¹² A.R.S. §§ 21–131(C), 21–315(B); *see* Ariz. Code Jud. Conduct § 5-203(C)(2).

¹³ See ABA *Standards for Criminal Justice: Trial by Jury*, 15–2.2(c)(1) (“The jurors should be advised of the purpose of the questionnaire, how it will be used and who will have access to the information.”), available at

https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/criminal_justice_standards_jurytrial_blk#2.4; ABA Jury Principles 6(C)(1) and 7(A)(4) (recommending that that courts explain the jury’s role, how the court and parties will use jury information, how long it is retained, and who may access it), available at

The SJSW concluded that these explanations will help jurors understand the importance of voir dire and will help the court and parties elicit more thorough, complete, and candid answers. Additionally, given the personal and sensitive information solicited on case-specific questionnaires, the proposed explanation provides transparency, thus building public confidence in the judicial system.

As discussed above, the SJSW proposes amendments to the criminal and civil rules to encourage the use of case-specific questionnaires where feasible. These questionnaires will allow the parties to conduct a more thorough examination, provide additional information regarding prospective jurors, and promote public confidence that verdicts are rendered fairly and impartially. To that end, the SJSW proposes adding Civil Rule 47(c)(3) and Criminal Rule 18.5(c) to urge that courts use case-specific written questionnaires and provide guidance on what those questionnaires should provide.

First, the recommendation creates a presumption that trial courts should use case-specific written questionnaires: “[u]nless the court orders otherwise, the court should require prospective jurors to complete a case-specific written questionnaire . . .” Of note, the proposed language is permissibly written, stating that trial courts “should require” case-specific written questionnaires.

Second, the SJSW recommendation gives trial courts discretion to determine the manner of use and form for case-specific written questions to suit the individual needs of the case, preferences of the court, and requests of the parties. The SJSW, however, concluded it was important to provide guidance in the text of the rule by specifying that specific questionnaires should include questions designed to determine a juror’s qualification to serve, any hardships that would prevent jury service, and any questions designed to determine whether a juror could render a fair

and impartial verdict. Similarly, the SJSW proposes a Comment to proposed Civil Rule 47(c)(3) and proposed Criminal Rule 18.5(c) to clarify that case-specific written questionnaires should be used where feasible, deferring to the court on whether to use paper or electronic questionnaires, administered before prospective jurors are assembled at the court or immediately before voir dire. Even assuming written questionnaires are feasible, the proposed Rules and Comments do not mandate their use.

k. Civil Rule 47(c)(4) & Criminal Rule 18.5(h).

The SJSW proposes that both the existing provisions in the civil and criminal rules authorizing brief opening statements during voir dire be amended to clarify opening statements may be given before oral voir dire. This recommendation preserves existing practice, and depending on use, it may be impractical to allow brief opening statements before prospective jurors complete written questionnaires.

l. Civil Rule 47(c)(5), Criminal Rule 18.5(d), (f), & Comment.

Although the SJSW proposes that courts use case-specific written questionnaires, it does not believe that courts should substitute them for oral voir dire. Thus, the SJSW proposes amending both existing Civil Rule 47(c)(3) and existing Criminal Rule 18.5(b) to reaffirm that courts should conduct oral voir dire.

Additionally, the SJSW proposes clarifying language to ensure that a party's failure to submit questions before oral examination is not grounds to deny oral examination. This recommendation is needed so the proposed amendments that emphasize submitting voir dire questions during pretrial conferences are not mistakenly read to prohibit follow up questions by parties, even if they failed to submit questions during pretrial conferences.

Finally, the SJSW proposes specifying in proposed Criminal Rule 18.5(f) that courts allow the parties "sufficient time" for oral examination. The current Rule provides that courts allow "reasonable time," and the SJSW concluded that replacing

reasonable with sufficient would encourage courts to give the parties additional time to ask appropriate follow-up questions. The existing Rules of Civil Procedure do not have a similar limitation, and no amendment was required.

The SJSW also considered adding additional guidelines to proposed Civil Rule 47(c)(5) and proposed Criminal Rule 18.5(f), including a proposal from the State Bar's Criminal Practice and Procedure Committee, which would have limited courts' discretion to restrict the parties' oral voir dire. Ultimately the SJSW concluded that procedural rules should not unnecessarily restrict courts' discretion, but that a Comment would be beneficial in providing additional guidance on the rule changes and this shift in practice.

Accordingly, the SJSW proposes an identical Comment to both Civil Rule 47(c)(5) and Criminal Rule 18.5(f) that encourages courts to permit liberal and comprehensive examination by the parties with open-ended questions. The Comment also encourages courts not to rehabilitate prospective jurors by asking leading and conclusory questions, such as, "despite your statement, could you fairly and impartially consider the evidence?"

m. Civil Rule 47(d)(3) burden of proof changes.

Unlike the Criminal Rule, existing Civil Rule 47(d) did not provide a burden of proof to establish a for-cause challenge. To ensure a consistent statewide policy, the SJSW proposes adding a burden of proof to Civil Rule 47(d) in new paragraph 3, which is identical to the burden of proof adopted by the Arizona Supreme Court's August 31, 2021, order amending Criminal Rule 18.5.

After approval of the proposed rule changes by the SJSW, the suggested revisions were reviewed and considered by the Civil Practice and Procedure Committee of the State Bar of Arizona. During that review, a recommendation was made to include a standard for courts reviewing a for-cause challenge. Thus, new

language was drafted. The new language in 47(d)(3) and 18.5(h) clarifies that when a court reviews a challenge for-cause, the court should consider the totality of a prospective juror's conduct and answers given during voir dire. This provides clarity for the trial court and appellate courts that all answers provided by the prospective juror should be considered and the court should not merely decide a challenge for cause on a juror's commitment that they will be fair and impartial.

The SJSW proposes removing as neither current nor accurate the 1973 Comment to Criminal Rule 18.4(b). That Comment includes a list of for-cause grounds to challenge a prospective juror. The SJSW concluded that an extensive list was unnecessary. Additionally, there was concern that the grounds did not precisely match the statutory basis for challenges, and a similar Comment was not included in the civil rules. If the Arizona Supreme Court prefers retaining the Comment, the SJSW proposes that the Comment be updated, and that a similar Comment be added to the civil rules.

n. 1995 Comments to Civil Rule 47(a) & (e), and Criminal Rule 18.5(b).

The 1995 Comment to Civil Rules 47(a) & (e), and Criminal Rules 18.5(b) authorizes both the traditional “strike-and-replace” and “struck” methods of jury selection. The Comment specified under either method, and following challenges, “the clerk calls the first 8 or 12 names, as the law may require, from those remaining on the list, plus the number of alternate jurors thought necessary by the judge who become the trial jury.” The SJSW concluded that courts should have flexibility to either call replacement jurors sequentially as the Comment currently requires, or randomly. A random replacement would disincentivize the parties from improperly attempting to strike a prospective juror currently in the box, for the next sequential, and possibly more favorable, juror on the list.

The proposed Comment provides that “the rules do not prescribe a method for replacing an excused prospective juror in the jury box with a member of the panel, deferring to the discretion of the court on the appropriate method.”

B. Civil Justice Court Rules and Eviction Action Rules

The SJSW’s proposed amendments to the Justice Court Civil Rules and Eviction Action Rules are purposefully more limited than are the proposed amendments to the civil and criminal rules. Both the existing Civil Justice Court and Eviction Action Rules provide less detail than the civil and criminal rules. Incorporating matching amendments would require substantial amendments to Civil Justice Court Rule 134 and Eviction Action Rule 12. Such changes are presently unnecessary.

As a result, the SJSW proposes minimal amendments to Civil Justice Court Rule 134(a)(1) and Eviction Action Rule 12(a) that accomplish the following: (1) expressly authorizing case-specific written questionnaires; (2) ensuring any case-specific written questionnaires comply with the confidentiality and document retention provisions in proposed Civil Rule 47(c)(3); and (3) expressly adding the preponderance of the evidence standard to establish a for-cause challenge.

III. Request for Expedited Consideration.

Petitioner requests expedited adoption of the proposed rule amendment as permitted by Rule 28(g)(1), Ariz. R. Sup. Ct. and that the Court consider adopting the amendment requested herein on an emergency basis pursuant to Rule 28(g)(2) at its December 2021 Rules Agenda, effective January 1, 2022. The Report and Recommendations of the Statewide Jury Selection Workgroup were publicly posted on its website and the Jury Task Force Website on November 1, 2021.

Petitioner further requests that the Court open the petition and rule amendments to public comment until May 1, 2022, with any reply due on June 1,

2022. The Court could then consider whether to adopt the rule amendments on a permanent basis during its August 2022 Rules Agenda.

Submitted this 23rd day of November 2021.

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