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6 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 In the Matter of:

Supreme Court No. R-05-0001

8 PETITION TO AMEND RULE 53,
9 ARIZONA RULES OF CIVIL PROCEDURE

COMMENTS

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11 The Special Master, Arizona General Stream Adjudication, submits the following comments to
12 the Petition to Amend Arizona Rule of Civil Procedure 53 filed by the State Bar of Arizona.

13 A. Proposed Rule 53(a)

14 *Suggestion:* That the term “and conclusions of law” be added in subsection a(1)(B) to clarify,
15 as proposed subsection (g) recognizes, that a master can make or recommend conclusions of law as
16 well as findings of fact. This term is not in the text of Federal Rule of Civil Procedure 53(a), but this
17 inclusion confirms the well established authority of a court-appointed master, *see* A.R.S. § 45-
18 257(A)(2), and secondly, puts subsection a(1)(B) in line with subsection g(3).

19 B. Proposed Rule 53(g)

20 *Suggestion:* That the term “order” in proposed subsections (g)(1) and (g)(5) be deleted or its
21 meaning be limited to a master’s final order at the conclusion of duties.

22 The term “order” appears to allow a party, while a matter is being heard by a master, to “file
23 objections” with the appointing court to *any* “order” of the master, “no later than 10 days from the
24 time the master’s order” is served. *See also* proposed subsection 53(e). Such a process could

1 significantly delay proceedings before a master as every order becomes subject to review by the
2 appointing court.

3 In the general stream adjudications, the Special Master, during the course of contested cases,
4 has issued case management, discovery, intervention, protective, and substantive orders determining
5 legal issues. During the course of a reference, a master can issue many kinds of orders. If an avenue is
6 opened to file objections to all such orders when they are made, significant delays will result,
7 compounded by the possibility that a party not satisfied with the trial court's ruling could proceed to a
8 special action.¹ Speedy resolution and efficient case management are at risk.

9 It is possible that the term "order" is intended to mean the final recommendation of the master
10 at the conclusion of duties, but the proposed language of subsection (g) does not reasonably allow this
11 interpretation. It is submitted that this issue, if not addressed now, could be litigated.

12 C. Proposed Deletion of Rule 53(j)

13 *Suggestion:* That current subsection (j), which the petition requests to delete, is retained. The
14 current provision states that:

15 "Before filing the master's report a master may submit a draft thereof to
16 counsel for all parties for the purpose of receiving their suggestions.

17 Although the order appointing a master could provide this authority, retaining the current
18 provision would make it clear that the appointing court can allow it, and disagreements over the
19 court's authority to allow the master this opportunity would be precluded. Draft reports can help to
20 resolve minor, clearly invalid, clerical, or even major objections thereby expediting a case's resolution.
21 Draft reports can be very helpful in complex litigation involving numerous factual issues, voluminous
22

23 ¹ See *Cobell v. Norton*, 213 F.R.D. 48, 62 (D. D. C. 2003) ("As a direct result of defendants' filing of a frivolous
24 motion [for a protective order against discovery sought by the court-appointed special master-monitor], the Court and plaintiffs were unnecessarily required to expend time and effort.").

1 evidentiary documents, or extensive expert testimony. This provision has been a part of Arizona's
2 Rule 53 since its initial promulgation effective January 1, 1956, almost 50 years ago!

3 It might be claimed that allowing draft reports will create a conflict with the time limit, set
4 forth in A.R.S. § 12-128.01, for a judicial officer's rulings, but there are exceptions to this limit, and in
5 some cases sixty days could be sufficient time to distribute and consider a draft report. Further, it is
6 submitted that the 60-days begin to run *after* comments to the draft report are filed, when the master
7 takes the matter, including comments to the draft, under advisement. *See* Ariz. R. Sup. Ct. 91(e).

8 *Suggestion:* That this provision be shortened as follows:

9 "Before filing a report a master may submit a draft to the
10 parties for the purpose of receiving comments."

11 *Suggestion:* This provision could be independently retained in a new subsection (f) or
12 incorporated in the proposed subsection (f). The Special Master suggests placing it in a new subsection
13 (f) entitled "Draft Reports" and using subsection (g) to cover "Master's Reports" because if the
14 proposed renumbering of rule 53 is adopted, A.R.S. § 45-257(A)(2) will have to be amended as that
15 statute specifically refers "to any rule 53(g) report."

16 Respectfully submitted this 16th day of August, 2005.

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18 /s/ George A. Schade, Jr.
19 GEORGE A. SCHADE, JR.
20 *Special Master*

21 On August 16, 2005, the original and six copies were
22 filed with the Clerk of the Supreme Court of Arizona and
23 a copy was mailed to Mr. Robert B. Van Wyck, Chief
24 Counsel, State Bar of Arizona, 4201 North 24th Street,
Suite 200, Phoenix, Arizona 85016-6288.

/s/ KDolge
Kathy Dolge