

1 John A. Furlong, Bar No. 018356
2 General Counsel
3 STATE BAR OF ARIZONA
4 4201 North 24th Street, Suite 100
5 Phoenix, Arizona 85016-6266
6 Telephone: (602) 252-4804
7 John.Furlong@staff.azbar.org

8
9
10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**
12

13
14
15
16
17
18
19
20
21
22
23
24
25
26
PETITION TO AMEND RULE
15(a)(3), ARIZONA RULES OF
CIVIL PROCEDURE

Supreme Court No. R-11-0037

**Comment of the State Bar of Arizona
on Petition to Amend Rule 15(a)(3),
Arizona Rules of Civil Procedure**

A petition has been submitted to amend Rule 15(a)(3) of the Arizona Rules of Civil Procedure. The petition seeks to modify the language of Rule 15(a)(3) to mirror the Federal Rules of Civil Procedure¹ so that Rule 15(a)(3) serves solely as a “timing mechanism” rather than a mandatory pleading rule. The State Bar of Arizona opposes the proposed amendment as it is unwarranted and likely to create more problems than it resolves.

I. The petition addresses the facts of a single case rather than a statewide problem in need of a solution.

The State Bar notes that petitioner appears to have filed the petition in response to a single trial court decision and unpublished court of appeals decision. Specifically,

¹ Presumably because Arizona has not adopted the “day is a day” 2009 amendment to Rule 6(a), Fed. R. Civ. P., which amendment led to changing most ten-day periods in those rules to fourteen-day periods, petitioner actually proposes that this Court replace the language of Arizona’s rule with the pre-2009-amendment text of Rule 15(a)(3), Fed. R. Civ. P.

1 petitioner supports his request for amendment of Arizona’s Rule 15(a)(3) by reference to
2 the outcome in one legal malpractice action. The malpractice claim arose from the failure
3 of a lawyer to respond to an application for entry of default after the lawyer had failed to
4 file a mandatory response to an amended complaint. In the malpractice action, the trial
5 court ruled that the language of Rule 15(a)(3) requires an answer to an amended
6 complaint in all circumstances, even when the amended complaint does not add any new
7 claims or theories.

8 If the State Bar has correctly identified the matter referenced by the petition,
9 Division One of the Arizona Court of Appeals recently affirmed the trial court’s decision
10 in an unpublished memorandum decision. *See Gonzalez v. Eckley & Associates, P.C.*, 1
11 CA-CV 10-0718 (Jan. 3, 2012). In that decision, the court of appeals found that the plain
12 language of the rule—“shall plead in response to the original pleading”—indicated that a
13 responsive pleading is mandatory. *Id.* ¶ 24. The court further noted that the history of
14 Rule 15(a)(3) supports this interpretation. The 1928 version of the rule read: “Where the
15 defendant has answered and the plaintiff shall afterward amend his pleading, the
16 defendant need not answer a second time, but the original answer shall extend to such
17 amended pleading, so far as applicable.” 1928 Revised Code Arizona § 3787. The
18 language was changed in 1939 to its current formulation. The court of appeals found that
19 “[t]he inclusion of the phrase ‘shall plead in response’ indicates a change to a mandatory
20 pleading rule.” *Gonzalez, supra*, at ¶ 25.

21 **II. The petition lacks merit.**

22 The State Bar agrees with the Court of Appeals’ finding that the plain language of
23 Rule 15(a)(3) and its history support treating Rule 15(a)(3) as a mandatory pleading rule.
24 Other states—including Colorado, North Carolina, and Wisconsin—also treat Rule 15(a)
25 as a mandatory pleading rule. *See, e.g., Currier v. Sutherland*, 218 P.3d 709, 715 (Colo.
26 2009) (“Once a plaintiff files an amended complaint, the original complaint is

1 superseded, and the defendant must answer the amended complaint.”); *Hyder v.*
2 *Dergance*, 332 S.E. 713 (N.C. App. 1985); *Bell v. Employers Mut. Cas. Co. of*
3 *Des Moines*, 541 N.W. 2d 284 (Wis. App. 1995). Petitioner has failed to identify
4 compelling reasons for amending Rule 15(a)(3) to convert it from a mandatory pleading
5 rule to a rule that merely governs the timing for a response to an amended pleading.

6 Petitioner first contends that interpreting Rule 15(a)(3) as a mandatory pleading
7 rule “conflicts with existing Rules of Civil Procedure,” namely Rules 8 and 55. To the
8 contrary, Rules 8 and 55 both require a party to plead or otherwise defend its case in
9 conformity with the requirements of the Rules of Civil Procedure. *See, e.g.*, Rule 8(d)
10 (“Averments in a pleading to which a responsive pleading is required . . . are admitted
11 when not denied in the responsive pleading.”) (emphasis added); *see also* Rule 55(a)
12 (“When a party against whom a judgment for affirmative relief is sought *has failed to*
13 *plead or otherwise defend as provided by these Rules*, the clerk shall enter that party’s
14 default. . . .”) (emphasis added).

15 Again referring to the outcome in the malpractice action, petitioner further
16 contends that interpreting Rule 15(a)(3) as a mandatory pleading rule “leads to absurd
17 results” and is a “trap for the unwary.” The State Bar disagrees. Rule 15(a)(3) requires
18 that a party file a responsive pleading to an amended complaint. Failure to answer an
19 amended complaint, as required by Rule 15(a)(3), is a proper basis for applying for entry
20 of default. But unlike the Federal Rules of Civil Procedure, Arizona’s Rules of Civil
21 Procedure allow the party claimed to be in default to plead or otherwise defend within ten
22 days from the filing of the application for entry of default. *See* Rule 55(a)(3), Ariz. R.
23 Civ. P. It is not an “absurd result” for a clerk to enter default against a party who fails to
24 respond to an application for entry of default.

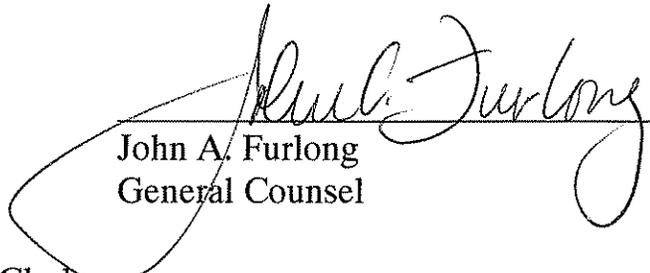
25 Moreover, petitioner’s proposed solution—amending Rule 15(a)(3) to mirror the
26 Federal Rules of Civil Procedure—creates more ambiguity than it resolves. Federal

1 Rule 15(a)(3) provides that “any required response to an amended pleading must be
2 made within the time remaining to respond to the original pleading or within 10 days
3 after service of the amended pleading, whichever is later.” The language “any required
4 response” leaves open to interpretation whether a response to an amended pleading is
5 required. Although petitioner correctly points out that a majority of federal courts have
6 held that a response to an amended complaint is not always required, at least one circuit
7 court has interpreted Federal Rule 15(a)(3) as a mandatory pleading rule. *See, e.g.,*
8 *Snyder v. Pascack Valley Hosp.*, 303 F.3d 271, 276 (3d Cir. 2009) (“a defendant is
9 required to answer the amended complaint even if the new version does not change the
10 charges against him”). Changing Rule 15(a)(3) from a mandatory pleading rule to a
11 timing mechanism solely to align with some federal courts *would* create a “trap for the
12 unwary.”

13 **III. Conclusion.**

14 For the reasons set forth herein, the State Bar opposes the proposed amendment to
15 Rule 15(a)(3) of the Arizona Rules of Civil Procedure.

16 RESPECTFULLY SUBMITTED this 18th day of May, 2012.

17
18
19 
20 John A. Furlong
General Counsel

21 Electronic copy filed with the Clerk
22 of the Supreme Court of Arizona this
23 18th day of May, 2012,

24 by: Kathleen A. Sudgen
25
26