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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 RULE 23**
11 **OF THE ARIZONA RULES OF**
12 **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 Rule 23 of the Arizona
15 Rules of Civil Procedure (“ARCP”). Consistent with the goal of federalizing and
16 modernizing the Arizona rules where appropriate, proposed ARCP 23 adopts aspects
17 of changes to Federal Rule of Civil Procedure (“FRCP”) 23 that took effect
18 December 1, 2018. The proposed amendments relate to the procedures for class
19 actions, including (i) notice to potential class members, (ii) information the parties
20 must provide to the court regarding a proposed settlement, (iii) the factors the court
21 should consider in determining whether a proposed settlement is fair, reasonable,
22 and adequate, and (iv) addressing objections to a proposed settlement.
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1 In particular, the proposed amendments would modify Rule 23 in the
2 following respects:

3 (1) Proposed amendments to ARCP 23(c)(2) would require that notice be
4 provided to members of a class proposed to be certified for purposes of settlement
5 and the manner of providing notice to class members or potential class members;
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7 (2) Proposed amendments to ARCP 23(e)(1) address information the
8 parties must provide to the court regarding a proposed settlement;
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10 (3) Proposed amendments to ARCP 23(e)(2) address the specific
11 considerations by the court in determining whether to approve a proposed
12 settlement; and
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14 (4) Proposed amendments to ARCP 23(e)(5) address objections to a proposed
15 settlement, including the court's review and approval of any consideration provided
16 to an objector to resolve an objection.

17 The attached Appendix A contains a blackline showing all the proposed
18 changes to ARCP 23. A clean version of the proposed changes is at Appendix B.

19
20 **I. INTRODUCTION AND BACKGROUND**

21 Effective December 1, 2018, the United States Supreme Court amended
22 FRCP 23 to address several issues. Most of these changes were made to conform the
23 rule to existing best practices in class-action litigation. *See* Bolch Judicial Institute,
24 Duke Law School, Guidelines And Best Practices, Implementing 2018 Amendments
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1 to Rule 23 Class Action Settlement Provisions, at ii, iv (available at
2 [https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-](https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-Practices-Final-Version.pdf)
3 [Practices-Final-Version.pdf](https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-Practices-Final-Version.pdf)). The amendments included changes to the following
4 provisions of FRCP 23:
5

6 1. FRCP 23(c)(2)(B): adding that (a) notice should be provided to class
7 members of a proposed class to be certified for purposes of settlement and (b) notice
8 may be provided to class members by appropriate means, including email.
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10 2. FRCP 23(e): addressing (a) information that the parties must provide to
11 the court regarding a proposed settlement; (b) the grounds for a court's decision to
12 provide notice to the class of a proposed settlement; (c) the considerations the court
13 should apply in determining whether a settlement is fair, reasonable, and adequate;
14 and (d) how objections to a proposed settlement should be handled by the court,
15 including the requirement that the court review and approve any payment made in
16 connection with resolution of an objection.
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18 3. FRCP 23(f): addressing that there is no appeal from preliminary
19 approval of a class action settlement.¹
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23 ¹ The amendments to FRCP 23(f) also included changes to give the United States
24 more time to take an appeal from an order granting or denying class-action
25 certification. As that is not an issue for the Arizona state courts, the State Bar does
not propose that amendment or address it herein.

1 Considering A.R.S. § 12-1873, the State Bar does not believe that the changes
2 to FRCP 23(f) should be implemented in ARCP 23(f) as the Arizona legislature has
3 already defined the orders relating to class actions that may be appealed.
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5 The State Bar believes the other changes to FRCP 23(c) and (e) in the
6 December 1, 2018, amendments should be made to ARCP 23.

7 **II. OVERVIEW OF PROPOSED AMENDMENTS**

8 An overview of the proposed amendments to ARCP 23 is set forth below.

9 **A. Proposed Changes to ARCP 23(c):**

10 The State Bar’s proposed amendments to ARCP 23(c) would alter the current
11 rules for notice in two ways: (1) clarify that the trial court must direct notice to the
12 proposed class that will be certified for purposes of a class settlement; (2) clarify
13 that the court may consider alternative forms of notice to class members and
14 potential class members, including email, if it is “the best notice that is practicable
15 under the circumstances.”
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19 The first proposed amendment to ARCP 23(c)(2)(B) adds express language
20 that the court should provide notice to members of a class proposed to be certified
21 for purposes of a settlement. Although the prior version of the rule did not require
22 notice to members of a proposed class certification, courts routinely provided such
23 notice as a matter of best practice. As the 2018 Advisory Committee Note to FRCP
24 23 (“Advisory Committee Note”) explains: “It is common to send notice to the class
25

1 simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision
2 for class members to decide by a certain date whether to opt out. This amendment
3 recognizes the propriety of this combined practice.”
4

5 The second proposed amendment to ARCP 23(c)(2)(B) addresses the means
6 by which courts should provide notice to class members and members of potential
7 class settlements. As the Advisory Committee Note explains, “technological change
8 since 1974 has introduced other means of communication that may sometimes
9 provide a reliable additional or alternative method for giving notice.” The Note
10 recognizes that “first class mail may often be the preferred primary method of giving
11 notice,” but recognizes that “courts and counsel have begun to employ new
12 technology to make notice more effective” and that technological change will
13 continue. Thus, it instructs courts “when selecting a method or methods of giving
14 notice,” to “consider the capacity and limits of current technology, including class
15 members’ likely access to such technology.” Effectively, the change permits the
16 courts leeway to determine the best means to provide notice to class members given
17 the reality of technological change and the prevalence of the use of email. However,
18 the Note also states, “it is important to keep in mind that a significant portion of class
19 members in certain cases may have limited or no access to email or the Internet.”
20 Thus, it retains the court’s ability to determine the best practicable form of notice for
21 the affected class.
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1 **B. Proposed Changes to ARCP 23(e):**

2 The State Bar’s proposed amendments to ARCP 23(e) would alter the current
3 rule relating to the settlement of class action cases in the following ways: (1)
4 requiring the parties to provide the court with information sufficient to enable it to
5 determine whether to give notice to a proposed class; (2) specifying the grounds for
6 a court’s decision to provide notice to a proposed settlement class; (3) identifying
7 the factors the court should consider in determining whether a proposed settlement
8 is fair, reasonable, and adequate; and (4) addressing the requirement that the court
9 review and approve any consideration offered to class-action settlement objectors to
10 withdraw an objection.
11

12 1. Proposed changes to ARCP 23(e)(1)(A)

13 The proposed changes to ARCP 23(e)(1)(A) require that the parties provide
14 the court with adequate information to make a reasonable determination as to
15 whether to provide notice to the class.
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18 The Advisory Committee Note explains

19 The decision to give notice of a proposed settlement to the class is an
20 important event. It should be based on a solid record supporting the
21 conclusion that the proposed settlement will likely earn final approval
22 after notice and an opportunity to object. The parties must provide the
23 court with information sufficient to determine whether notice should be
24 sent.
25

1 2. Proposed changes to ARCP 23(e)(1)(B)

2 The proposed changes to ARCP 23(e)(1)(B) specify that the court should only
3 provide notice of a proposed settlement if it finds that it will likely be able to approve
4 the settlement and to certify the class. This requires the court to give preliminary
5 consideration of the proposed settlement prior to giving notice to determine whether
6 there is reasonable likelihood that the proposed settlement will be approved. This
7 was an existing best practice of courts in the settlement-approval process even prior
8 to the amendment and conforms the rule to that existing practice.
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11 3. Proposed changes to ARCP 23(e)(2)

12 The proposed changes to ARCP 23(e)(2) outline the specific factors the court
13 should consider in determining whether a proposed settlement is fair, reasonable,
14 and adequate and, thus, appropriate for approval.
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16 The amendments to FRCP 23(e)(2) were made to codify the most significant
17 factors that courts should consider in making that determination. As the Advisory
18 Committee Note indicates:
19

20 The central concern in reviewing a proposed class-action settlement is
21 that it be fair, reasonable, and adequate. Courts have generated lists of
22 factors to shed light on this concern. Overall, these factors focused on
23 comparable considerations, but each circuit has developed its own
24 vocabulary for expressing these concerns. In some circuits, these lists
25 have remained essentially unchanged for thirty or forty years. The goal
of this amendment is not to displace any factor, but rather to focus the
court and the lawyers on the core concerns of procedure and substance
that should guide the decision whether to approve the proposal.

1 The Note further indicates that the list in Rule 23(e)(2) “directs the parties to present
2 the settlement to the court in terms of a shorter list of core concerns, by focusing on
3 the primary procedural considerations and substantive qualities that should always
4 matter to the decision whether to approve the proposal.”
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6 4. Proposed changes to ARCP 23(e)(5)

7 The amendments to FRCP 23(e)(5) were implemented specifically to address
8 the situation in which an objector receives consideration to withdraw an objection.
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10 The Advisory Committee noted that some class-action-settlement objectors
11 seek “only personal gain” and utilize “objections to obtain benefits for themselves
12 rather than assisting in the settlement-review process.” It further found that allowing
13 payment of objectors without judicial review “perpetuates a system that can
14 encourage objections advanced for improper purposes.” Court approval of any
15 consideration provided to an objector for withdrawal of an objection addresses this
16 concern.
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18 5. Proposed addition of ARCP 23(e)(5)(C)

19 The Bar proposes ARCP 23(e)(5)(C) to address court approval of
20 consideration paid to objectors for the withdrawal of an objection while the matter
21 is on appeal.
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1 The Advisory Committee Note recognizes that “[b]ecause an appeal by a
2 class-action objector may produce much longer delay than an objection before the
3 district court, it is important to extend the court-approval requirement to apply in the
4 appellate context.” The Committee further found that the trial court “is best
5 positioned to determine whether to approve such arrangements.” Thus, FRCP
6 23(e)(5)(C) provides that the trial court may review payment of consideration for the
7 withdrawal of objections while the matter is on appeal by reference to existing FRCP
8 62.1, which sets forth the procedure for district courts to address motions for relief
9 while an appeal is pending (and, thus, the district court lacks jurisdiction over the
10 case). Specifically, FRCP 23(e)(5)(C) states:

14 (C) Procedure for Approval After an Appeal. If approval under Rule
15 23(e)(5)(B) has not been obtained before an appeal is docketed in the
16 court of appeals, the procedure of Rule 62.1 applies while the appeal
remains pending.

FRCP 62.1, in turn, provides:

17 (a) Relief Pending Appeal. If a timely motion is made for relief that the
18 court lacks authority to grant because of an appeal that has been
docketed and is pending, the court may:

19 (1) defer considering the motion;

20 (2) deny the motion; or

21 (3) state either that it would grant the motion if the court of
22 appeals remands for that purpose or that the motion raises a
substantial issue.

23 (b) Notice to the Court of Appeals. The movant must promptly notify
24 the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the
district court states that it would grant the motion or that the motion
25 raises a substantial issue.

1 (c) Remand. The district court may decide the motion if the court of
2 appeals remands for that purpose.

3 In the context of FRCP 23(e)(5)(C), the procedure under Rule 62.1 allows the
4 trial court to resolve issues and to make the required findings under 23(e)(5)(B) when
5 there has been a settlement of an objection while the case is on appeal.

6 The Arizona Rules of Civil Procedure, however, have no corollary to FRCP
7 62.1. Thus, to provide a similar procedure for the review of consideration paid to
8 objectors, the State Bar proposes the adoption of language substantially similar to
9 FRCP 62.1 in proposed Rule 23(e)(5)(C):
10

11
12 (C) Procedure for Approval After an Appeal. If approval under Rule
13 23(e)(5)(B) has not been obtained before an appeal is docketed in the
14 court of appeals, the following procedure applies as to any motion for
15 approval under Rule 23(e)(5)(B) while the appeal remains pending:

16 (i) Relief Pending Appeal. In addressing the motion, the court
17 may:

18 (a) defer considering the motion;

19 (b) deny the motion; or

20 (c) state either that it would grant the motion if the court
21 of appeals remands for that purpose or that the motion
22 raises a substantial issue.

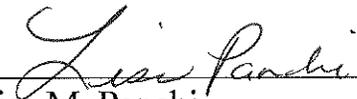
23 (ii) Motion to the Court of Appeals. If the trial court states that
24 it would grant the motion or that the motion raises a substantial
25 issue, the movant must promptly move the court of appeals
under Arizona Rule of Appellate Procedure 3(b) to suspend the
appeal and to revest jurisdiction in the superior court to allow
the superior court to consider the motion under Rule
23(e)(5)(B).

(iii) Remand. The trial court may decide the motion if the court
of appeals remands for that purpose.

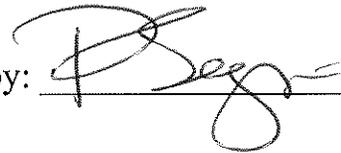
1 **III. CONCLUSION**

2 For the foregoing reasons, the State Bar respectfully petitions this Court to
3 amend ARCP 23 as set forth in the attached Appendix B.
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5 RESPECTFULLY SUBMITTED this 9th day of January, 2020.

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8 _____
9 Lisa M. Panahi
10 General Counsel

11 Electronic copy filed with the
12 Clerk of the Supreme Court of Arizona
13 this 10th day of January, 2020.

14 by: 
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Appendix A: Blackline showing proposed revisions (underline and ~~strikethrough~~)

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede the other members' ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate for the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

- (A) *When to Issue.* At an early practicable date after a person sues or is sued as a class representative, the court must hold a hearing and determine by order whether to certify the action as a class action.
- (B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must:
- (i) define the class and the class claims, issues, or defenses;
 - (ii) appoint class counsel under Rule 23(g);
 - (iii) set forth the court's reasons for maintaining the case as a class action; and
 - (iv) describe the evidence supporting the court's determination.
- (C) *Altering or Amending the Order.* An order that grants or denies class certification may be conditioned, altered, amended, or withdrawn before final judgment.

(2) Notice.

- (A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.
- (B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:
- (i) the nature of the action;
 - (ii) the definition of the class certified;
 - (iii) the class claims, issues, or defenses;
 - (iv) that a class member may enter an appearance through an attorney if the member so desires;
 - (v) that the court will exclude from the class any member who requests exclusion;
 - (vi) the time and manner for requesting exclusion; and
 - (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

- (3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:
- (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and
 - (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.
- (4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
- (5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

- (1) *Generally.* In conducting an action under this rule, the court may issue orders that:
- (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
 - (B) require—to protect class members and to fairly conduct the action—appropriate notice to some or all class members of:
 - (i) any step in the action;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
 - (C) impose conditions on the representative parties or on intervenors;
 - (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
 - (E) deal with similar procedural matters.
- (2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

- (e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) *Notice to the Class.*

- (A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
- (B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal; if giving notice is justified by the parties' showing that the court will likely be able to:
- (i) approve the proposal under Rule 23(e)(2); and
 - (ii) certify the class for purposes of judgment on the proposal.
- (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
- (A) the class representatives and class counsel have adequately represented the class;
 - (B) the proposal was negotiated at arm's length;
 - (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
 - (D) the proposal treats class members equitably relative to each other.
- (3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal;
- (4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion by individual class members who had an earlier opportunity to request exclusion but did not do so; and
- (5) Class-Member Objections. ~~any class member may object to the proposal if it requires court approval under this rule; the objection may be withdrawn only with the court's approval.~~
- (A) Generally. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the following procedure applies as to any motion for approval under Rule 23(e)(5)(B) while the appeal remains pending:

(i) Relief Pending Appeal. In addressing the motion, the court may:

(a) defer considering the motion;

(b) deny the motion; or

(c) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(ii) Motion to the Court of Appeals. If the court states that it would grant the motion or that the motion raises a substantial issue, the movant must promptly move the court of appeals under Arizona Rule of Appellate Procedure 3(b) to suspend the appeal and to revest jurisdiction in the superior court to allow the superior court to consider the motion under Rule 23(e)(5)(B).

(iii) Remand. The trial court may decide the motion if the court of appeals remands for that purpose.

(f) Appeals. The court's order certifying or denying class action status is appealable in the same manner as a final order or judgment. During the pendency of an appeal under A.R.S. § 12-1873, all discovery and other proceedings are stayed, but the court may, on motion, permit discovery to continue.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

- (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
 - (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
 - (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
 - (E) may make further orders in connection with the appointment.
- (2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
 - (3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
 - (4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.
- (h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
- (1) Subject to the provisions of this rule, a claim for an award must be made by motion under Rule 54(g) at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
 - (2) A class member, or a party from whom payment is sought, may object to the motion.
 - (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Appendix B: Clean Version of Proposed Amended Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede the other members' ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate for the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *When to Issue.* At an early practicable date after a person sues or is sued as a class representative, the court must hold a hearing and determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must:

(i) define the class and the class claims, issues, or defenses;

(ii) appoint class counsel under Rule 23(g);

(iii) set forth the court's reasons for maintaining the case as a class action; and

(iv) describe the evidence supporting the court's determination.

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be conditioned, altered, amended, or withdrawn before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), – or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) – the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
- (3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:
 - (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and
 - (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.
- (4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
- (5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

- (1) *Generally*. In conducting an action under this rule, the court may issue orders that:
 - (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
 - (B) require—to protect class members and to fairly conduct the action—appropriate notice to some or all class members of:
 - (i) any step in the action;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
 - (C) impose conditions on the representative parties or on intervenors;
 - (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
 - (E) deal with similar procedural matters.
 - (2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.
- (e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court’s approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
- (1) *Notice to the Class*.

- (A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
- (B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:
 - (i) approve the proposal under Rule 23(e)(2); and
 - (ii) certify the class for purposes of judgment on the proposal.
- (2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
 - (A) the class representatives and class counsel have adequately represented the class;
 - (B) the proposal was negotiated at arm's length;
 - (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
 - (D) the proposal treats class members equitably relative to each other.
- (3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal;
- (4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion by individual class members who had an earlier opportunity to request exclusion but did not do so; and
- (5) *Class-Member Objections.*
 - (A) Generally. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
 - (B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the

court after a hearing, no payment or other consideration may be provided in connection with:

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the following procedure applies as to any motion for approval under Rule 23(e)(5)(B) while the appeal remains pending:

- (i) Relief Pending Appeal. In addressing the motion, the court may:
 - (a) defer considering the motion;
 - (b) deny the motion; or
 - (c) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.
- (ii) Motion to the Court of Appeals. If the court states that it would grant the motion or that the motion raises a substantial issue, the movant must promptly move the court of appeals under Arizona Rule of Appellate Procedure 3(b) to suspend the appeal and to revest jurisdiction in the superior court to allow the superior court to consider the motion under Rule 23(e)(5)(B).
- (iii) Remand. The trial court may decide the motion if the court of appeals remands for that purpose.

(f) Appeals. The court's order certifying or denying class action status is appealable in the same manner as a final order or judgment. During the pendency of an appeal under A.R.S. § 12-1873, all discovery and other proceedings are stayed, but the court may, on motion, permit discovery to continue.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

- (A) must consider:
 - (i) the work counsel has done in identifying or investigating potential claims in the action;
 - (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
 - (iii) counsel's knowledge of the applicable law; and
 - (iv) the resources that counsel will commit to representing the class;

- (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
 - (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
 - (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
 - (E) may make further orders in connection with the appointment.
- (2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
 - (3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
 - (4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.
- (h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
- (1) Subject to the provisions of this rule, a claim for an award must be made by motion under Rule 54(g) at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
 - (2) A class member, or a party from whom payment is sought, may object to the motion.
 - (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).