

**ARIZONA JUDICIAL COUNCIL**  
Arizona State Courts Building  
1501 W. Washington Street, Suite 119  
Phoenix, Arizona 85007

December 7, 2010

**Council Members Present:**

Chief Justice Rebecca White Berch  
Judge Louraine Arkfeld (*retired*)  
Alan Bayham  
Jim Bruner  
Judge Robert Brutinel  
David Byers  
Judge Rachel Torres Carrillo  
Judge Norman Davis  
Jose A. Cardenas, Esq.  
Karen D. Ferrara

Mike Hellon  
Yvonne R. Hunter  
Emily Johnston  
Michael Jeanes  
Judge Jan Kearney  
William J. Mangold, M.D., J.D.  
Janet Regner  
Judge Antonio Riojas, Jr.  
Judge Ann A. Scott Timmer  
Judge David Widmaier

**Council Members Absent:**

Athia Hardt  
Judge Douglas Holt  
Judge Joseph Howard

Judge James Soto  
George Weisz

**Administrative Office of the Courts (AOC) Staff Present:**

Theresa Barrett  
Mike Baumstark  
Stewart Bruner  
William Earl  
Jennifer Greene  
Melinda Hardman  
Janet Johnson  
Jerry Landau  
Caroline Lutt-Owens

Jennifer Liewer  
Mark Meltzer  
Susan Pickard  
Katy Proctor  
Lorraine Smith  
Nancy Swetnam  
Kathy Waters  
Henrietta Williams  
David Withey

**Presenters and Guests Present:**

Judge Daniel Barker  
Doreen C. Borgmann  
Pete Dunn  
Andrew Federhar

John MacDonald  
Judge Robert Carter Olson  
Bill Owsley  
Justice Michael Ryan (*retired*)

Cindy Fineburg  
Vice Chief Justice Andrew Hurwitz

Judge Sally Simmons (*telephonically*)  
Judicial Delegation from Turkey

Chief Justice Rebecca White Berch, Chair, called the meeting to order at 10:00 a.m., at the State Courts Building, 1501 W. Washington, Suite 119, Phoenix, Arizona. The Chair welcomed those in attendance and announced that Judge Robert Brutinel has been appointed to the Arizona Supreme Court, and Judge Robert Carter Olson, Presiding Judge of the Superior Court in Pinal County, will be joining the Council at the March meeting.

The Chair reported on the status of the child support guidelines. She noted the Court has approved the Council's recommendation to update Income Shares with a cost of living adjustment. The Chair reported the issue has been referred to the Legislature and will come back to the Council at the October 2011 meeting.

### **Approval of Minutes**

The Chair called for any omissions or corrections to the minutes from the October 21, 2010, meeting of the Arizona Judicial Council. Mr. Hellon asked that the minutes reflect his attendance at the October meeting. The Chair noted the need to correct the spelling of the word "anecdotal" on Page 5. A motion was made to approve the minutes with the two corrections.

**MOTION: To approve the minutes from the October 21, 2010, meeting of the Arizona Judicial Council with the addition of Mr. Hellon's name as attending and the correction of the word "anecdotal."** Motion was seconded and passed. AJC 2010-35.

### **Judicial Branch Legislative Package**

Mr. Jerry Landau, Director of Governmental Affairs, and Ms. Katy Proctor, Legislative Liaison, for the AOC, updated the Council on the status of the legislative package to include actions and issues for the Council's consideration.

Ms. Proctor presented proposal 2011-03: Unlawful sexual conduct; probation employees. Ms. Proctor noted the proposal was approved at the October meeting, and staff was asked to scrub the language, take it through the committee review process, and bring back to the Council with updates. Ms. Proctor reviewed the revised language. A motion was moved and seconded to support the proposal as presented.

**MOTION: To support 2011-03 as presented.** Motion was seconded and passed. AJC 2010-36.

Ms. Proctor presented proposal 2011-06: Pretrial services; arrests. She noted the Council had referred the proposal back to internal committees for additional vetting. Ms. Proctor reported the proposal only affects one county, and the committees who reviewed the proposal are split. A motion was made and seconded to support the proposal. Mr.

Byers added he would support the proposal if Maricopa goes forward with this as a pilot experiment and makes it available statewide at a later date.

**MOTION: To support 2011-06 as presented.** Motion was seconded and passed. AJC 2010-37.

Mr. Landau presented 2011-09: Grand jury. He noted the Council voted to bring this proposal back to the appropriate committees for further vetting, obtain input from stakeholders, and reconsider it at the December meeting. Mr. Landau provided a summary of the comments received and discussion ensued. Judge Kearney noted Section C does not require secrecy from the person who would prepare a transcript from the electronic recording and stated such people should be covered by the confidentiality rule.

Mr. John MacDonald, Lobbyist for the Arizona Court Reporters Association, opposed the proposal and addressed the Council stating this is a major change in what happens in grand juries. He noted the end result will be no court reporters in Grand Jury rooms except in very rare cases, and the next step will be the elimination of court reporters in felony trials. Mr. MacDonald stated that just because court reporters use electronic recording to assist them in their jobs should not be a reason to replace them. He stated the Association would vigorously oppose this proposal at the Legislature, and the Legislators will want to see this proposal addressed by statute and not court rule.

Mr. MacDonald discussed the cost incurred in the production of transcripts and noted this is a subject the Association can continue to discuss in terms of how often they are prepared, how they are prepared, timing, etc. He stated the Association would welcome the opportunity to participate in this discussion.

A motion was made and seconded to approve the modifications to 2011-09 and move forward with the inclusion of the modification to Section C requiring confidentially no matter whom the transcriber is.

**MOTION: To support 2011-09 as presented.** Motion was seconded and passed (one abstention). AJC 2010-38.

Mr. Landau presented a new legislative proposal for the Council's consideration entitled "Reduction in Fine" brought forward by the County Supervisors Association.

Discussion ensued regarding why the judicial system would have interest in the county jail system. A motion was made and seconded to take no action on this proposal.

**MOTION: To take no action on the "Reduction in Fine" proposal.** Motion was seconded and passed. AJC 2010-39.

Ms. Proctor presented Folder 384 (Probate; protective proceedings; unreasonable conduct). She noted the Legislature is moving forward with this probate fee-related legislation and has opened this bill folder containing the fee-shifting language. Ms. Proctor added the language is identical to what came out of the Probate Committee

recommendations but would move forward independent of this body. A motion was made and seconded to authorize staff to support this legislation.

Judge Timmer stated the Probate Committee will support this provision. Judge Davis expressed concern with limiting the legislation to one narrow issue. He noted the Superior Court in Maricopa County has a committee working on 20 different legislative proposals dealing with probate. He stated he supports this proposal, but suggested leaving the door open to include other proposals to bolster the legislation and provide a more comprehensive submission. Ms. Hunter suggested staff use this opportunity to work with Senator Nelson and committees who will hear this bill (educational opportunity).

**MOTION: To support Folder 384 as presented.** Motion was seconded and passed. AJC 2010-40.

The Chair noted staff would continue to work with Senator Nelson, offer educational resources, and provide further opportunities to expand the bill.

Mr. Landau reported the Court of Appeals, Division II issued an opinion affecting surcharges in criminal cases. He noted staff are reviewing it for its affect and will provide an update in March.

### **Retirement Systems Update**

Mr. Pete Dunn, Lobbyist for the Arizona Judges Association, provided an update on the retirement systems as they impact the judiciary. He noted the Board of Trustees will be making recommendations to all three retirement plans: Elected Officials Retirement Plan (EORP), Public Safety Personnel Retirement System (PSPRS), and Corrections Officer Retirement Plan (CORP) which will include substantial changes in benefits to both existing members and new hires for EORP. Mr. Byers stated this issue will result in a big battle during the upcoming legislative session.

### **Arizona Code of Judicial Administration**

Mr. David Withey, Chief Legal Counsel for the AOC, presented the following consent code sections for the Council's consideration: ACJA 3-202: Parent Education Program (amendment) and 5-206: Fee Deferrals and Waivers (amendment).

Mr. Withey called for any discussion on the two consent items. Mr. Byers moved approval of the two code sections. Discussion took place regarding ACJA 5-206: Fee Deferrals and Waivers. It was noted that on Page 8, Section Q, the word "correction" in the words "state department of correction" is referred to as singular and should be referred to as plural and read "corrections."

Judge Davis questioned the need for a definition of what the data and validation safeguards are in D.4. of ACJA 3-202: Parent Education Program. He asked about F.8 which seems to remove these programs from the procurement code to a system of competitive assessment. Judge Davis asked if we are removing it from the procurement

code provisions, do we need to modify the procurement code provisions to exempt it or clarify that the current code still applies. Jennifer Greene noted the change to F.8. was to recognize that arrangements between courts and providers of parent education programs do not involve a court paying money to the providers. Therefore, even under the procurement code there wouldn't need to be competitive bidding.

The original motion was seconded to approve the two consent items with the change to the word correction in ACJA 5-206.

**MOTION: To approve ACJA 3-202: Parent Education Program as presented and 5-206: Fee Deferrals and Waivers with the change to the word "correction."** Motion was seconded and passed. AJC 2010-41.

Ms. Nancy Swetnam, Director of the Certification and Licensing Division of the AOC, presented 7-206: Certified Reporter (amendment) for the Council's consideration. A motion was made and seconded to approve 7-206 as presented.

**MOTION: To approve ACJA 7-206: Certified Reporter as presented.** Motion was seconded and passed (one abstention). AJC 2010-42.

The Council met with a judicial delegation from Turkey consisting of high-ranking officials during lunch and discussed their respective judicial systems. The delegation was referred to Arizona by the State Department, recognizing Arizona has one of the premier justice systems in the country. The delegation was asking for Arizona's assistance, per the European Union's request, to adopt more accountability in their justice system as a condition of entry into the European community.

### **Proposed Attorney Standards for Child Representation in Dependency Cases**

Judge Sally Simmons (telephonically) and Mr. Bill Owsley presented the proposed attorney standards for the Council's consideration. Judge Simmons asked the Council to recommend the standards to the Arizona Supreme Court for adoption by administrative order to put them in effect now (interim step) and then through the rule petition process. Mr. Owsley noted these standards are desperately needed statewide.

Mr. Bayham expressed concern that approving these standards creates separate standards for different areas of practice among lawyers in the superior court that may affect a lawyer's ability to practice law. He added the intent is good, and the standards are appropriate. Ms. Hunter stated that because of the population represented by this block of attorneys, standards are needed.

A motion was made and seconded to approve the idea that there should be these types of clarifications to existing statutes.

**MOTION: To approve proposed attorney standards for child representation in dependency cases as presented.** Motion was seconded and passed (one abstention). AJC 2010-43.

## **2010 Report from the Capital Case Oversight Committee**

Justice Michael Ryan (retired), Chair of the Capital Case Oversight Committee updated the Council on the status of the Committee and asked for support of the recommendations in the Committee's report: 1. Consider assigning Court of Appeal judges, as necessary, to handle anticipated increase of capital appeals; 2. Remove the presumptive limitation on hours under A.R.S. § 13-4041, and increase the hourly rate under that statute; 3. Support the extension of the State Capital Post-Conviction Public Defender's Office beyond its July 1, 2011 sunset date; and 4. Extend the term of the Capital Case Oversight Committee for one year.

Discussion took place regarding recommendation #2. Mr. Byers suggested referring this recommendation to the State Bar and asking them to consider it in their legislative package. Mr. Bayham noted on behalf of the Bar this is something they could consider, but he would need to run it through the State Bar's legislative process first.

A motion was made and seconded to approve recommendations #1, #3, and #4.

**MOTION: To approve recommendations #1, #3, and #4 as presented.**

Motion was seconded and passed. AJC 2010-44.

A motion was made to refer recommendation #2 to the State Bar for their consideration of lobbying that item.

**MOTION: To refer recommendation #2 to the State Bar.** Motion was

seconded and passed. AJC 2010-45.

The Chair acknowledged Judge Robert Brutinel for his service on the Council and presented him with a certificate of appreciation.

### **Update on the Complex Civil Litigation Court (taken out of order)**

Mr. Andrew M. Federhar, Chair of the Complex Civil Litigation Court Evaluation Committee, provided information on the background and history of the complex civil litigation court. Mr. Federhar asked for the Council's support of the following recommendations: 1) Make the complex program a permanent feature of the superior court; 2) Adopt the rules of procedure for complex cases on a permanent basis; 3) Continue to educate the Bar about the complex program; 4) Compile useful information on the complex case program; and 5) Disband the Evaluation Committee. In addition, Mr. Federhar asked the Council for its specific authorization to file a rule petition seeking adoption of the rules of procedure for complex cases on a permanent basis.

Mr. Federhar spoke about the filing fee fund and the need to ensure the money stays in the fund for its intended purposes, i.e., funding law clerks, equipment, and CLE opportunities for the judges to make the program first rate.

Mr. Cardenas stated the need to develop a process for when there are openings for cases, i.e., a waiting list. Mr. Federhar agreed there is a need to cast the net a little wider and broaden the program. Judge Davis stated the need for flexibility, but still look at improvements. He noted he supports the proposal.

A motion was made and seconded to support the five recommendations and the filing of a rule petition seeking adoption of the rules of procedure for complex cases on a permanent basis.

**MOTION: To support the five recommendations and the filing of a rule petition seeking adoption of the rules of procedure for complex cases on a permanent basis.** Motion was seconded and passed. AJC 2010-46.

### **Guilty/No Contest Pleas by Mail in Limited Jurisdiction Courts**

Judge Antonio Riojas, Jr., Chair of the Committee on Limited Jurisdiction Courts, presented a proposed rule amendment to Rule 17.1 (“Pleading by defendant”) of the Rules of Criminal Procedure which would authorize the limited jurisdiction courts to accept pleas of guilty or no contest to misdemeanors and petty offenses by mail. Judge Arkfeld suggested that the instructions on Page 9, where it asks for a state bar number, that it should be made clear that it must be an Arizona lawyer.

A motion was made and seconded to approve the filing of the rule petition to amend Rule 17.1 of the Rules of Criminal Procedure as presented with the amendment to clarify in the instructions on Page 9 that it must be an Arizona lawyer.

**MOTION: To approve the filing of the rule petition to amend Rule 17.1 of the Rules of Criminal Procedure as presented with the amendment to clarify in the instructions on Page 9 that it must be an Arizona lawyer.** Motion was seconded and passed. AJC 2010-47.

### **Rule Petition for Revisions to SCR 124/Accompanying e-Filing Standards Document**

Mr. Stewart Bruner, Strategic Planning Manager, Information Technology Division of the AOC, and Melinda Hardman, Court Services Division representative, briefed the Council regarding the potential revision of Supreme Court Rule 124 and developing necessary technical requirements to accompany the rule in order that a formal rule petition can be filed by the January 2011 deadline. Vice Chief Justice Hurwitz noted that once the rule petition is approved, relevant administrative orders can be rescinded as needed.

Judge Kearney asked if the new rules dovetail with the rules dealing with sensitive data. Ms. Hardman indicated she would look into this issue. Judge Kearney added the language in G.4 doesn’t make any sense, i.e., if a pro per needs to try to get everyone else on their side to agree to a filing, this doesn’t address the fact that sometimes the position they are taking isn’t the same position that everyone else is taking. Justice Hurwitz stated this is the type of area that requires inventive thinking.

Additional discussion took place regarding the proposed language in Section E. The Chair reminded the members that the Committee is only seeking approval to file the rule petition, and once the rule petition is filed, comment will be taken. A motion was made and seconded to recommend approval that a rule petition be filed by January 10, 2011 requesting revisions to Rule 124, Rules of the Supreme Court of Arizona. Mr. Byers suggested that the comment period be extended until April 2011. Vice Chief Justice Hurwitz stated he will present the rule petition and comments at a Commission on Technology meeting before going to the full Court.

**MOTION: To approve the filing of the rule petition and proposed revisions to Rule 124, Rules of the Supreme Court of Arizona, as presented, and approve, in concept, the technical filing standards document as presented.** Motion was seconded and passed. AJC 2010-48.

### **Report from the Ad Hoc Committee on Rules of Evidence**

Vice Chief Justice Andrew Hurwitz, Chair of the Ad Hoc Committee on Rules of Evidence provided background information on the Committee and progress to date. Justice Hurwitz noted the Committee decided to send two alternatives to the Court containing reports from the people on the Committee and their various views. He stated the rule petition, along with a Committee report, will be posted and circulated for comment by the beginning of January. Justice Hurwitz noted it is fair to say the only controversy was with the expert witness part and to expect great controversy regarding this issue. Justice Hurwitz stated there is no need for additional meetings, but one of their recommendations is to put together a permanent committee on the state rules of evidence that would meet routinely and consider what changes have been adopted at the federal level and whether they should be adopted at the state level, in addition to filtering rule petitions for the Court and providing comment.

### **Adult Probation Update and Outcomes**

Ms. Kathy Waters, Director of the Adult Probation Services Division of the AOC, presented information on probation updates and reduction of revocation outcomes, i.e., evidence-based practice. Ms. Waters reported staff at all 15 county probation departments have been trained on the new codes and have moved to new evidence-based principles in supervision. Ms. Waters referred the Council to the Safe Communities Act publication that reports out successes. She noted the Act has reduced revocations to the Department of Corrections since 2008 by 29%, and 1,800 people did not go to prison.

Ms. Hunter suggested capturing the attention of a joint judicial or government committee session and sharing this presentation so legislators understand the importance and significance of these numbers where the budget is concerned. She stated it's important to get this message out there to show that Arizona is doing something right with regards to this branch of government.

### **Call to the Public/Adjourn**

The Chair made a call to the public; there was none.

A motion was made to adjourn the meeting.

The meeting adjourned at 3:05 p.m.