

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: July 19, 2016

Members attending: Don Bivens (Chair), Hon. Dawn Bergin, Ray Billotte by his proxy Phil Knox, Hon. Robert Brutinel, Roopali Desai, Veronika Fabian, Jodi Feuerhelm, Glenn Hamer, Andrew Jacobs, Dinita James, Hon. Michael Jeanes, Jack Jewett, William Klain, Mark Rogers, Hon. Peter Swann, Hon. Timothy Thomason, Hon. Patricia Trebesch, Steven Twist by his proxy Christine Martin, David Weinzweig

Absent: Hon. Jeffery Bergin, Krista Carman, Hon. Charles Harrington, Stephen Montoya, Michael O’Connor, Geoff Trachtenberg

Guests: Shelley Spacek Miller (by telephone), Brittany Kaufman (by telephone), Janell Adams, Alan Sparrow, Julee Bruno

Staff: Jennifer Albright, Mark Meltzer, Sabrina Nash

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the sixth Task Force meeting to order at 10:02 a.m. He introduced guests on the telephone and the proxies. He advised that Mr. Jacobs’ workgroup would present its recommendations after two preliminary presentations. First, he asked members to review draft minutes of the Committee’s June 14, 2016 meeting.

Motion: A member moved to approve the June 14, 2016 draft meeting minutes, which was followed by a second, and the motion passed unanimously. **CJRC-006**

2. Remarks from Ms. Adams. Members of the legal community have contacted the Chair concerning status of the Committee’s work. The Chair has encouraged those individuals to contact the respective workgroup chairs. He also invited Janell Adams, an attorney at Bowman and Brooke who was involved in the 2015 federal rules amendments, to address the Committee today. Ms. Adams made these points:

1. *Rules 26 and 26.1:* She noted that the Committee’s draft of Rule 16 mentions “proportionality.” Because proportionality is central to disclosure and discovery, she suggested that draft Rules 26 and 26.1 also include express references to this concept.
2. *Rule 34:* She disagreed with an amendment to federal Rule 34, mirrored in the Arizona draft of this rule, which requires an objection to a request for production to state whether the responding party is withholding responsive materials. Especially with multinational clients, it is impractical to conduct a worldwide search for what might exist before interposing an objection that a request is overly broad. She suggested the adoption of language similar to

what is in a comment to federal Rule 34, which allows counsel to limit a response about withheld documents to those counsel knows to exist.

3. *Form of production:* Ms. Adams believes a rule that allows production of documents in native form is problematic. She stated that this inhibits Bates stamping and subjects documents to alteration. Although production in native form may be best for some documents, such as those in Excel, she suggested that the rule not require production in native format.
4. *Rules 8 and 36:* Mr. Jacobs' current drafts of these rules preclude a party from providing responses such as "the document speaks for itself." Ms. Adams suggested that just as the rules do not include scripts for a complaint, the rules should not script answers or responses to requests to admit.

The Chair thanked Ms. Adams for her comments, and requested that Mr. Jacobs' workgroup give them further consideration when it reconvenes.

3. Presentation by Mr. Sparrow concerning "Wendell." Mr. Sparrow is a specialist with the Education Technologies Unit of the Education Services Division of the Administrative Office of the Courts ("AOC"). The Chair asked Mr. Sparrow to provide an overview of the "Wendell" judicial resource pages on the Arizona Judicial Education Network ("AJIN"). Mr. Sparrow explained that Wendell is an informational website for Arizona judges. It is a site "by judges and for judges" that includes informational as well as educational materials. AJIN, which is the judicial branch intranet site, is the primary portal for users to access Wendell. Judges may submit materials to Wendell, and a publications editorial advisory board determines which of those submissions will appear on the site. The site also includes materials prepared by the Education Services Division, the State Bar, and others. The site contains bench books, recommended jury instructions ("RAJI's"), scholarly articles, computer based training, video training, and a roster of retired judges available for call back duty.

Wendell currently is not searchable, but the Education Services Division is considering ways of adding this functionality. Wendell is not accessible by the public, but the Education Services Division will make some of the materials available on request. In response to a question from a member, Mr. Sparrow suggested it might be possible to design a corresponding resource site for the public. Mr. Sparrow also advised the site includes updates provided by contributors. The Chair thanked Mr. Sparrow for his informative presentation to the Committee.

4. Workgroup presentation on case management reform. Before Mr. Jacobs began his presentation, the Chair asked members to consider which of the workgroup recommendations Committee members could agree on today. Any agreement would be subject to reconsideration and modification after presentations by other workgroups

at the August meeting, but these agreements would be a useful foundation on which the Committee can proceed.

Mr. Jacobs reminded members that the workgroup is proposing case management “reform.” The workgroup’s reform proposal follows its review of the 2015 federal rule amendments and reports from IAALS and the CCJ, as directed by the Chief Justice. The core premise of these materials is that litigation is becoming “supersized,” and that it should be “rightsized.” Mr. Jacobs reviewed the cultural context of litigation in 2016, and compared it to the context that existed in 1938, the year of adoption of the federal civil rules. Litigation costs now, particularly those associated with discovery, are spiraling upward. Meanwhile, the number of civil filings is down, resulting in lawyers spending more time on discovery in their remaining cases. Engaging in discovery, rather than conducting trials, has become the objective of many lawyers, but discovery is a means for resolving cases, not an end to itself. Costs are often not proportional to what is at stake in the litigation, and avoiding costs rather than securing decisions on the merits is often the motivation for case resolution. With increased litigation costs, more parties are now self-represented, and these parties have economic disadvantages against opposing parties represented by counsel. Above all, and as noted in the IAALS report, proportionality should be the most important principle applied to discovery.

Mr. Jacobs noted the worthy goal stated in Rule 1: that the purpose of the rules is to promote the “just, speedy, and inexpensive” resolution of civil cases. These objectives should be in balance and should coexist. To further all of the objectives, rather than just one or two, Mr. Jacobs is proposing a system of differentiated case management. He alternatively refers to the proposal as “tripartite case management,” “triage” of cases, or simply three case “tiers.” The first tier, for complex cases, already exists under Rule 8(h). Another pathway already exists under current Rule 16(b) for “expedited” cases.

The workgroup believed that Utah’s system of tiers, that differentiates cases based on the amount in controversy, provides several useful components for a new Arizona case management model, but not all components. The workgroup supported Utah’s inclusion of “clients” in its overall case management scheme. The workgroup also favored aspects of Utah’s approach that requires communication and information sharing between counsel and clients and between adverse parties. But the workgroup believed there were ways in which Arizona could improve the Utah system. The workgroup therefore recommended:

1. Assigning tiers through a participatory rather than a default process;
2. Encouraging parties to meet early and to try to agree on the appropriate tier;
3. Using qualitative case attributes rather than inflexible qualitative (monetary) descriptions for determining tier assignments;

4. Empowering parties by allowing them to move to a new tier when appropriate;
5. Empowering courts by providing them with discretion to assign a case to a tier, or to a different tier;
6. Using the amount in controversy as a tier determinant only in the event that neither the parties nor the court selects a tier.

In addition, the workgroup recommends that each tier permit more discovery than Utah's corresponding tier, on the belief that more generous, but not excessive, pretrial discovery facilitates case resolution by settlement or by pretrial motions. Therefore,

7. Arizona's Tier 1 would allow 5 hours of deposition for each side (compared to 3 hours for Utah); 5 requests for admission (versus none for Utah); and 10 interrogatories (versus 5 for Utah);
8. The proponent of discovery is relieved of the burden of showing it is relevant and proportional;
9. Over-the-tier-limit discovery is permitted if it is "necessary and proportional," versus Utah, which allows it only on a showing of "extraordinary" circumstances.

Another feature of the workgroup's proposal is a strengthened Rule 37. Mr. Jacobs cited a 2009 survey of Arizona's bench and bar, which indicated that 58% of respondents thought that judges enforced disclosure rules only "occasionally" or "almost never." The workgroup's proposed modifications to Rule 37 would, among other things:

10. Allow the court the authority to shift fees in discovery and disclosure matters;
11. Require parties to explain why they made late disclosure or production;
12. Require the parties to submit a report at the conclusion of a case concerning how much discovery they utilized;
13. Include a comment that "imposition of sanctions and incentivizing robust early disclosure is a centerpiece" of these disclosure and discovery reforms.

The Chair invited questions and comments, which included the following.

1. There appears to be a disconnection between the revisions to Rules 8(h) and 36, and the provisions of Rule 11. Mr. Jacobs agreed that the workgroup intends to review provisions of other rules and harmonize them with the rule amendments he presented today.
2. There appears to be a disparity between the order of factors listed in Rules 16(a) and 26(b)(1), and the workgroup should give thoughtful consideration to the order of these factors.

3. There may be a discrepancy between when parties can stipulate to discovery beyond tier limits, and when court approval is required to exceed discovery limits. Mr. Jacobs explained that parties can stipulate to exceed discovery limits at the inception of a case, but court approval for additional discovery is required when the parties reach the applicable limit.
4. It may be desirable to allow for self-executing stipulations when discovery reaches the limit, that is, a stipulation that did not require court approval. For example, the parties might agree that one more deposition might be useful, and they could file a stipulation confirming that agreement, but entry of a court order approving the stipulation should not be required and might necessitate that judges micromanage cases.
5. Why must the parties first reach the limit of discovery before they can file a stipulation to exceed that limit? Parties are often aware well before that point that they will need to exceed the limit. The rule should not require parties to enter a “panic” phase of reaching the limit before seeking relief.
6. Existing Rule 16 requires parties to file a joint report and a proposed scheduling order. Would it be appropriate to synchronize filing of the “Report of Early Meeting” under proposed Rule 8(h) with the joint report? The workgroup considered “marrying” these two filings, but decided against it. It is impractical for parties to gather the full information required in a Rule 16 within the short time limit (20 days after a defendant files an answer) set by Rule 8(h) for the filing of Report of Early Meeting. Also, the Rule 8(h) report is brief, and serves the function of early triage, whereas the Rule 16 report is content rich and typically follows the exchange of disclosure statements.
7. There were concerns with the deposition time allowed for the lower tiers, specifically that parties may not know when they agree to a tier how much time they will need for meaningful depositions. One suggestion was that the tiers include a limit based on the number of deposed parties or witnesses, rather than using an hour-based limit. Another suggestion was to add the number-of-witnesses limit as an alternative to the hour limit. If the parties cannot take adequate and meaningful depositions, a significant number of cases might not be amenable to resolution by motion and might require a more expensive resolution by trial.
8. Could the topics in a Rule 8(h) report be components of a Rule 16 report, rather than a separate filing? Mr. Jacobs’ emphasized that the value of the Rule 8(h) report is early triaging of a case and reducing case persistence. Although it might be possible to reduce the time for filing Rule 16 reports, even a reasonable and significant reduction of that time would not be sufficient to fulfill the Rule 8(h) objective of early triage.

9. There were concerns with a requirement in proposed Rule 26(e)(4)(A), when presenting stipulations for discovery beyond tier limits, that “each party has reviewed and approved a discovery budget.” The concerns included that the requirement was invasive and vague, and requiring counsel to produce these budgets involves additional cost to the client. Also, should the civil rules specify ethical duties? The requirement that counsel communicate with the client is already a requirement of Ethical Rule 1.4. A member suggested that the proposed rule simply require that counsel certify that he or she has discussed the additional “costs” (not “budget”) with the client.
10. A question arose under Rule 26(e)(3), which sets discovery limits within every tier for “each side.” Does “side” have the same meaning in this rule as it does in Rule 42, or should it have a different meaning? It is not always possible to align the discovery needs of parties based on which “side” of the case they appear. Furthermore, the discovery tiers implicate due process, and that is a concept that applies to “parties” rather than to “sides.” The workgroup should consider further whether the discovery limit should be for “each party,” or if not, whether the rule needs to define further the meaning of “each side.”

The Chair and the members commended the workgroup’s most recent draft. The Chair then asked for a motion.

Motion: A member moved to approve conditionally the workgroup’s recommendations. The condition is that the recommendations will require further refinement and integration with other recommendations included in the Committee’s final report. Another member made a second to the motion, and it passed unanimously. CJRC-007

Action: The Chair directed Mr. Jacob’s workgroup to revise the workgroup’s proposal consistent with the discussion at today’s meeting, and to do a follow-up presentation at the Committee’s August meeting.

5. **Workgroup presentation on court operations reform.** Ms. Desai presented on the topics of judicial profiles and preferences, and judicial resources.

Ms. Desai observed that some judges have provided their profiles and preferences on their local websites, and others have not. Some of the profiles and preferences have limited information, while others are robust. The workgroup has prepared a template of items judges may wish to include in their list of preferences. The workgroup used one of the existing judge’s preferences on the Maricopa superior court website as a model. Ms. Desai noted that especially in Maricopa County, where there are about a hundred judges subject to triennial rotations, it is important that litigants have information on how to

proceed in a particular judge's division, or to decide intelligently whether to request a change of a particular judge. The Committee should consider whether profiles and preferences should be available on a statewide website or on local sites. The AOC is developing a new statewide website ("azcourthelp") to assist self-represented litigants in navigating through the legal process and the courthouse, and this might be an appropriate repository for profile and preference information. One suggestion was that preference templates include a section on how judges receive and process requests for emergency orders.

Ms. Desai added that about 85% of Arizona's superior court judges rotate assignments during their careers. Primary training sources are new judge orientation ("NJO") and the annual Judicial Conference, but this training is often general in nature and remote in time from when judges need precise information. Ms. Desai's workgroup intends to recommend content specific and immediately available training. It does not intend to prepare or recommend particular content, although it might suggest adding items on the Wendell site, for example, certain rulings or other information or resources that would be useful for judges on a civil calendar. The workgroup will present its full recommendations at the August meeting.

6. Roadmap; call to the public; adjourn. The Committee's next meeting is set for August 23, 2016. The Chair advised that given the anticipated scope and extent of presentations at that meeting, it might begin sooner or conclude later than past meetings. He requested that workgroup chairs provide their materials to staff as far in advance of the meeting as possible, and that the workgroup chairs distinguish matters on which there is no controversy from those that require decision by the full Committee. If the Committee cannot complete its business on August 23, it might be necessary to schedule another meeting between August 23 and the final meeting, which is set for September 13.

There was no response to a call to the public. The meeting adjourned at 12:21 p.m.