Committee on Civil Justice Reform ("CJRC")

Meeting Agenda

Tuesday, August 23, 2016
10:00 AM to 2:30 PM

State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 6252

Item no. 1	**Call to Order** **Introductory comments**	*Mr. Bivens, Chair*
Item no. 2	**Approval of July 19, 2016 meeting minutes**	*Mr. Bivens*
Item no. 3	**Discussion of workgroup proposals and a draft report to the Arizona Judicial Council** - **Case management reform** - **Discovery reform** - **Compulsory arbitration reform** - **Court operations reform**	 *Mr. Jacobs* *Ms. Feuerhelm* *Judge Harrington* *Ms. Desai*
Item no. 4	**Roadmap** - **Committee's next meeting date: Tuesday, September 13**	*Mr. Bivens*
Item no. 5	**Call to the Public** **Adjourn**	*Mr. Bivens*

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Jennifer Albright at (602) 452-3453 or Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Julie Graber at (602) 452-3250. Please make requests as early as possible to allow time to arrange accommodations.

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. <u>Presentation by Mr. Sparrow concerning "Wendell."</u> 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. <u>Workgroup presentation on case management reform</u>. Before Mr. Jacobs began his presentation, the Chair asked members to consider which of the workgroup recommendations Committee members could agrees 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. <u>Workgroup presentation on court operations reform</u>. 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.

DRAFT DATE AUGUST 17, 2016

Rule 26.3 Dispute Resolution Procedures Regarding Preservation Requests

(a) Generally; Scope. This rule governs the resolution of disputes concerning the scope of a party or nonparty's duty to preserve electronically stored information.

(b) Definitions. For purposes of this rule:

(1) A "preservation request" is a written notice to a party or nonparty requesting that the nonparty preserve electronically stored information for possible use in pending or anticipated litigation.

(2) A "nonparty" is a person who receives a preservation request under this rule and is not a party to a pending action in which the request is made. The preservation request may, but need not, relate to anticipated litigation against the nonparty.

(3) A "requestor" is a person who makes a preservation request.

(4) A "petitioner" is a nonparty who files a petition under Rule 26.3(f).

(5) A "respondent" is a requestor who has been identified as a person expected to oppose a petition filed under Rule 26.3(f).

(c) Objections. A party or nonparty receiving a preservation request may serve a written objection on the requestor. Grounds for objection may include that there is no duty to preserve electronically stored information under Rule 37(g)(1), or that the requested preservation would impose an undue burden or expense. A party or nonparty does not waive an objection to a preservation request by failing to object in writing under this rule, but the dispute resolution procedures in Rule 26.3(e) and (f) only apply if a written objection is served.

(d) Duty to Confer. If a written objection is served, the objecting party or nonparty and the requestor must promptly confer and attempt to reach agreement on the reasonable scope of the party or nonparty's obligation to preserve electronically stored information, taking into account the limitations of Rule 37(g)(1).

(e) Dispute Resolution Procedures—Pending Action.

(1) ***Parties.*** If the parties to a pending action are unable to satisfactorily resolve any dispute regarding the preservation of electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and a separate Rule 7.1(h) certification.

(2) ***Nonparties.*** If a preservation request is made to a nonparty in connection with an action pending in superior court, the nonparty may move for a Rule 26(c) protective order in the action, or may file a separate petition under Rule 26.3(f).

(f) Dispute Resolution Procedures—No Pending Action.

(1) ***Content of Petition.*** A nonparty may file a verified petition, asking the court to determine the existence or scope of any duty to preserve electronically stored information. The petition must be titled "Verified Rule 26.3 Petition." Any petition must:

(A) be accompanied by a Rule 7.1(h) good faith consultation certificate;

(B) identify, by name and address, the respondent expected to oppose the petition;

(C) identify—in separately numbered paragraphs—each issue on which the petitioner and the respondent were unable to reach agreement, and state the petitioner's position on each issue;

(D) if the petitioner contends that a preservation request imposes an undue burden or expense, describe the burden and provide an estimate of the expense likely to be incurred; and

(E) state the specific relief requested.

(2) ***Service of Petition; Response; Reply.*** The petition must be served on the respondent in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable. The petition must be accompanied by a notice in the form set forth in Rule 84, Form 15. Proof of service must be made as provided in Rule 4(g). The requestor must serve and file any response within 20 days after service is complete, if service is made in the State of Arizona, or within 30 days after service is complete, if service is made outside the State of Arizona. The response may be in the form of a memorandum. The petitioner may filed a reply memorandum within 5 days after service of any response. The page limitations of Rule 7.1(a)(3) apply to any response or reply filed under this rule.

(3) ***Applicable Procedures; Hearing.*** The petition will be decided under Rule 7.1's procedures governing motions. Unless the court orders otherwise for good cause, no discovery is permitted. Unless the petitioner and the respondent stipulate otherwise, the court must hold a hearing on the relief the petition seeks.

(g) Determination. The court may issue orders limiting a party or nonparty's preservation obligation based on the factors set forth in Rule 26(b)(1)(B) and 37(g). If the court finds that preservation would impose an undue burden or expense on the petitioner, preservation may be ordered only on such conditions as are just, which may include requiring the requestor to pay some or all of the reasonable costs of preservation. Reasonable expenses

incurred in connection with a proceeding under this rule, including attorney's fees, may be awarded as allowed by Rule 37(a)(5).

(h) Effect of Order. A party or nonparty who complies with a preservation order obtained under this rule is deemed to have taken reasonable steps to preserve electronically stored information under Rule 37(g).

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[Rule 37 from the Task Force petition is repeated verbatim below, to provide context for the preservation portions of new Rule 26.3]

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(g) Failure to Preserve Electronically Stored Information

(1) ***Duty to Preserve.***

(A) *Generally.* A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) *Reasonable Anticipation.* A person reasonably anticipates an action's commencement if:

(i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or

(ii) it seriously contemplates commencing an action or takes specific steps to do so.

(C) *Reasonable Steps to Preserve.*

(i) A party must take reasonable steps to prevent the routine operation of an electronic information system or policy from destroying information that should be preserved.

(ii) Factors that a court should consider in determining whether a party took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system or the consistent application of a document retention policy, the

timeliness of the party's actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy.

(2) ***Remedies and Sanctions.*** If electronically stored information that should have been preserved is lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2). If the information cannot be restored or replaced through additional discovery, the court:

(A) upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or

(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:

(i) presume that the lost information was unfavorable to the party;

(ii) instruct the jury that it may or must presume the information was unfavorable to the party; or

(iii) upon also finding prejudice to another party, dismiss the action or enter a default judgment.

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Form 15: Required Notice re: Rule 26.3 Verified Petition Seeking Rule 26.3 Determination Regarding Preservation of Electronically Stored Information

Notice Regarding Verified Rule 26 Petition

Regarding Preservation of Electronically Stored Information

THIS IS AN IMPORTANT NOTICE REGARDING YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY. IF YOU DO NOT UNDERSTAND IT, CONTACT A LAWYER FOR HELP.

Nature of Proceeding. You have been served with a Petition under Rule 26.3 of the Arizona Rules of Civil Procedure. The Petition asks the court to decide issues concerning the petitioner's obligation to preserve electronically stored information for possible use in pending or anticipated litigation. You have been served with the Petition and this Notice because you are a person who requested that the petitioner preserve electronically stored information, and the petitioner has identified you as a respondent who may oppose the Petition.

Your Obligation to Respond to the Petition. You are required to file a written response to the Petition with the court, and to mail or hand-deliver a copy of your response to the petitioner, within the time required by Rule 26.3 of the Arizona Rules of Civil Procedure. IF YOU ARE SERVED WITHIN THE STATE OF ARIZONA, YOUR RESPONSE MUST BE FILED WITHIN 20 DAYS AFTER YOU ARE SERVED, NOT COUNTING THE DAY OF SERVICE. IF YOU ARE SERVED OUTSIDE THE STATE OF ARIZONA, YOUR RESPONSE MUST BE FILED WITHIN 30 DAYS AFTER YOU ARE SERVED, NOT COUNTING THE DAY OF SERVICE. WITHIN THE SAME TIME PERIOD, YOU MUST ALSO MAIL OR HAND-DELIVER A COPY OF YOUR RESPONSE TO THE PETITIONER

AT THE ADDRESS INDICATED IN THE UPPER LEFT-HAND CORNER OF THE VERIFIED PETITION.

Effect of Failing to Respond. If you do not respond to the Petition within the time required, the court may issue orders and grant relief in your absence. Any such orders or relief granted by the court in connection with the Petition may impact your legal rights. Examples of the types of orders that the court may issue in ruling on the Verified Petition are described below.

Court's Orders on Petition. In ruling on the Petition, the court may make orders as allowed by Rule 26.3 of the Arizona Rules of Civil Procedure, including:

(a) determining the existence and scope of the petitioner's obligation to preserve electronically stored information, including limiting the scope of the petitioner's obligation or finding that the petitioner has no obligation to preserve electronically stored information;

(b) determining that the preservation of the electronically stored information at issue would impose an undue burden or expense on the petitioner;

(c) imposing limits or conditions on any obligation of the petitioner to preserve electronically stored information, which may include requiring you (the respondent), to pay some or all of the petitioner's reasonable costs of preserving the information; and

(d) awarding reasonable expenses as allowed by Rule 26.3(g) of the Arizona Rules of Civil Procedure, which may include an award of attorneys' fees, to the party who prevails in connection with the Verified Petition.

Effect of Preservation Order. A preservation order issued in connection with a Petition may impact your legal rights. A petitioner complying with a preservation order obtained in this proceeding is deemed to have taken reasonable steps to preserve electronically stored information as required by Arizona Rule of Civil Procedure 37(g). *See* Rule 26.3(h) of the Arizona Rules of Civil Procedure.

DRAFT DATE 8/17/2016

Proposed, and interrelated, rules regarding ESI discovery and disclosure, including:

(1) Proposed revisions to Rule 26, highlighted in yellow **(and in bold)** below, impacting Rule 26(b)(1)(C) (new); Rule 26(b)(2)(A), (B) and (C); Rule 26(b)(6); and Rule 26(c)(1). Other than the highlighted material, the draft of Rule 26 below is taken from the pending Task Force proposal.

(2) Proposed revisions to Rule 26.1(c)(1) and (4) (Disclosure of Electronically Stored Information). Other than the highlighted material, the draft of Rule 26.1 below is taken from the pending Task Force proposal.

(c) Proposed New Rule 26.4 governing disputes with respect to the discovery and disclosure of electronically stored information.

(d) Proposed revisions to Rule 37 to mirror new language proposed in Rule 26(b)(2).

Rule 26. General Provisions Governing Discovery

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(b) Discovery Scope and Limits. Unless the court orders otherwise in accordance with these rules, the scope of discovery is as follows:

(1) Generally.

(A) *Scope.* Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter of the pending action, including matters relevant to: (i) the claim or defense of any party; (ii) the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things; and (iii) the identity and location of persons having knowledge of any discoverable matter. If the information appears reasonably calculated to lead to the discovery of admissible evidence, it is not a ground for objection that the information, though relevant, would be inadmissible at trial.

(B) *Limits on Discovery.* Discovery is impermissible if it: (i) is unreasonably cumulative or duplicative; (ii) can be obtained from another source that is more convenient, less burdensome, or less expensive; (iii) seeks information that the party has had ample opportunity to obtain; or (iv) is unduly burdensome or

expensive given the needs of the action, the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, and the parties' resources.

(C) ***Contractual Limits.*** **In determining the permissible scope of discovery, the court must enforce any pre-litigation agreement limiting a party or person's obligation to preserve information, or to provide disclosure or discovery, so long as such agreement was freely negotiated and is otherwise enforceable under applicable law.**

(2) ***Specific Limits on Discovery of Electronically Stored Information.***

(A) *Generally.* A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense, **the good-faith routine operation of an electronic information system, or the consistent application of a document retention policy.** If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause, considering the limits of Rule 26(b)(1)(B). The court may specify conditions for the disclosure or discovery.

(B) ***Specific Limits.*** **A party is not entitled to obtain discovery of electronically stored information that is sought for purposes unrelated to the merits of the case. A party is not entitled to image an opposing party's data sources, inspect an opposing party's data storage devices, or to discover electronically-stored information that would require restoration of data through forensic means, unless the court finds: (1) that the information sought is relevant to a claim of fraud or other intentional misconduct; (2) that restoration is reasonably required to address prejudice arising from spoliation of evidence or a party's failure to comply with its obligation to preserve evidence under Rule 37(g); or (3) other good cause.**

(C) ***Disputes*****. Disputes concerning the disclosure or discovery of electronically stored information are governed by Rule 26.4. Disputes concerning the preservation of electronically stored information are governed by Rule 26.3.**

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(6) ***Claims of Privilege or Protection of Work-Product Materials*****.**

(A) *Information, Documents, or Electronically Stored Information Withheld.* When a party withholds information, a document, or electronically stored information in response to a written discovery request on the claim that it is privileged or

subject to protection as work product, the party must promptly identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that—without revealing information that is itself privileged or protected—will enable other parties to assess the claim. **The parties may stipulate to alternate requirements to reduce the burden and expense of providing the information required by this rule, such as identification by category or excluding certain categories of documents. A party seeking to modify the requirements of this rule must confer with the opposing party in an attempt to reach agreement. Disputes must be presented at the Rule 16(d) Scheduling Conference, or by joint motion accompanied by a good faith consultation certificate under Rule 7.1(h).**

(B) *Inadvertent Production.* If a party contends that a document or electronically stored information subject to a claim of privilege or of protection as work-product material has been inadvertently produced in discovery, the party making the claim may notify any party who received the document or electronically stored information of the claim and the basis for it. After being notified, a party: (i) must promptly return, sequester, or destroy the specified document or electronically stored information and any copies it has; (ii) must not use or disclose the document or electronically stored information until the claim is resolved; (iii) must take reasonable steps to retrieve the document or electronically stored information if the party disclosed it before being notified; and (iv) may promptly present the document or electronically stored information to the court under seal for a determination of the claim. The producing party must preserve the document or electronically stored information until the claim is resolved.

(c) Protective Orders.

(1) ***Generally.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or alternatively, on matters relating to a deposition, the court in the county where the deposition will be taken. **A person receiving a request to preserve electronically stored information may move for a protective order in the court where the action is pending, as provided in Rule 26.3(e)(2).** Subject to Rule 26(c)(4), the court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the discovery;

(B) specifying terms and conditions, including time and place, for the discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on terms that are just, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses on a motion for a protective order.

***

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose; Disclosure Categories. Within the times set forth in Rule 26.1(d) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

***

(8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;

(9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and

***

(b) Disclosure of Hard-Copy Documents. Subject to the limits of Rule 26(b)(1)(B) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

(c) Disclosure of Electronically Stored Information.

(1) ***Duty to Confer***. When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, **taking into account the limitations of Rule 26(b)(1) and (2). At the conference, each party must have at least one representative present who is reasonably familiar with the party's systems with respect to electronically stored information. The following topics should be addressed, as applicable:**

(A) the location and types of systems that are reasonably likely to contain electronically stored information within the permissible scope of discovery;

(B) whether it is appropriate to conduct discovery of electronically stored information in phases or stages as a method of reducing costs and burden, and if so, what the parties will include in the first phase;

(C) sources of electronically stored information that are less likely to contain discoverable information, and from which the parties will postpone or avoid discovery;

(D) search protocols or methods that will be used to identify discoverable information and filter out information not subject to discovery;

(E) the form in which the information will be produced;

(F) sharing or shifting of costs incurred by the parties for disclosing and producing the information;

(G) agreements on the preservation of electronically stored information; and

(H) whether the parties will enter a stipulation or seek an order under Rule 502(d) of the Arizona Rules of Evidence to address inadvertent production of privileged information.

(2) *Production of Electronically Stored Information.* Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.

(3) *Presumptive Form of Production.* Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(4) *Resolution of Disputes.* If the parties are unable to satisfactorily resolve any dispute regarding the disclosure of electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and the separate certification from all counsel required under Rule 7.1(h). **Rule 26.4 governs any such motion.**

***

[NEW] Rule 26.4. Dispute Resolution Procedures Regarding Disclosure and Discovery of Electronically Stored Information.

(a) Generally. This rule governs disputes regarding the disclosure or discovery of electronically stored information arising under Rule 26, 26.1, 26(c), 37, or 45.

(b) Duty to Confer; Other Requirements. Before bringing any motion regarding the discovery or disclosure of electronically stored information, the movant must attempt to resolve the dispute by good faith consultation with the opposing party or person. Any motion must be accompanied by a Rule 7.1(h) good faith consultation certificate. A party or person contending that the disclosure or discovery of electronically stored information should be disallowed or limited because of undue burden or expense must provide an affidavit describing the burden and estimating the expense that will be incurred.

(c) Standards. If the party or person opposing discovery or disclosure contends that sources of electronically stored information are not reasonably accessible because of undue burden or expense as provided in Rule 26(b)(2), the court must determine: (1) whether the information sought is within the permissible scope of discovery, considering the limits of Rule 26(b)(1); (2) whether the party or person opposing the discovery has established that it would incur undue burden or expense; and, if so (3) if good cause is shown for the requested discovery or disclosure. The court may specify conditions to address the burden or expense of the discovery or disclosure, including ordering the sharing or shifting of costs. The following standards govern the court's determination of these issues:

(1) ***Burden or Expense—Factors.*** In addition to the factors in Rule 26(b)(1), in determining whether the party or person opposing the discovery or disclosure will incur undue burden or expense, the court must consider: (A) the estimated expense of the discovery or disclosure; (B) the anticipated disruption of the responding party or person's normal business operations if the discovery or disclosure is ordered; (C) the difficulty and expense of any necessary review to separate confidential or privileged material; (D) whether the difficulty or expense of accessing the requested information is attributable to any violation of Rule 37(g) or to other purposeful action by the responding party or person to shield information from discovery; and (E) the party or person's interest in the action.

(2) ***Good Cause—Factors.*** In addition to the factors in Rule 26(b)(1), in determining whether good cause is shown, the court may consider: (A) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (B) the extent to which the request has been

narrowly tailored to discover relevant information; (C) the importance of the information to a fair resolution on the merits; and (D) the parties' resources.

(d) ***Specifying Conditions.*** The court may impose conditions on the discovery or disclosure that include: (A) issuing any appropriate orders under Rule 26(c); (B) requiring the party seeking discovery to pay some or all of the reasonable expenses that the responding party will incur in complying with the requested discovery or disclosure, which may include the reasonable fees charged by counsel, consultants, and vendors; and (C) reimbursing the responding party or person for disruption to the responding party or person's normal business operations, to the extent such cost is quantifiable and warranted by the facts and circumstances.

[Rule 37 from the Task Force petition is repeated verbatim below, to provide context for proposed new Rule 26.3]

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(g) Failure to Preserve Electronically Stored Information

(1) ***Duty to Preserve.***

(A) *Generally.* A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) *Reasonable Anticipation.* A person reasonably anticipates an action's commencement if:

(i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or

(ii) it seriously contemplates commencing an action or takes specific steps to do so.

(C) *Reasonable Steps to Preserve.*

(i) A party must take reasonable steps to prevent the routine operation of an electronic information system or **document retention** policy from destroying information that should be preserved.

(ii) Factors that a court should consider in determining whether a party took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the

difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system **or the consistent application of a document retention policy**, the timeliness of the party's actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy.

(2) ***Remedies and Sanctions.*** If electronically stored information that should have been preserved is lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2). If the information cannot be restored or replaced through additional discovery, the court:

(A) upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or

(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:

(i) presume that the lost information was unfavorable to the party;

(ii) instruct the jury that it may or must presume the information was unfavorable to the party; or

(iii) upon also finding prejudice to another party, dismiss the action or enter a default judgment.

UPDATED DRAFT DATED 8/17/2016

The redline shows proposed changes to the Task Force's Rule 45 proposal and Form 9. Note: Some of the cross-references to Rule 26 may need to be updated to conform to numbering changes in Work Group #1's proposals.

Rule 45. Subpoena

(a) Generally.

(1) ***Requirements—Generally.*** Every subpoena must:

(A) state the name of the Arizona court from which it issued;

(B) state the title of the action, the name of the court in which it is pending, and its civil action number;

(C) command each person to whom it is directed to do the following at a specified time and place:

(i) attend and testify at a deposition, hearing, or trial;

(ii) produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or

(iii) permit the inspection of premises; and

(D) be substantially in the form set forth in Rule 84, Form 9.

(2) ***Issuance by Clerk.*** The clerk must issue a signed but otherwise blank subpoena to a party requesting it. That party must complete the subpoena before service. The State Bar of Arizona may also issue signed subpoenas on behalf of the clerk through an online subpoena issuance service approved by the Supreme Court.

(b) Subpoena for Deposition, Hearing, or Trial; Duties; Objections.

(1) ***Issuing Court.*** A subpoena commanding attendance at a hearing or trial must issue from the superior court in the county where the hearing or trial is to be held. Except as otherwise provided in Rule 45.1, a subpoena commanding attendance at a deposition must issue from the superior court in the county where the action is pending.

(2) ***Combining or Separating a Command to Produce or to Permit Inspection.*** A command to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

(3) ***Place of Appearance.***

(A) *Trial Subpoena.* Subject to Rule 45(e)(2)(B)(iii), a subpoena commanding attendance at a trial may require the subpoenaed person to travel from anywhere within the state.

(B) *Deposition or Hearing Subpoena.* A subpoena commanding a person who is neither a party nor a party's officer to attend a deposition or hearing may not require the subpoenaed person to travel to a place other than:

(i) the county where the person resides or transacts business in person;

(ii) the county where the person is served with a subpoena, or within 40 miles from the place of service; or

(iii) such other convenient place fixed by a court order.

(4) ***Command to Attend a Deposition—Notice of Recording Method.*** A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(5) ***Objections; Appearance Required.*** Objections to a subpoena commanding attendance at a deposition, hearing, or trial, must be made by timely motion under Rule 45(e)(2). Unless excused from doing so by the party or attorney serving a subpoena, by a court order, or by any other provision of this Rule 45, a person who is properly served with a subpoena must attend and testify at the date, time, and place specified in the subpoena.

(c) Subpoena to Produce Materials or to Permit Inspection; Duties; Objections.

(1) ***Issuing Court.*** If separate from a subpoena commanding attendance at a deposition, hearing, or trial, a subpoena commanding a person to produce designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, must issue from the superior court in the county where the production or inspection is to be made.

(2) ***Electronically Stored Information.***

(A) *Specifying the Form for Electronically Stored Information.* A subpoena may specify the form or forms in which electronically stored information is to be produced.

(B) *Form for Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding may produce it in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the consistent application of a document retention policy. Any such objection must be made in the time and manner provided in Rule 45(c)(6). On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(B) and (b)(2). The court may specify conditions for the discovery. Rule 26.4 applies to any motion to quash, motion for protective order, or motion to compel based on an objection that the discovery of electronically stored information would impose an undue burden or expense.

(3) ***Appearance Not Required.*** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless the subpoena also commands attendance at a deposition, hearing, or trial.

(4) ***Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the usual course of business, or organize and label them to correspond with the categories in the demand.

(5) ~~***Objections.***~~ ***Claiming Privilege or Protection.***

(A) A person withholding subpoenaed information under a claim that it is privileged or subject to protection as work-product material must promptly comply with

Rule 26(b)(6)(A), unless a timely objection is made under Rule 45(c)(6)(A) that providing the information required by Rule 26(b)(6)(A) would impose an undue burden or expense. Unless the court orders otherwise for good cause, a subpoenaing party requesting a privilege log must pay the subpoenaed person's reasonable expenses incurred in preparing the log.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as work-product material, the person making the claim and the receiving parties must comply with Rule 26(b)(6)(B), as applicable.

(6) Objection Procedures; Duty to Confer.

(A) *Form and Time for Objection.*

(i) A person commanded to produce documents, electronically stored information, or tangible things, or to permit inspection, may serve a written objection to producing, inspecting, copying, testing, or sampling any or all of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested, or from sources that are not reasonably accessible because of undue burden or expense, the good faith operation of an electronic information system, or the consistent application of a document retention policy. The objection must state the basis for the objection, and must include the name, address, and telephone number of the person, or the person's attorney, serving the objection.

(ii) The objection must be served on the party or attorney serving the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.

(iii) A person served with a subpoena that combines a command to produce materials or to permit inspection, with a command to attend a deposition, hearing, or trial, may object to any part of the subpoena. A person objecting to the part of a combined subpoena that commands attendance at a deposition, hearing, or trial must attend and testify at the date, time, and place specified in the subpoena, unless excused as provided in Rule 45(b)(5).

(B) *Procedure After Objecting.*

(i) A person objecting to a subpoena to produce materials or to permit inspection need not comply with those parts of the subpoena that are the subject of the objection, unless ordered to do so by the issuing court. The objecting person may move for a protective order or to modify or quash the subpoena.

(ii) The party serving the subpoena may move under Rule 37(a) to compel compliance with the subpoena. The motion must comply with Rule 37(a)(1), and must be served on the subpoenaed person and all other parties under Rule 5(c).

(iii) Any order to compel entered by the court must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(C) ~~*Claiming Privilege or Protection.*~~ *Duty to Confer.* Before bringing any motion to compel, motion to quash, or motion for protective order regarding compliance with a subpoena, the movant must attempt to resolve the dispute by good faith consultation with the opposing party or person. Any motion regarding compliance with a subpoena must be accompanied by a good faith consultation certificate under Rule 7.1(h).

~~**(i)** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as work-product material must promptly comply with Rule 26(b)(6)(A).~~

~~**(ii)** If information produced in response to a subpoena is subject to a claim of privilege or of protection as work-product material, the person making the claim and the receiving parties must comply with Rule 26(b)(6)(A) or, if applicable, Rule 26(b)(6)(B).~~

(~~6~~7) ***Production to Other Parties.*** Unless otherwise stipulated by the parties or ordered by the court, a party receiving documents, electronically stored information, or tangible things in response to a subpoena must promptly make such materials available to all other parties for inspection and copying, along with any other disclosures required by Rule 26.1.

(d) Service.

(1) ***General Requirements; Tendering Fees.*** A subpoena may be served by any person who is not a party and is at least 18 years old. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law.

(2) ***Exceptions to Tendering Fees.*** Fees and mileage need not be tendered when the subpoena commands attendance at a trial or hearing or is issued on behalf of the State of Arizona or any of its officers or agencies.

(3) ***Notice to, and Service on, Other Parties.*** A copy of every subpoena and any proof of service must be served on every other party in accordance with Rule 5(c). If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party at least 5 days before it is served on the person to whom it is directed.

(4) ***Service Within the State.*** A subpoena may be served anywhere within the state.

(5) ***Proof of Service.*** Proof of service may not be filed except as allowed by Rule 5.1(c)(2)(A). Any such filing must be with the court clerk for the county where the action is pending and must include the server's certificate stating the date and manner of service and the names of the persons served.

(e) Protecting a Person Subject to a Subpoena; Motion to Quash or Modify.

(1) ***Avoiding Undue Burden or Expense; Sanctions.***

(A) *Generally.* A party or an attorney responsible for serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and may impose an appropriate sanction. Unless otherwise ordered by the court for good cause, a subpoena may not seek the production of materials that have already been produced in the action or that are available from parties to the action.

(B) *Subpoena to Produce Materials or to Inspect Premises.* Unless otherwise ordered by the court for good cause, the party seeking discovery must pay the reasonable expenses incurred by the subpoenaed person in responding to a subpoena seeking the production of documents, electronically stored information, tangible things, or an inspection of premises. If a person served with a subpoena expects to incur costs other than routine clerical and per-page copying costs as allowed by statute, an advance estimate of those costs must be provided to the subpoenaing party before they are incurred. The court may order payment of costs in advance.

(C) *Sanctions.* The court must impose an appropriate which may include lost earnings and reasonable attorney's fees on a party or attorneyperson who fails to comply with Rule 45(e)(1)(A) and (B).

(2) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court in the county where the case is pending or from which a subpoena was issued must quash or modify a subpoena if it:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel to a location other than the places specified in Rule 45(b)(3)(B);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden. or expense.

(B) *When Permitted.* On timely motion, the superior court in the county where the case is pending or from which a subpoena was issued may quash or modify a subpoena if:

(i) it requires disclosing a trade secret or other confidential research, development, or commercial information;

(ii) it requires disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party;

(iii) it requires a person who is neither a party nor a party's officer to incur substantial travel expense; or

(iv) justice so requires.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(e)(2)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions, including any conditions and limits set forth in Rule 26(c), as the court deems appropriate:

(i) if the party or attorney serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and

(ii) if the person's travel expenses or the expenses resulting from the production are at issue, the party or attorney serving the subpoena assures that the subpoenaed person will be reasonably compensated for those expenses.

(D) *Time for Motion.* A motion to quash or modify a subpoena must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.

(E) *Service of Motion.* Any motion to quash or modify a subpoena must be served on the party or the attorney serving the subpoena. The party or attorney who served the subpoena must serve a copy of any such motion on all other parties.

(f) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. A failure to

obey must be excused if the subpoena purports to require a person who is neither a party nor a party's officer to attend or produce at a location other than the places specified in Rule 45(b)(3)(B).

Form 9. Form of Subpoena

Name:

Address:

City:

State:

Phone:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

_____	)	
Plaintiff	)	Case No.:
	)	
vs.	)	**SUBPOENA IN A CIVIL CASE**
	)	
_____	)	
Defendant	)	
	)	
	)	

TO: _____
(Name of Recipient)

[Select one or more of the following, as appropriate:]

[ ] **For Attendance of Witnesses at Hearing or Trial**

YOU ARE COMMANDED to appear in the Superior Court of the State of Arizona, in and for the County of _____, at the place, date and time specified below to testify at [ ] a hearing [ ] trial in the above cause:

Judicial Officer:

Courtroom:

Address:

Date:

Time:

[ ] **For Taking of Depositions**

YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above cause:

Place of Deposition:

Address:

Date:

Time:

Method of Recording:

[ ] **For Production of Documentary Evidence or Inspection of Premises**

YOU ARE COMMANDED, to produce and permit inspection, copying, testing, or sampling of the following designated documents, electronically stored information or tangible things, or to permit the inspection of premises:

[designation of documents, electronically stored information or tangible things, or the location of the premises to be inspected]

at the place, date, and time specified below:

Place of Production or Inspection:

Address:

Date:

Time:

[The following text must be included in every subpoena:]

Your Duties in Responding To This Subpoena

Attendance at a Trial. If this subpoena commands you to appear at a trial, you must appear at the place, date and time designated in the subpoena unless you file a timely motion with the court and the court quashes or modifies the subpoena. See Rule 45(b)(5) and Rule 45(e)(2) of the Arizona Rules of Civil Procedure. *See also* "Your Right To Object To This Subpoena" section below. Unless a court orders otherwise, you are required to travel to any part of the state to attend and give testimony at a trial. See Rule 45(b)(3)(A) of the Arizona Rules of Civil Procedure.

Attendance at a Hearing or Deposition. If this subpoena commands you to appear at a hearing or deposition, you must appear at the place, date and time designated in this subpoena unless either: (1) you file a timely motion with the court and the court quashes or modifies the subpoena; or (2) you are not a party or a party's officer and this subpoena commands you to travel to a place other than: (a) the county where you reside or you transact business in person; or (b) the county where you were served with the subpoena or within forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order. *See* Rule 45(b)(3)(B) and Rule 45(e)(2)(A)(ii) of the Arizona Rules of Civil Procedure. *See also* "Your Right To Object To This Subpoena" section below.

Production of Documentary Evidence. If this subpoena commands you to produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things, you must make the items available at the place, date, and time designated in this subpoena, and in the case of electronically stored information, in the form or forms requested, unless you provide a good faith written objection to the party or attorney who served the subpoena. You may object to the production of electronically stored information from sources that you identify as not reasonably accessible because of undue burden or expense, the good faith operation of an electronic information system, or the consistent application of a document retention policy. *See* Rule 45(c)(2)(D~~) and (c)(5~~) of the Arizona Rules of Civil Procedure. ~~*See also*~~Other grounds for objecting are described in the **"Your Right To Object To This Subpoena"** section below. If this subpoena does not specify a form for producing electronically stored information, you may produce it in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person, but you need not produce the same electronically stored information in more than one form. *See* Rule 45(c)(2)(B) and (C) of the Arizona Rules of Civil Procedure.

If the subpoena commands you to produce documents, you have the duty to produce the designated documents as they are kept by you in the usual course of business, or you may organize the documents and label them to correspond with the categories set forth in the subpoena. *See* Rule 45(c)(4) of the Arizona Rules of Civil Procedure.

Inspection of Premises. If the subpoena commands you to make certain premises available for inspection, you must make the designated premises available for inspection on the date and time designated in this subpoena unless you provide a good faith written objection to the party or attorney who served the subpoena. *See* Rule 45(c)(~~5~~6) of the Arizona Rules of Civil Procedure. *See also* "Your Right to Object to This Subpoena" section below.

Combined Subpoena. You should note that a command to produce certain designated materials, or to permit the inspection of premises, *may* be combined with a command to

appear at a trial, hearing, or deposition. *See* Rule 45(b)(2) of the Arizona Rules of Civil Procedure. You do not, however, need to appear in person at the place of production or inspection unless the subpoena *also* states that you must appear for and give testimony at a hearing, trial or deposition. *See* Rule 45(c)(3) of the Arizona Rules of Civil Procedure.

Your Right To Object To This Subpoena

Generally. If you have concerns or questions about this subpoena, you should first contact the party or attorney who served the subpoena. The party or attorney serving the subpoena has a duty to take reasonable steps to avoid imposing an undue burden or expense on you. Unless otherwise ordered by the court for good cause, the party seeking discovery from you must pay your reasonable expenses incurred in responding to a subpoena seeking the production of documents, electronically stored information, tangible things, or an inspection of premises. If you expect to incur costs other than routine clerical and per-page copying costs as allowed by A.R.S. §12-351, you must provide an advance estimate of those costs to the subpoenaing party before they are incurred. The court may order the party seeking discovery from you to pay costs in advance. *See* Rule 45(e)(1)(B).

The superior court enforces this duty and may impose sanctions upon the party or attorney serving the subpoena if this duty is breached. *See* Rule 45(e)(1)(C) of the Arizona Rules of Civil Procedure.

Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition. If you wish to object to a subpoena commanding your appearance at a hearing, trial or deposition, you must file a motion to quash or modify the subpoena with the court to obtain a court order excusing you from complying with this subpoena. *See* Rules 45(b)(5) and 45(e)(2) of the Arizona Rules of Civil Procedure. The motion must be filed in the superior court of the county in which the case is pending or in the superior court of the county from which the subpoena was issued. *See* Rule 45(e)(2)(A) and (B) of the Arizona Rules of Civil Procedure. The motion must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(e)(2)(D) of the Arizona Rules of Civil Procedure. You must send a copy of any motion to quash or modify the subpoena to the party or attorney who served the subpoena. *See* Rule 45(e)(2)(E) of the Arizona Rules of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date, time, and place specified in the subpoena, unless excused from doing so—by the party or attorney serving the subpoena or by a court order—before the date and time specified for your appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

The court *must* quash or modify a subpoena:

(1) if the subpoena does not provide a reasonable time for compliance;

(2) unless the subpoena commands your attendance at a trial, if you are not a party or a party's officer and if the subpoena commands you to travel to a place other than: (a) the county where you reside or transact business in person; (b) the county where you were served with a subpoena, or within forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order; or

(3) if the subpoena requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(4) if the subpoena subjects you to undue burden.

See Rule 45(e)(2)(A) of the Arizona Rules of Civil Procedure.

The court *may* quash or modify a subpoena:

(1) if the subpoena requires you to disclose a trade secret or other confidential research, development or commercial information;

(2) if you are an unretained expert and the subpoena requires you to disclose your opinion or information resulting from your study that you have not been requested by any party to give on matters that are specific to the dispute;

(3) if you are not a party or a party's officer and the subpoena would require you to incur substantial travel expense; or

(4) if the court determines that justice requires the subpoena to be quashed or modified.

See Rule 45(e)(2)(B) of the Arizona Rules of Civil Procedure.

In these last four circumstances, a court may, instead of quashing or modifying a subpoena, order your appearance or order the production of material under specified conditions if: (1) the serving party or attorney shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (2) if your travel expenses or the expenses resulting from the production are at issue, the court ensures that you will be reasonably compensated. *See* Rule 45(e)(2)(C) of the Arizona Rules of Civil Procedure.

Procedure for Objecting to Subpoena For Production of Documentary Evidence. If you wish to object to a subpoena commanding you to produce documents, electronically stored information or tangible items, or to permit the inspection of premises, you may send a good faith written objection to the party or attorney serving the subpoena that objects to: (1) producing, inspecting, copying, testing, or sampling any or all of the materials designated in the subpoena; (2) inspecting the premises; or (3) producing electronically stored information in the form or forms requested or from sources that are not reasonably accessible because of undue burden or expense, the good faith routine operation of an

electronic information system, or the consistent application of a document retention policy. You also may object on the ground that the subpoena seeks the production of materials that have already been produced in the action, or that are available from parties to the action. *See* Rule 45(e)(1)(A). You must send your written objection to the party or attorney who served the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(c)(~~5~~6)(A)(i) and (ii) of the Arizona Rules of Civil Procedure.

If you object because you claim the information requested is privileged, protected, or subject to protection as trial preparation material, you must express the objection clearly, and identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that~~—~~ without revealing information that is itself privileged or protected~~—~~ will enable the demanding party to assess the claim. *See* Rules 26(b)(6)(A) and 45(c)(5)(~~C~~A) of the Arizona Rules of Civil Procedure. You may object to providing the information required by Rule 26(b)(6)(A) if providing the information would impose an undue burden or expense.

If you object to the subpoena in writing, you do not need to comply with the subpoena until a court orders you to do so. It will be up to the party or attorney serving the subpoena to first personally consult with you and engage in good faith efforts to resolve your objection and, if the objection cannot be resolved, to seek an order from the court to compel you to provide the documents or inspection requested, after providing notice to you. *See* Rule 45(c)(~~5~~6)(B) and (C) of the Arizona Rules of Civil Procedure.

If you are not a party to the litigation, or a party's officer, the court will issue an order to protect you from any significant expense resulting from the inspection and copying commanded. *See* Rule 45(c)(6)(B) of the Arizona Rules of Civil Procedure.

Instead of sending a written objection to the party or attorney who served the subpoena, you also have the option of raising your objections in a motion to quash or modify the subpoena, or through a motion for protective order. *See* Rule 45(c)(6)(B) and (e)(2) of the Arizona Rules for Civil Procedure. The procedure and grounds for doing so are described in the section above entitled "Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition."

If the subpoena *also* commands your attendance at a hearing, trial or deposition, sending a written objection to the party or attorney who served the subpoena does not suspend or modify your obligation to attend and give testimony at the date, time and place specified in the subpoena. *See* Rule 45(c)(~~5~~6)(A)(iii) of the Arizona Rules of Civil Procedure. If you wish to object to the portion of this subpoena requiring your attendance at a hearing, trial or deposition, you must file a motion to quash or modify the subpoena as

described in the section above entitled "Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition." *See* Rule 45(b)(5) and 45(c)(~~5~~6)(A)(iii) of the Arizona Rules of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date, time, and place specified in the subpoena, unless excused from doing so~~—~~by the party or attorney serving the subpoena or by a court order~~—~~before the date and time specified for your appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

ADA Notification

Requests for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding.

[Optional: this form may include the provisions of Rule 64.1(c)(2) of the Arizona Rules of Civil Procedure].

SIGNED AND SEALED this date _____

_____, CLERK

By: _____

Deputy Clerk

Certificate of service:

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DRAFT DATE AUGUST 17, 2016

Rule Changes Relating to Expert Witnesses: Changes to the Task Force's proposed versions of Rules 16, 26 and 26.1 are shown in track-changes below.

Rule 16. Scheduling and Management of Actions

***

(b) Joint Report and Proposed Scheduling Order

(2) ***Conference of the Parties.*** No later than 60 days after any defendant has filed an answer to the complaint or 180 days after the action commences—whichever occurs first—the parties must confer regarding the subjects set forth in Rule 16(d).

(3) ***Filing of Joint Report and Proposed Scheduling Order.*** No later than 14 days after the parties confer under Rule 16(b)(2), they must file a Joint Report and a Proposed Scheduling Order with the court stating—to the extent practicable—their positions on the subjects set forth in Rule 16(d) and proposing a Scheduling Order that specifies deadlines for the following by calendar date, month, and year:

(A) serving initial disclosures under Rule 26.1 if they have not already been served;

(B) identifying areas of expert testimony;

(C) identifying and disclosing expert witnesses and their opinions under Rule 26.1(a)(6);

***

(4) ***Requirements of Joint Report and Proposed Scheduling Order.*** *** The Joint Report must certify that the parties conferred regarding the subjects set forth in Rule 16(d). ***

(d) Scheduling Conferences in Non-Medical Malpractice Actions. Except in medical malpractice actions, on a party's written request the court must—or on its own the court may—set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

***

(4) determine a schedule for disclosing expert witnesses;

(5) determine the form of expert disclosures, including whether a signed expert report should be required under Rule 26.1(c)(3).

***

Rule 26. General Provisions Governing Discovery

(b) Discovery Scope and Limits.

***

(3) ***Work Product and Witness Statements.***

(A) *Documents and Tangible Things Prepared in Anticipation of Litigation or for Trial.* Ordinarily, a party may not discover documents and tangible things that another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) prepared in anticipation of litigation or for trial. But, subject to Rule 26(b)(4)(B), a party may discover those materials if:

[provisions re: substantial need omitted]

(B) *Protection Against Disclosure of Opinion Work Product.* If the court orders discovery of materials under Rule 26(b)(3)(A), it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(4) ***Expert Discovery.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been disclosed as an expert witness under Rule 26.1(a)(6).

(B) ***Trial-Preparation Protection for Draft Reports or Disclosures.*** Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26.1(c), regardless of the form in which the draft is recorded.

(C) ***Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.*** Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert witness, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

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(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. A party may discover such facts or opinions only:

(i) as provided in Rule 35(d); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E~~C~~) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B), including the time the expert spends testifying in a deposition; and

(ii) for discovery under Rule 26(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including—in the court's discretion—the time the expert reasonably spends preparing for deposition.

(F~~D~~) *Number of Experts Per Issue.*

(i) *Generally.* Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue. When there are multiple parties on a side and those parties cannot agree on which expert to call on an issue, the court may designate the expert to be called or, for good cause, allow more than one expert to be called.

(ii) *Standard-of-Care Experts in Medical Malpractice Actions.* Notwithstanding the limits of Rule 26(b)(4)(D)(i), a defendant in a medical malpractice action may—in addition to that defendant's standard-of-care expert witness—testify on the issue of that defendant's standard of care. In such an instance, the court is not required to allow the plaintiff an additional expert witness on the issue of the standard of care.

***

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose; Disclosure Categories. Within the times set forth in Rule 26.1(d) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

***

(6) the anticipated subject areas of expert testimony; ~~. name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;~~

***

(c) Disclosure of Expert Testimony.

(1) ***In General.*** In addition to the disclosures required by Rule 26(a)(1), a party must disclose the identity of any witness it may use at trial to present evidence under Rules 702, 703, or 705.

(2) ***Duty to Confer; Dispute Resolution.***

(A) *Duty to Confer*. Unless otherwise stipulated to or ordered by the court, promptly after receiving initial disclosures under Rule 26.1(a), the parties must confer and attempt to agree on the form of expert disclosures. Ordinarily, an expert report complying with Rule 26.1(c)(4) should be provided [in any Tier 3 case, or] if a hearing may be required to determine if the testimony satisfies the requirements of Ariz. R. Evid. 702.

(B) *Dispute Resolution*. The parties must submit any dispute regarding the form of expert disclosures in a single joint motion accompanied by a Rule 7.1(h) certificate. In determining whether an expert report should be required over the objection of a party, the court should consider whether requiring a written report would be unduly burdensome or expensive given the needs of the action, the importance of the issues at stake, the amount in controversy, and the parties' resources. The court also may order that the additional disclosures set forth in Rule 26.1(c)(4) need not be in the form of a signed written report by the expert.

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(3) ***Expert Witnesses Who Do Not Provide a Written Report.*** If an expert witness is not required to provide a written report, the disclosure must state:

(A) the expert's name, address, and qualifications;

(B) the subject matter on which the expert is expected to testify;

(C) the substance of the facts and opinions to which the expert is expected to testify;

(D) a summary of the grounds for each opinion;

(E) a statement of the compensation to be paid for the expert's work and testimony in the case; and

(F) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; but if compiling such a list would be unduly burdensome, a reasonable summary of the expert's testimonial history over the previous 4 years.

(4) ***Expert Witnesses Who Must Provide a Written Report.*** If an expert is required to provide a signed written report, the report must contain:

(A) the expert's name, address, and qualifications, including a list of all publications authored in the previous 10 years;

(B) a complete statement of all opinions the expert will express and the basis and reasons for them;

(C) the facts or data considered by the expert in forming them;

(D) any exhibits that will be used to summarize or support them;

(E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; but if compiling such a list would be unduly burdensome, a reasonable summary of the expert's testimonial history over the past 4 years.

(d) Purpose; Scope.

(1) ***Purpose.*** The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) ***Scope.*** A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

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Rule 11. Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions; Assisting Filing by Self-Represented Person

(a) Signature.

(1) ***Generally.*** Every pleading, written motion, and other document filed with the court or served must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The court must strike an unsigned document unless the omission is promptly corrected after being called to the filer's attention.

(2) ***Electronic Filings.*** A person may sign an electronically filed document by placing the symbol "/s/" on the signature line above the person's name. An electronic signature has the same force and effect as a signature on a document that is not filed electronically. The court may treat a document that was filed using a person's electronic filing registration information as a filing that was made or authorized by that person.

(3) ***Filings by Multiple Parties.*** A person filing a document containing more than one place for a signature—such as a stipulation—may sign on behalf of another party only if the person has actual authority to do so. The person may indicate such authority either by attaching a document confirming that authority and containing the signatures of the other persons who have authority to consent for such parties, or, after obtaining a party's consent, by inserting "/s/ [the other party's or person's name] with permission" as any non-filing party's signature.

(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the factual contentions are well-grounded in fact;

~~(2)~~ (3) the denials of factual contentions are well-grounded in fact or, if specifically so identified, are reasonably based on belief or a lack of information;

(4) the claims, defenses, and other legal contentions are warranted by existing law or by a ~~nonfrivolous~~reasonable argument for extending, modifying, or reversing existing law or for establishing new law~~;~~. A legal contention may be reasonable even if it does not succeed on the merits.

~~(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and~~

~~(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.~~

(c) Sanctions.

(1) ***Generally.*** If a pleading, motion, or other document is signed in violation of this rule, or if a party fails to participate in good faith in the consultation required by Rule 11(c)(2), the court—on motion or on its own~~—may~~—must impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, or because of the party's failure to participate in the required Rule 11(c)(2) consultation, including a reasonable attorney's fee. In considering an appropriate sanction, the court must take into account the opportunities provided to the party or person violating Rule 11 to withdraw or correct the alleged violation under Rule 11(c)(2).

(2) ***Consultation.*** Before filing a motion for sanctions under this rule, the moving party must:

(A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and

(B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) ***Motion for Sanctions.*** A motion for sanctions under this rule must:

(A) be made separately from any other motion;

(B) describe the specific conduct that allegedly violates Rule 11(b);

(C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and

(D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).

(d) Assisting Filing by Self-Represented Person. An attorney may help draft a pleading, motion, or other document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or other document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts.

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DRAFT DATE AUGUST 17, 2016

Redline shows proposed changes to Task Force Rule 35 proposal.

Rule 35. Physical and Mental Examinations

(a) Examination on Order.

(1) ***Generally.*** The court where the action is pending may order a party whose physical or mental condition is in controversy to submit to a physical or mental examination by a physician or psychologist. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) ***Motion and Notice; Contents of the Order.*** An order under Rule 35(a)(1):

(A) may be entered only on motion for good cause and on notice to all parties and the person to be examined;

(B) must specify the time, place, manner, conditions, and scope of the examination; and

(C) must specify the person or persons who will perform the examination.

(b) Examination on Notice; Motion Objecting to Examiner; Failure to Appear.

(1) ***Notice.*** When the parties agree that an examination is appropriate but do not agree on the examiner, the party seeking the examination may proceed by giving reasonable—and not fewer than 30 days—written notice to all other parties. The notice must:

(A) identify the party or person to be examined;

(B) specify the time, place, and scope of the examination; and

(C) identify the examiner(s).

(2) ***Motion Objecting to Examiner.*** After being served with a proper notice under Rule 35(b)(1), a party who objects to the examiner(s) identified in the notice may file a motion in the court where the action is pending. For good cause, the court may order that the examination be conducted by a physician or psychologist other than the one specified in the notice.

(3) ***Failure to Appear.*** Unless the party has filed a motion under Rule 26(c), the party must appear—or produce the person in the party's custody or legal control—for the

noticed examination. If the party fails to do so, the court where the action is pending may, on motion, make such orders concerning the failure as are just, including those under Rule 37(f).

(c) Attendance of Representative; Recording.

(1) ***Attendance of Representative.*** Unless his or her presence may adversely affect the examination's outcome, the person to be examined has the right to have a representative present during the examination.

(2) ***Recording.***

(A) *Audio or Video Recording*. The person to be examined or the party requesting the examination may audio-record or video-record any ~~physical~~ examination. ~~Unless~~On a showing that such recording may adversely affect the examination's outcome, the ~~person to be examined may audio-record any mental examination.~~court may limit the recording, using the least restrictive means possible.

(B) ~~*Video Recording*. On order for good cause—or on agreement of the parties and the person to be examined—an examination may be video-recorded.~~**~~(C)~~** *Copy of Recording*. A copy of a recording made of an examination must be provided to any party upon request.

(d) Examiner's Report; Other Like Reports of Same Condition; Waiver of Privilege.

(1) ***Contents.*** The examiner's report must be in writing and set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(2) ***Request by the Party or Person Examined.*** The party who is examined—or who produces the person examined—may request the examiner's report, like reports of the same condition, and written or recorded notes from the examination. If such a request is made, the party who moved for or noticed the examination must, within 20 days of the examination or request—whichever is later—deliver to the requestor copies of:

(A) the examiner's report;

(B) like reports of all earlier examinations of the same condition; and

(C) all written or recorded notes made by the examiner and the person examined at the time of the examination, and must provide access to the original written or recorded notes for purposes of comparing them with the copies.

(3) ***Request by the Examining Party.*** After delivering the materials required by Rule 35(d)(2), the party who moved for or noticed the examination is entitled, on its

request, to receive from the party who was examined—or who produced the person examined—like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony by any other person who has examined or who later examines the same condition.

(5) ***Failure to Deliver a Report as Ordered.*** On motion, the court may order—on terms that are just—that a party deliver a report of an examination. If the report is not delivered as ordered, the court may exclude the examiner's testimony at trial.

(6) ***Scope.*** This Rule 35(d) applies to examinations conducted by agreement of the parties, unless the agreement states otherwise. This rule does not preclude a party from obtaining an examiner's report, or deposing an examiner, under other rules.

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IX. COMPULSORY ARBITRATION

Rule 72. Suitability for Arbitration

(a) Decision to Require Compulsory Arbitration. Rules 72 through 77 apply if the superior court in a county, by a majority vote of the judges in that county, decides to require arbitration of certain claims and establishes jurisdictional limits by local rule under A.R.S. § 12-133. Such a decision must be incorporated into a superior court order that is filed with the Supreme Court clerk, with a copy filed with the clerk in that county. Except when a rule is inconsistent with a specific provision in Rules 72 through 77, the Arizona Rules of Civil Procedure apply to all actions in arbitration.

(b) Compulsory Arbitration.

(1) ***Generally.*** Civil actions, except appeals from municipal or justice courts, must be submitted to arbitration in accordance with A.R.S. § 12-133 if:

(A) No party seeks affirmative relief other than a money judgment; and

(B) No party seeks an award in excess of the jurisdictional limit for arbitration set by applicable local rule of the superior court.

(2) ***Definitions.*** For this rule's purposes, "award" and "affirmative relief" include punitive damages, but do not include interest, attorney's fees, or costs.

(3) ***Exception.*** The court may waive the arbitration requirement if all parties stipulate to the waiver and show good cause for not arbitrating the action.

(c) Arbitration by Agreement of Reference. Whether or not an action is filed, any claim may be referred to arbitration at any time by an Agreement of Reference signed by all parties or their counsel. If an action has not been filed, the Agreement of Reference must define the issues involved for determination in the arbitration proceedings and may contain stipulations with respect to agreed facts, issues, or defenses. In such instances, the Agreement of Reference takes the place of the pleadings in the action and must be filed and assigned a civil case number. Filing an Agreement of Reference does not relieve any party from paying a required filing fee. Filing of an Agreement of Reference has the same effect on the running of the statute of limitations as the filing of a civil complaint.

(d) Alternative Dispute Resolution. Before a hearing is held under Rule 75, the parties or their counsel may confer regarding the feasibility of resolving their dispute through another form of alternative dispute resolution, including private mediation or binding arbitration. The court may waive the arbitration requirement if the parties file a written stipulation to participate in good faith in an alternative dispute resolution proceeding, and the court approves the method selected by the parties. The stipulation must identify the specific method selected for alternative dispute resolution. If the alternative dispute resolution method selected under this rule fails, the action will proceed under the case management rules in Rule 16 and will not be subject to compulsory arbitration.

(e) Procedure for Determining Suitability for Arbitration.

(1) ***Certificate on Compulsory Arbitration.*** When a complaint is filed, the plaintiff must also file with the clerk a separate certificate on compulsory arbitration in substantially the following form:

"The undersigned certifies that he or she knows the dollar limits and any other limitations set forth by the local rules of practice for the applicable superior court, and further certifies that this action [is] [is not] subject to compulsory arbitration, as provided in Rules 72 through 77 of the Arizona Rules of Civil Procedure."

The certificate must be served on the defendant when the complaint is served.

(2) ***Controverting Certificate.*** If the defendant disagrees with the plaintiff's assertion as to arbitrability, the defendant must file a controverting certificate that specifies the particular reason for the defendant's disagreement. The defendant's controverting certificate must be filed with the defendant's answer and a copy must be served under Rule 5(c) on the plaintiff and all other parties who have appeared in the action.

(3) ***Signing and Certification.*** The certificate and controverting certificate must be signed by the party or its counsel, and constitutes a certification by the signer that:

(A) the signer has considered the applicability of the local rules governing arbitration and Rules 72 through 77;

(B) the signer has read the certificate or controverting certificate on compulsory arbitration;

(C) after reasonable inquiry, the statements in the certificate or controverting certificate are accurate to the best of the signer's knowledge, information, and belief; and

(D) the allegation as to arbitrability is not set forth for any improper purpose.

(4) ***Conflicting Certificates.*** If conflicting certificates are filed, the matter must be referred to the judge assigned to the action to decide whether the action is subject to compulsory arbitration.

(5) ***Amendment of Certificate.*** A party and its counsel are under a duty to seasonably amend a prior certificate or controverting certificate on compulsory arbitration if the party or counsel obtains information that establishes that the certificate was incorrect when filed or is no longer accurate.

(6) ***Motions.*** At any time after the close of the pleadings, the court may, on its own or on motion, determine that an action is subject to compulsory arbitration and may order that it proceed to arbitration as provided in these rules.

(7) ***Sanctions.*** If the court, on motion or on its own, finds that a party or its counsel has made an allegation as to arbitrability that was not made in good faith or failed to seasonably amend a prior certificate on compulsory arbitration, the court may

make such orders regarding such conduct as are just, including an order under Rule 11(c).

(f) Waiver of Appeal and Waiver of Trial A plaintiff who chooses under Rule 73.1(b) to proceed by compulsory arbitration rather than by short trial waives the right to a Rule 77 appeal of the arbitration award and waives the right to trial by jury or otherwise.

Rule 73. Appointment of Arbitrator

(a) Mutually Agreed Arbitrator. If the parties agree on a person to serve as the arbitrator and the proposed arbitrator consents, the clerk or court administrator must assign the action to that person upon the filing of a written stipulation requesting the person's appointment. The stipulation must include the written consent of the proposed arbitrator, and a conformed copy must be delivered to the court administrator.

(b) Appointment of Arbitrator. Unless the parties stipulate to the assignment of an arbitrator under Rule 73(a), the clerk or court administrator must appoint the arbitrator from a list of eligible arbitrators as provided in local rule. The clerk or court administrator must randomly select and then assign to each action one arbitrator from the list.

(c) List of Eligible Arbitrators. The clerk or court administrator, under the supervision of the presiding superior court judge in the county or that judge's designee, must prepare a list of arbitrators who may be designated by their area of concentration, specialty, or expertise. The list of eligible persons must include the following:

(1) all county residents who have been active members of the State Bar of Arizona for at least 4 years;

(2) all other members of the State Bar of Arizona residing in other counties who have agreed to serve as arbitrators in the county where the court is located; and

(3) all members of any other federal court or state bar who have agreed to serve as arbitrators in the county where the court is located.

On written motion showing good cause, the presiding judge or that judge's designee may excuse a lawyer from the list of arbitrators. The clerk or court administrator should endeavor to select and assign an arbitrator with experience in the subject matter of the action, but if such an arbitrator is unavailable, the clerk or court administrator may select an arbitrator randomly or by another method.

(d) Timing of Appointment. The clerk or court administrator must appoint an arbitrator to an action no later than 120 days after an answer is filed.

(e) Notice of Appointment. The clerk or court administrator must promptly distribute written notice of the arbitrator's appointment to the parties and the arbitrator. The

written notice must advise the parties of the deadline specified in Rule 38.1(d) for placing an action on the Dismissal Calendar.

(f) Change of Arbitrator as of Right. In any action, each side is entitled as of right to a change of one arbitrator. Each action, even if consolidated with another action, must be treated as having only two sides. A party waives the right to change of arbitrator if the right is not exercised within 10 days after the date of the written notice of appointment. If a party enters an appearance after the arbitrator is appointed, that party waives the right to change of arbitrator if it is not exercised within 10 days after that party's appearance. A motion for recusal or motion to strike for cause tolls the time to exercise a change of arbitrator as of right.

(g) Disqualifying or Excusing an Arbitrator.

(1) ***Disqualifying an Arbitrator.*** On motion, the court may disqualify an appointed arbitrator from serving in a particular action. The motion must be in writing and establish that the arbitrator has an ethical conflict of interest or that other good cause exists under A.R.S. § 12-409 or § 21-211. The motion must be submitted to and considered by the judge assigned to the action in accordance with the procedures provided in Rule 42.2.

(2) ***Excusing an Arbitrator.*** The presiding superior court judge or that judge's designee may excuse an arbitrator from serving in a particular action on the arbitrator's showing that he or she has completed contested hearings and ruled as an arbitrator under these rules in two or more actions assigned during the current calendar year.

(3) ***Replacement.*** If the court disqualifies or excuses an arbitrator, the clerk or court administrator must appoint a new arbitrator consistent with these rules.

Rule 74. General Proceedings and Prehearing Procedures

(a) Arbitrator's Powers. The arbitrator has the power to administer oaths or affirmations to witnesses, determine the admissibility of evidence, and decide the law and the facts in an action.

(b) Initial Disclosure. Unless the parties agree or the arbitrator orders otherwise, the parties must serve their initial disclosure required under Rule 26.1 no later than the deadline provided in Rule 26.1(d).

(c) Scheduling an Arbitration Hearing. The arbitrator must set a hearing date not earlier than 60 days nor later than 120 days after the arbitrator's appointment. If good cause exists, an arbitrator may set a hearing date that is before or after this time period, or reschedule a noticed hearing date for a date later than 120 days after the arbitrator is appointed. The arbitrator must provide at least 30 days' written notice of the hearing's time and place, unless waived by the parties. Unless the parties agree otherwise, no hearings may be held on Saturdays, Sundays, legal holidays, or evenings.

(d) Arbitrator's Rulings.

(1) ***Authorized Rulings.*** After an action has been assigned to an arbitrator, the arbitrator will make all legal rulings, including rulings on motions, except on:

(A) motions to continue on the Dismissal Calendar or otherwise extend time allowed under Rule 38.1(d);

(B) motions to consolidate actions under Rule 42;

(C) motions to dismiss;

(D) motions to withdraw as attorney of record under Rule 5.3;

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party; and

(F) motions for sanctions under Rule 68(g).

(2) ***Procedure.*** The parties must deliver to the arbitrator copies of all documents requiring the arbitrator's consideration. The arbitrator may hear motions and testimony by telephone.

(3) ***Discovery Motions.*** In ruling on discovery motions, the arbitrator should consider that the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, and may limit discovery when appropriate to accomplish this purpose.

(4) ***Interlocutory Appeal of Discovery Ruling.*** If an arbitrator makes a discovery ruling requiring the disclosure of matters that a party claims are privileged or otherwise protected from disclosure, the party may appeal the ruling by filing a motion with the judge assigned to the action within 10 days after the arbitrator transmits the ruling to the parties. No party need respond to the motion unless the court so orders, but no such motion may be granted without the court providing an opportunity for response. The arbitrator's ruling is subject to de novo review by the court. If the court finds that the motion is frivolous or was filed for the purpose of delay or harassment, the court must impose sanctions on the party filing the motion, including an award of reasonable attorney's fees incurred in responding to the motion. The time for conducting an arbitration hearing is tolled while such motion is pending.

(e) Time for Filing Summary Judgment Motion. A motion for summary judgment must be filed at least 20 days before the date for hearing. A copy of the motion must be delivered to the arbitrator and judge assigned to the action. The time for conducting an arbitration hearing is tolled while any such motion is pending. If the court finds that the motion is frivolous or was filed for the purpose of delay or harassment, it must impose sanctions on the party filing the motion, including an award of reasonable attorney's fees incurred in responding to the motion.

(f) Receipt of Court File. If the arbitrator believes the court file contains materials needed to conduct the arbitration hearing, the arbitrator may, within 4 days before the hearing, sign for and receive the original superior court file from the clerk, if the file exists in paper form. If the clerk maintains an electronic court record, the arbitrator must have access to the original or to a certified paper or electronic copy of the file. The clerk may deliver the documents electronically to any arbitrator who files a consent in a form acceptable to the clerk. Alternatively, the arbitrator may order the parties to provide the arbitrator those pleadings and other documents the arbitrator deems necessary.

(g) Settlement of Actions Assigned to Arbitration. If the parties settle an action assigned to arbitration, they must file with the court an appropriate stipulation for the entry of final judgment or a dismissal order, and must mail or otherwise deliver a copy to the arbitrator. The arbitration terminates on entry of the judgment or order.

(h) Offer of Judgment. A party to an action subject to arbitration may serve an offer of judgment under Rule 68.

Rule 75. Hearing Procedures

(a) Issuing Subpoenas. Subpoenas may be issued, served and enforced as provided by these rules or other law.

(b) Prehearing Statement.

(1) ***Requirement.*** No later than 10 days before the hearing, the parties or their counsel must confer, prepare, and submit to the arbitrator a joint written prehearing statement. In preparing this prehearing statement, the parties and their counsel must consider that the purpose of compulsory arbitration is to provide for the efficient and inexpensive resolution of claims and the parties are encouraged to agree on facts and issues.

(2) ***Content.*** The statement must contain the following:

(A) a brief statement of the nature of each party's claims or defenses;

(B) a witness list including the subject matter of witness testimony for each witness who will be called to testify;

(C) an exhibit list; and

(D) the estimated time required for the arbitration hearing.

(3) ***Evidence Excluded.*** Unless the parties agree otherwise or the offering party shows good cause, no witness or exhibit may be offered at the hearing other than those listed and exchanged.

(c) Evidence. The Arizona Rules of Evidence apply to arbitration hearings, except as provided in Rule 75(d). Certificates or controverting certificates are not admissible in evidence in any proceedings on the action's merits.

(d) Documentary Evidence. Unless the document is not what it appears to be and an objection is stated in the prehearing statement, the arbitrator must admit into evidence the following documents without further proof, if relevant, and if listed in the prehearing statement:

(1) hospital bills, if on the hospital's official letterhead or billhead, dated, and itemized;

(2) bills of doctors and dentists, if dated and stating the date of each visit and the incurred charges;

(3) bills of registered nurses, licensed practical nurses, or physical therapists, if dated and stating the date and hours of service, and the incurred charges;

(4) bills for medicine, eyeglasses, prosthetic devices, medical belts, or similar items, if dated and itemized;

(5) property repair bills or estimates setting forth the costs or estimates for labor and material, if dated, itemized, and stating whether the property was, or is estimated to be, repaired in full or in part;

(6) a witness's deposition testimony, whether or not the witness is available to appear in person;

(7) an expert's sworn written statement, other than a doctor's medical report, whether or not the expert is available to appear in person, but only if:

(A) the statement is signed by the expert and summarizes the expert's qualifications; and

(B) the statement contains the expert's opinions, and the facts on which each opinion is based;

(8) in a personal injury action, a doctor's medical report, if a copy of the report was disclosed at least 20 days before the hearing, unless the offering party shows good cause;

(9) records of regularly conducted business activity qualified under Arizona Rule of Evidence 803(6); and

(10) a sworn witness statement, except from an expert witness, whether or not the witness is available to appear in person, if listed in the prehearing statement.

(e) Assessing Damages Against Defaulted Parties. In actions involving multiple defendants, if default has been entered against one or more, but fewer than all of the defendants before the arbitration hearing, the arbitrator must refer all further proceedings involving the defaulted defendant(s) to the judge assigned to the action. The arbitrator must continue to serve and proceed with the arbitration for the remaining parties.

(f) Record of Proceedings. The arbitrator is not required to make a record of the hearing. If any party wants a court reporter to transcribe the hearing, the party must pay for and provide the reporter. The reporter's charges are not considered costs in the action.

(g) Failure to Appear or Participate in Good Faith at a Hearing. Absent good cause, a party waives the right to appeal if the party fails to appear or to participate in good faith at a hearing under Rule 74(c).

Rule 76. Posthearing Procedures

(a) Arbitrator's Decision. Within 10 days after completing the hearing, the arbitrator must:

(1) make a decision;

(2) if the original paper file was obtained from the superior court, return it to the clerk by messenger or certified mail;

(3) notify the parties that their exhibits are available for retrieval;

(4) notify the parties or their counsel of the decision in writing; and

(5) file a notice of decision with the court.

(b) Arbitrator's Award.

(1) ***Submission of Proposed Award.*** Within 10 days after the notice of decision is filed, either party may submit a proposed form of award to the arbitrator. The proposed award may include blanks for requested amounts for attorney's fees and costs.

(2) ***Award Exceeding Limit.*** If an arbitrator finds that the appropriate award in an action exceeds the limit for compulsory arbitration set by local rule or statute, the arbitrator must render an award for the full amount.

(3) ***Objections to Proposed Award.*** Within 5 days of receiving the proposed form of award, an opposing party may file objections.

(4) ***Final Award.*** Within 10 days of receiving the objections, the arbitrator must rule on the objections and file one signed original award with the clerk. On the same day the arbitrator must mail or otherwise deliver copies of it to all parties or their counsel.

(c) Arbitrator's Failure to File Award. If an award or stipulation for entry of another form of relief is not filed with the court within 50 days after the notice of decision is filed, the notice of decision will constitute the arbitrator's award.

(d) Judgment. If no appeal is filed by the deadline for filing an appeal under Rule 77(b), any party may file a motion to enter judgment on the award. If no party files such a motion within 90 days of the filing of the notice of decision and if no appeal is pending, the clerk or court administrator must notify the parties in writing that the action will be

dismissed without prejudice unless a motion to enter judgment is filed within 30 days after the date of the notice. If no motion is filed within that time, the court must dismiss the action without prejudice and enter an appropriate order regarding any bond or other posted security. No further notice to the parties is required before dismissing the action.

(e) Referral of an Action to the Assigned Judge. If the arbitrator does not file an award with the clerk within the later of 145 days after the arbitrator's appointment or 30 days after a noticed hearing, the clerk or the court administrator must refer the matter to the assigned judge for appropriate action.

(f) Arbitrator's Compensation. An arbitrator assigned to an action under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12-133(G) per day for each day, or part of a day, necessarily expended in hearing the action. For this rule's purposes, "hearing" means any fact-finding proceeding or oral argument resulting in the filing of an award, or at which the parties agree to settle and stipulate to the action's dismissal. The fee to be paid in each county must be decided by a majority vote of the judges in that county. The amount must be incorporated into a superior court order that is filed with the Supreme Court clerk, with a copy filed with the clerk in that county. When more than one action arising out of the same transaction is heard at the same hearing or hearings, it will be considered as one action for purposes of compensating the arbitrator.

(g) Payment of Compensation. The arbitrator is not entitled to receive compensation under Rule 76(f) until after an award is filed with the clerk, or, if the parties agree to settle and stipulate to dismiss the action at a proceeding before the arbitrator, until after the action is dismissed.

Rule 77. Appeal

(a) Filing a Notice of Appeal. Any party who appears and participates in the arbitration proceedings, except the party(s) who chose Compulsory Arbitration, may appeal an arbitrator's award by filing a notice of appeal with the clerk. The notice of appeal must be entitled "Appeal from Arbitration and Motion for Trial Setting." It must request that the action be set for trial in the superior court, and must state whether a jury trial is demanded and the estimated length of trial.

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(b) Time for Filing. To appeal an award, a party must file a notice of appeal no later than 20 days after (1) the award is filed or (2) the date on which the notice of decision becomes an award under Rule 76(c), whichever occurs first.

(c) Deposit on Appeal. At the time of filing the notice of appeal, the appellant must deposit with the clerk a sum equal to one hearing day's compensation of the arbitrator or 10 percent of the amount in controversy, whichever is less. The court may waive the deposit only on a showing that the appellant is financially unable to make such a deposit.

(d) Appeal De Novo. Although the proceeding is denominated as an "appeal," the parties are entitled to a trial on all issues determined by the arbitrator. The arbitrator's legal rulings and factual findings are not binding on the court or the parties. If, however, the court finds that further proceedings before the arbitrator are appropriate, it may remand the action to the assigned arbitrator.

(e) Waiver of Right to Appeal. At any time before the entry of an award by the arbitrator, the parties may stipulate in writing that the award so entered is binding on the parties. If the parties enter such a stipulation, no party may appeal or collaterally attack the award except as allowed by A.R.S. § 12-1501, *et seq*.

(f) Discovery and Listing of Witnesses and Exhibits on Appeal.

(1) Any discovery conducted while the action was assigned to arbitration may be used on appeal.

(2) Simultaneous with the filing of the notice of appeal, the appellant may serve a "List of Witnesses and Exhibits Intended to be Used at Trial" that complies with Rule 26.1.

(3) No later than 20 days after the Notice of Appeal is served, the appellee may serve a "List of Witnesses and Exhibits Intended to be Used at Trial" that complies with Rule 26.1.

(4) If any party does not serve a timely "List of Witnesses and Exhibits Intended to be Used at Trial," that party's trial witnesses and exhibits will be deemed to be those set forth in any such list previously filed in the action or in the prehearing statement submitted under Rule 75(b).

(5) The parties have 80 days after the filing of the notice of appeal to complete discovery under Rules 26 through 37.

(6) For good cause, the court may extend the time to conduct discovery or to serve a supplemental list of witnesses and exhibits.

(g) Refund of Deposit on Appeal. The clerk must refund the deposit on appeal to the appellant if:

(1) the judgment on the trial de novo is at least 23 percent more favorable than the monetary relief or other type of relief granted by the arbitration award; or

(2) there is no order from the court for the disposition of the deposit on appeal upon the action's final disposition.

(h) Forfeiture of Deposit on Appeal; Sanctions on Appeal. If the judgment on the trial de novo is not at least 23 percent more favorable than the monetary relief or other type of relief granted by the arbitration award, the court must order that the deposit on appeal be used to pay the following costs and fees:

(1) to the county, the compensation actually paid to the arbitrator;

(2) to the appellee, those costs taxable in civil actions together with reasonable attorney's fees as determined by the trial judge for services necessitated by the appeal; and

(3) reasonable expert witness fees incurred by the appellee in connection with the appeal.

If the deposit is insufficient to pay those costs and fees, the court must order that the appellant pay them, unless the court, on motion, finds that imposing costs and fees would create a substantial economic hardship that is not in the interests of justice.

(i) Contact by Court. A court may contact an arbitrator regarding the arbitration award or other matters relating to the arbitration.

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Rule 72.1. Short Trial Alternative

(a) Application. Rules 72.1 through 77.1 are experimental rules that apply in counties where the Supreme Court and the superior court in a county have authorized a short trial as an alternative to compulsory arbitration under Rules 72 through 77. In those counties, cases that are subject to compulsory arbitration under Rule 72 may instead proceed to a short trial as provided by these experimental rules.

(b) Determining Suitability. The procedure for determining the suitability of an action for compulsory arbitration described in Rule 72(e) continues to apply to the short trial alternative. Although a case may proceed to a short trial, the plaintiff still must file a certificate of compulsory arbitration under Rule 72(e)(1), and the defendant may file a controverting certificate under Rule 72(e)(2).

Rule 73.1. Plaintiff's Choice of a Short Trial Alternative; Assignment of a Judicial Officer

(a) Plaintiff's Choice. The plaintiff alone has the choice of proceeding by a short trial as an alternative to compulsory arbitration.

(b) Manner of Choosing a Short Trial. At the time of filing a complaint [**alternative**: Within 20 days after the defendant files an answer], the plaintiff must choose compulsory arbitration or a short trial and confirm that choice on a statement filed with the court. The statement must inform the court and the defendant whether plaintiff will proceed by compulsory arbitration under Rules 72 through 77, or by the short trial alternative under Rules 72.1 through 77.1.

(c) Failure to Choose. If the plaintiff does not file a timely statement under Rule 73.1(b), the case will proceed to short trial under these experimental rules.

(d) Action with a Counterclaim or a Third Party Claim. If there is a counterclaim, crossclaim, or a third party claim, the action will proceed to short trial if the plaintiff chooses one under Rule 73.1(b) or fails to file a timely statement under Rule 73.1(c).

(e) Trial by Jury; Waiver. The court will empanel a jury for a short trial. The parties may waive a jury by a written stipulation filed at least 30 days before trial.

(f) Inapplicability of Rule 68. Whether the plaintiff chooses a short trial, or whether the matter proceeds to a short trial under Rule 73.1(c), no party may thereafter tender a Rule 68 offer of judgment, and any previous tender of a Rule 68 offer of judgment is of no effect.

(g) Assignment of a Judicial Officer. The clerk or court administrator must assign a judicial officer to every action proceeding by short trial. A judicial officer as used in this rule includes a superior court judge or commissioner, or a judge pro tempore. The assigned judicial officer will make all legal rulings in the case, including rulings on motions.

(h) Challenge of the Assigned Judicial Officer. Parties in a short trial proceeding may challenge the assigned judicial officer in the manner provided by Rules 42.1 and 42.2.

Rule 74.1. Pretrial Proceedings

(a) Joint Report and Proposed Scheduling Order. Rule 16(b), which requires parties to file a joint report and proposed scheduling order, does not apply in actions proceeding to short trial.

(b) Disclosure Deadline. The parties must exchange Rule 26.1 disclosure statements within 30 days after the filing date of the first answer. The parties have a duty to make continuing and supplemental disclosures without a specific request from any other party.

(c) Discovery Limits. Each side in a short trial proceeding has the following discovery limits: 5 Rule 33 interrogatories, 5 Rule 34 requests for production, 10 Rule 36 requests for admissions, 1 Rule 35 examination, and 5 total hours of fact witness deposition.

(d) Medical and Other Experts. The deposition of a medical expert, including a treating physician, or other expert witness, is limited to one hour per side, and a total of two hours. The deposition fee of a medical or other expert witness under this rule is limited to $500 per hour, but a party or the witness [**Note:** if the witness files the motion, will the witness have to pay an appearance fee?] may file a motion showing good cause for exceeding the limit. Parties must endeavor to take the deposition at the expert's usual place of business.

(e) Video Recording of Medical and Other Expert Witness Depositions. Any party may video record the deposition of a medical or expert witness under this rule by any unobtrusive and reliable device, and without leave of court, but the party must provide a copy of the video, without charge, to other parties within 10 days after the deposition. ~~On motion, the judicial officer assigned to the action can impose cost shifting or cost sharing of a deposition under this rule as may be reasonable, fair, and appropriate.~~ [**Note**: This last sentence now appears in (f).]

(f) Apportionment of the Fee of Medical and Other Experts. Each party who asks questions during the deposition of a medical or expert witness is responsible for the medical or expert witness' fee in proportion to the questions asked, and the witness' time used, by each party during the deposition. On motion, the judicial officer assigned to the action can impose cost shifting or cost sharing of a deposition under this rule as may be reasonable, fair, and appropriate.

(g) Discovery Deadline. Parties in a case proceeding by short trial must complete all discovery under Rules 26 through 36 within 120 days after the filing date of the first answer or 190 days from the filing of the complaint, whichever is sooner. The assigned judicial officer may extend this deadline only for good cause.

(h) Trial Date. The court will set a date for a short trial not less than 180 days nor more than 270 days after the filing date of the complaint.

(i) Summary Judgment Motions. Parties must file motions for summary judgment at least 70 days before the trial date.

(j) Settlement. If the parties settle an action in a short trial proceeding, they must file an appropriate stipulation for entry of a final judgment or a dismissal order.

(k) Assessing Damages Against Defaulted Parties. In actions involving multiple defendants, if the court has entered a default against one or more, but fewer than all, of the defendants before trial, the assigned judicial officer must proceed against any defaulted defendant under Rule 55, and proceed with a short trial for the remaining parties.

(l) Pretrial Conference. The judge may set one or more Rule 16 pretrial conferences.

Rule 75.1. Short Trial Procedures.

(a) Pretrial Statement. No later than 10 days before the trial, the parties or their counsel must confer, prepare, file, and submit to the assigned judge a joint written pretrial statement. In preparing this statement, the parties must consider that the purpose of a short trial is to provide for the efficient and inexpensive resolution of claims and the parties are encouraged to agree on facts and issues. The statement must contain the

following:

(1) a brief statement of the nature of each party's claims or defenses;

(2) a witness list including the subject matter of witness testimony for each witness who will be called to testify;

(3) an exhibit list;

(4) the parties' stipulations; and

(5) the estimated time required for the trial.

Unless the parties agree otherwise or the offering party shows good cause, a party may not call a witness or offer an exhibit at trial other than those listed and exchanged.

(b) Documentary Evidence. Unless there is an objection in the pretrial statement, the following documents are admissible in evidence:

(1) Medical bills of licensed or authorized providers, provided the party requesting admission of a bill establishes a foundation that the amount of the bill is reasonable and the treatment or service described in the bill was medically necessary;

(2) Property repair bills or estimates containing costs or estimates for labor and material, if a bill is dated and itemized, and if the bill states whether the property was repaired in full or in part;

(3) Records of regularly conducted business activity under Rule 803(6) of the Arizona Rules of Evidence;

(4) A witness' deposition, whether or not the witness is available to appear in person;

(5) A sworn witness statement, except a statement of an expert witness, whether or not the witness is available to appear in person.

(c) Video Recording of Medical and Other Experts. A party who deposed and made a video record of a medical or other expert under Rule 74.1(d) may introduce the video record at trial to avoid the cost of calling the expert. However, any party may object to the form or foundation of a question, or to the responsiveness of an answer, in the video record.

(d) Subpoenas. The court may issue and enforce a subpoena, and a party may serve subpoenas, as provided by these rules or other law.

(e) Order of the Short Trial; Limits. A short trial proceeds in the order described in Rule 39. The manner of selecting a jury, juror notebooks, juror questions of witnesses, jury

instructions, deliberations, and the return and entry of the verdict are as provided in other civil trials in the superior court, except for the following presumptive limits:

(1) Jury size: 6 jurors, no alternates

(2) Jury verdict: 5 of the 6 jurors must agree on a verdict

(3) Voir dire: 30 minutes per side

(4) Opening statements: 15 minutes

(5) Presenting a case in chief, including cross examination and rebuttal: 3 hours per side

(6) Closing arguments: 30 minutes

(7) Length of trial: 2 full days

(f) Record of Proceedings. The court is not required to make a verbatim record of a short trial. Any party who wants a court reporter to transcribe the proceeding must request, provide, and pay for the reporter. The reporter's charges are not costs in the action.

Rule 76.1. Post-trial Procedures

(a) Form of Judgment, Costs and Attorneys' Fees. After the jury returns its verdict, the judge must direct the prevailing party, pursuant to procedures provided in Rules 54 and 58, to prepare a statement of costs, a request for attorney's fees, if any, and a judgment. The judge may then proceed to enter judgment on the verdict under those rules.

(b) Verdict Exceeding Limit. If a jury verdict exceeds the limit for compulsory arbitration set by local rule or statute, the court must render a judgment for the full verdict amount.

Rule 77.1. Post-trial Motions; Appeal

(a) Post-trial Motions. A party may file post-trial motions as provided by these rules in other civil cases.

(b) Appeal. A final judgment entered at the conclusion of a short trial is appealable to the Court of Appeals as provided by law.

To: CJFC
From: Work Group 3; Court operations reforms
Re: Proposals and Recommendations for improving civil case management, judicial training, and litigant access to critical information about case management protocols.
Date: August 17, 2016

PROPOSAL 1: CIVIL BENCH JUDICIAL ROTATION TRAINING RECOMMENDATIONS

The Arizona Code of Judicial Administrations sets forth basic training requirements for all judges.[1] The Court Operations Work Group recognizes that there are three mandated forms of judicial training for Arizona superior court judges. The first is New Judge Orientation (NJO) which is specific to a judge's position and jurisdiction (limited versus general jurisdiction). The second form of training is the annual Judicial Conference, which is generally designed to provide judges with sufficient credits to meet their annual COJET requirements while providing education on current trends and recent changes to the law in a broad, general manner. The third training requirement is attendance at a program of regional or national scope at least once every three years.[2]

For example, NJO training is focused on providing a great deal of information related to working as a judicial officer in the judiciary and includes some limited, broad scope training on specific topics related to civil law. The work group understands that roughly 85% of the superior court judges face a rotation on the bench of some form. This means that it may be years before any information and training offered in the NJO training related to a civil bench assignment is used by or needed by a new judge. As such, a judge may not recall much of their initial NJO training. Moreover, because of the ever-changing nature of law, it is possible much of what a judge learns about presiding over a civil case will be stale by the time a judge rotates to a civil assignment. Further, the annual Judicial Conference includes some substantive law specific sessions, particularly on new issues, new laws, and trends and innovation in the law. These sessions meet a more general training goal of general information.

The Court Operations Work Group recommends that the training on civil law, both substantive topics and case management, received by superior court judges should be more content specific, detailed, and available to judges within a period at or near the time a judge presides over civil cases. As such, the Work Group recommends that there be an institutionalized Superior Court civil rotation training program in at least counties that rotate judges, whether on a scheduled court-wide rotation plan or a periodic docket or bench assignment rotation. The Work Group further recommends that training materials and

[1] A.C.J.A. § 1-302 (adopted by AO 2014-135, Jan. 2015).
[2] Sec. 1-302(I)

resources for the bench be revised and updated in consistent, timely manner and that such resources be made available in a more organized and readily accessible format than currently exists.

1. Recommendation:

- A.C.J.A. § 1-302(I)(4)(b) be amended to make bench assignment training mandatory rather than discretionary. (See Attachment A.)
- The specific content of civil rotation training should be established by the presiding judge to account for particular practices of the Superior Court in each county.
- The content, should include at a minimum: case management, civil disclosure, motion practice, jury trial procedures, and attorneys' fees.[3]

2. Recommendation.

- Civil bench assignment rotation training include a component that addresses Clerk's Office and Court Administration procedures.
- Often, there are general and civil specific standard case procedures, forms, and practices that have been approved by the court for use in the county; however, judges rotating into a civil assignment are not always aware of this information. The result can be inconsistency in processing and managing of cases. Having a component of rotation training that includes Court's Office and Court Administration procedures and practices should result in a shared understanding of how judges, the Clerk's Office, and Court Administration affects effective and efficient resolution of civil cases.[4]

3. Recommendation:

- Rotation training should also include a description of resources available to judges and how judges can locate and access those resources.
- Written materials should be prepared and available on Wendell (located on AJIN, the Arizona Judicial Internal Network) for future reference by judges. These materials should be easier to locate and updated on a regular basis to match the changing needs of the bench as well as the changes in substantive law and case management processes and systems.

4. Recommendation:

[3] This kind of training requirement aligns with Recommendations 8 and 9 of the Conference of Chief Justices Civil Justice initiative (CCJ-CJI) Final Report.

[4] This recommendation aligns with the CCJ-CJI Final Report, Recommendation 7; judicial team approach to improving civil case management.

- The work group further recommends that a statewide rotational training program that can be delivered online in a multi-module form be created for completion by judicial officers in smaller counties.

Attachment A

Proposed language for amendment of A.C.J.A. § 1-302(I)(4)(b).

4. Superior court judges

a. Orientation. Before assuming office, or within the first twelve months of assuming office, a new superior court judge shall receive orientation by an experienced judge of the superior court and shall complete the orientation requirements for judges of general jurisdiction courts approved by COJET.

b. Bench assignment. The presiding judge of the court shall determine if a superior court judge shall attend an approved program before assuming a new assignment in a specialized division. A judge shall complete a civil rotation training program within 6 months of an assignment to a civil calendar. A judge shall complete the specialized dependency-training program approved by COJET prior to or within twelve months of assuming a new assignment involving dependency cases.

PROPOSAL 2: STANDARDIZED WEB-BASED JUDICIAL PROTOCOLS

The Court Operations Work Group has determined counsel and self-represented litigants would benefit from consistent statewide access to the case management preferences and protocols for each judicial officer presiding over civil cases. As an example, Superior Court judicial officers in Maricopa County have the ability to detail courtroom, filing, pre-trial and trial protocols on their individual profile pages on the Court's website. (Click here for an example.) While these types of preferences case management protocols are available in various counties, not all judicial officers presiding over civil cases utilize them for various reasons. In addition, Superior Courts in many counties do not have any kind of judicial profiles on the court's website. Counsel or a self-represented litigant may not think to look for courtroom preferences and case management protocols on a judicial officer's bio page, particularly if the judicial profiles or bio pages are not sufficiently visible or conspicuous on the website.

The work group recognizes that the court in each county may not control its webpage or may share webpages with county government at large. In addition, the work group recognizes that there may be little ability for the AOC or Supreme Court to require local courts to design their webpages to include these judicial protocols. However, the Work Group has learned of the AZCourtHelp webpage being developed as part the work of other Arizona Supreme Court Committees to provide greater access to justice and to provide a central location for litigants and their counsel to access information about courts and court procedures.

The work group therefore recommends:

- A uniform judicial courtroom preference/case management protocol page be developed for each superior court judicial officer presiding over civil cases and that these protocols be located on
    - (1) each superior court website in a conspicuous location, and
    - (2) on the AZCourtHelp.gov webpage.
- A statewide template be required to be completed that includes courtroom preference and case management protocol information for all judicial officers presiding over civil cases in the Arizona Superior Court. (e.g., see linked above and the attached template.) The uniformity of the preference/protocol pages will allow counsel and self-represented litigants to quickly and easily find information related to pre-trial and trial protocols for any judicial officer in any court.
- The work group recommends that these protocol templates be completed and submitted within one of the following time periods, as applicable:
    - For new judicial officers who will preside over a civil docket – protocol templates should be submitted as part of the second phase of New Judges Orientation.

    - For judicial officers that rotate to a civil docket from another docket – protocol templates should be submitted within six (6) months after taking the civil bench
    - For judicial officers currently presiding over civil dockets - protocol templates should be submitted within six (6) months of the time this recommendation is adopted by the AJC
- The work group further recommends that the AOC assign a dedicated staff member to track submission of protocol templates and forward them to the personnel in charge of updating the AZCourtHelp webpage. Each county's Court administrator should assist each judicial offcier with submission coordination.

JUDGE NAME	
JUDICIAL ASSIGNMENT	
SPECIFIC COMMENTS OR ADVICE FOR LITIGANTS	
To be determined by judicial officer	
PRE-TRIAL PRACTICE AND MANAGEMENT	
Motion Practice	
General Protocol	
Forms of Order	
Supplemental Briefing	
Page Length Extensions	
Motion in Limine	
Motions for Summary Judgment	
Single or Combined Motions	
May Motions be Combined with Replies to other motions; responses to various motions in single document	
Omnibus Motions	
Oral Argument	
Other	
Discovery or Disclosure Disputes and/or Sanctions	
Standing Orders	
Personal Communication	
Communication between Parties	
Written Discovery and Rule 26.1	
ESI Discovery	
Other Pre-trial Practice Guidelines or Comments	
TRIAL PRACTICE AND PROTOCOL	
Trial Schedule	
Joint Pre-trial Memorandum and/or Conference; Exhibits and Objections	
Jury Selection	
Trial Practice and Procedure	
Courtroom Etiquette	
Where to stand in courtroom	
Protocol for approaching witnesses	
Approaching the bench or jury box	
Other Courtroom Policies & Recommendations	

PROPOSAL 3: ONLINE RESOURCE LIBRARY

Note: This is a rough draft. The Work Group determined to make this proposal separate from the rotational training proposal for purposes of clarity and emphasis.

The Work Group reviewed the training materials and substantive resources on civil law available to Arizona's Judicial Officers on the AJIN website Wendell. The Work Group noted the following:

- The menu does not clearly indicate where one would find training versus other substantive materials on particular areas of law.
- The training material available on civil law are lacking on many topics that a judicial officer presiding over a civil bench would need information and education on that they likely would not have experience with even if they had practiced civil litigation prior to taking the bench.
- Many of the materials are outdated, including the Civil Bench Book.
- Many judicial officer members of the CJRC noted they had no idea how to submit materials to Wendell or that it was judges that were the main source of information on Wendell.

The Work group also notes that many of the proposed recommendations of the CJRC as a whole involve changes to the civil rules of procedure that would necessitate training on new case management approaches that would allow judicial officers to be effective in the new case management approaches.

The Work Group recommends that the AOC Education Services division develop a robust online resource library for judicial officers presiding over civil matters, particular matters that are brought in Arizona's Superior Court. The resource library should contain up-to-date materials that are organized in a manner that coincides with civil case structure and case management. Examples of improvements to Wendell to allow for the development of resource library that meets the recommendation of the Work group include, but should not be limited to:

- The Arizona Administrative Office of Courts should create a structured system for thorough and meaningful annual updates to the Civil Bench Book. The current bench book update system does not allow for timely updates. The Work group recommends a work group or ad hoc committee be developed to design a structure for the timing of updates, the method of vetting authors for updates and a method for tracking topics in the bench book that need updating based on new statutes, rules, case law, and case management practices.
- Judges should be educated on the process for submitting materials to the resource library.