

**COMMITTEE ON SUPERIOR COURT
MINUTES**

Friday, September 11, 2015
Conference Room 119 A/B, Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007

Present: Judge David Mackey, chair; Judge David Cunanan; Judge Thomas Fink, William Gibbs; Judge Lee Jantzen (proxy for Judge Charles Gurtler); Judge Charles Harrington; Judge Celé Hancock; Toni Hellon; William Klain; Judge Kenneth Lee; Scott Mabery; Judge Paul McMurdie; Judge John Nelson; Judge Cathleen Brown Nichols; Ronald Overholt; Judge Michala Ruechel; Eric Silverberg; Megan Spielman; Judge Sam Vederman; Judge Randall Warner; Judge Joseph Welty

Telephonic: Judge Sally Duncan; Judge Richard Gordon

Absent/Excused: Judge Samuel Myers

Administrative Office of the Courts (AOC): Jerry Landau, Amy Love, Kevin Christen (extern), Jennifer Hancock (extern), Theresa Barrett, Kathy Waters, David Withey, Amy Wood, Tom O'Connell, Mark Meltzer

AOC Staff: Kay Radwanski, Sabrina Nash

I. REGULAR BUSINESS

Welcome and Opening Remarks. The September 11, 2015, meeting of Committee on Superior Court (COSC) was called to order at 10:01 a.m. by Judge David Mackey, chair. In remembrance of September 11, members observed a moment of silence. Judge Mackey welcomed new members Scott Mabery, chair of the Committee on Probation, and Eric Silverberg, court administrator in Cochise County.

A. Approval of Minutes from May 1, 2015

Motion: William Klain moved to approve the May 1, 2015, meeting minutes, as presented. **Seconded:** Judge Celé Hancock. **Vote:** Unanimous.

II. BUSINESS ITEMS AND POTENTIAL ACTION ITEMS

A. Legislative Update. Jerry Landau, AOC government affairs director, introduced Amy Love, AOC legislative liaison, and ASU externs Kevin Christen and Jennifer Hancock.

Ms. Love presented the following family court legislative proposals:

2016-01: Temporary order; preliminary injunction – current law requires the Clerk of the Court to issue a preliminary injunction in actions to establish paternity, legal decision making and parenting time, insurance coverage for a child, or permit a party to remove a child from the jurisdiction of the court. This proposal will apply some of these injunctions to cases where the parties were never married in an effort to reduce emergency petitions and temporary order requests. The injunction would not address disposition of property.

Motion: Judge Randall Warner moved to support. **Seconded:** Judge Hancock.
Vote: Unanimous.

2016-02: Child support; probation and court orders – requires probation officers to monitor the payment of child support and other court-ordered financial obligations.

Some members expressed concern about combining a family law case with a criminal case, conflating civil contempt with a criminal violation of probation. A concern also was expressed regarding increased costs to probation departments for monitoring child support payments.

Motion: William Klain moved to oppose. **Seconded:** Judge John Nelson. **Vote:** 19-2 agreed to oppose this proposal.

2016-03: Special needs/adult guardianship –

- Requires an alleged incapacitated person, or any person filing a petition for the appointment of a guardian on the incapacitated person's behalf, to provide the probate court with existing family court findings for review.
- Authorizes the court to order a person or the person's attorney, or both, who engage in unreasonable conduct in a guardianship for an incapacitated person to pay the parent or relative for some or all of the professional fees and expenses caused by the unreasonable conduct.
- Amends the guardianship appointment priorities to prioritize a parent or relative of the incapacitated person who has lived with the person for more than six months before the filing of the petition over a person nominated by will.
- If the family court makes a finding pursuant to A.R.S. § 25-403 that creates a rebuttal presumption that the current legal-decision making is in the ward's best interest and should be preserved after the appointment of a guardian the presumption can be rebutted if the court finds good cause.
- If the court has not made prior orders concerning legal decision making and parenting time and both parents are seeking appointment as guardian, the court may consider all factors.

During discussion, it was noted that it is helpful for the Probate Court judge to have a copy of any family court order, but concerns were raised that the other provisions limit the judge's discretion.

Motion: Judge Charles Harrington moved to oppose. **Seconded:** Judge Kenneth Lee. **Vote:** 18-3 agreed to oppose this proposal.

2016-04: Guardianship of foreign citizens – Removes the requirement that a foreign citizen be under age 21 in order to be eligible for guardianship under the statute.

In discussion, it was noted that this type of case is extremely rare.

Motion: Judge Nelson moved to oppose. **Seconded:** Judge Warner. **Vote:** Unanimous.

2016-10: FCRB sunset – Extends the Foster Care Review Board for another ten years until July 1, 2026.

Motion: Toni Hellon moved to support. **Seconded:** Judge Hancock. **Vote:** Unanimous.

Mr. Landau then presented the following civil and criminal court legislative proposals for 2016:

2016-05: Entry on records; stipulation; court order – When granting an order stating that a person has been cleared because of wrongful arrest, indictment, or charge, a judge is required to notify only the law enforcement agency of the petitioner's request instead of all law enforcement agencies.

Motion: Judge Joseph Welty moved to support. **Seconded:** Judge Hancock. **Vote:** Unanimous.

2016-06: Adult probation; GPS; restitution; lifetime probation; earned time credit –

1. Provides the court discretion in determining whether a person convicted of a dangerous crime against children and mandated to register as a sex offender is required to be placed on global position monitoring.
2. Proposes amending A.R.S. § 13-903 to spell out clearly that a probation sentence is tolled while a probationer is in the Department of Corrections.
3. Allows a review of process for those on lifetime probation. Probation may be reviewed after ten years at the request of the probation department or the prosecutor. If the probationer has made full payment of court-ordered restitution and any other monetary obligation in a given month, the probationer is eligible for earned time credit.
4. Removes the requirement that the probationer is current on community supervision in order to receive earned time credit.

A concern was raised as to whether Paragraph 3 would be a violation of a plea agreement. A question also was asked about what would happen to the remaining hours of community supervision referenced in Paragraph 4.

Motion: Judge Hancock moved that COSC take a neutral position. **Seconded:** Judge Nelson. **Vote:** Unanimous.

2016-07: CORP; service credit – Would allow probation, surveillance, or detention officers to elect to purchase up to 60 months of prior service by paying into the plan.

Motion: Mr. Klain moved that COSC take no position. **Seconded:** Judge Hancock. **Vote:** Unanimous.

2016-08: Juvenile court; disposition; commitment – Removes redundant provisions and also allows the juvenile court more discretion in determining levels of supervision, responses to certain violations based on an expansion in allowable activities and guided by objective assessment of risk, levels of need and supporting evidence-based practices that identify the importance of families as a factor in reducing recidivism. These changes would be applicable to the juvenile intensive probation and dispositional statutory provisions.

Motion: Judge Lee Jantzen moved to support. **Seconded:** Judge Welty. **Vote:** Unanimous.

2016-09: Title 12 statutes; Rules of Civil Procedure – Proposes to remove inconsistencies between the proposed rule and current statute by simplifying the process for including “costs” in a final judgment and clarifying the process for court appointment of a receiver.

Motion: Judge Harrington moved to support the first part of the proposal regarding the “costs” change and defer the second part of the proposal regarding “notice on receivership” pending more information. **Seconded:** Judge Nelson. **Vote:** Unanimous.

B. Language Interpreter Credentialing. Amy Wood, manager, AOC Court Services Division, Caseflow Management Unit, introduced David Svoboda, the AOC’s new language access coordinator. He replaces Carol Mitchell, who has taken a position in the AOC’s Certification and Licensing Division.

Ms. Wood announced that there is now a court interpreter webpage on the Judicial Branch website (azcourts.gov). The webpage provides information on becoming a court interpreter, registering as a court interpreter, and video remote interpreting.

Ms. Wood then presented information about a proposed court interpreter credentialing program that she will present to the Arizona Judicial Council in October. Arizona’s proposed certified court interpreter program will have four tiers. All court interpreters would have to pass the foundational tier (first tier), which focuses more on language skills than interpreting skills. The first tier would include ethical standards for all interpreters, provide a statewide registration method for all languages, ensure interpreters

have a basic understanding of the courts, a command of English and the target language, and clear a background check.

A potential interpreter would have to:

- Submit an application;
- Complete an orientation program (fee);
- Participate an online ethics training and sign an acknowledgement form;
- Pass a written English test with at least a score of 80% (fee);
- Complete an oral proficiency interview;
- Complete a background check; and
- Receive a registration approval ID number in a statewide registry.

Courts would be asked to show a preference for credentialed interpreters, manage interpreter complaints locally, and use discretion in managing staff interpreters that do not pass the oral exam. Tiers 2–4 would require interpreters to have completed Tier 1, prepare for an oral examination with online resources, and pay for and pass the National Center for State Courts' court interpreter written and oral examinations with a passing score to yet be determined.

During discussion, it was noted that the four-tier credentialing program would raise the bar for interpreters and increase the quality of services provided while leaving the courts with sufficient discretion in interpreter management. But others contended that Tier 1 alone might be sufficient and could avoid appeals. The concern was that a defendant could argue that his or her case merited a Tier 4 interpreter, but the court could provide only a Tier 1 interpreter. Ms. Wood noted that a credentialing program with standards that are too high could reduce the pool of interpreters, but a program with standards that are too low would do nothing to improve the interpreter pool. She agreed to take another look at programs in other states that use multiple tiers.

A concern also was raised about the code of ethics for interpreters. It was noted that in some rural counties, volunteers assist with interpreting in the courts. Holding volunteers to a code of ethics could cause them to discontinue their service to the court. Ms. Wood explained that there is a difference between holding a conversation with a court customer and courtroom interpreting. Many volunteers assist customers with directions in the building, reading instructions on forms, and the like. They are offering legal information, whereas the courtroom interpreter is providing language access services in a court case. For interpreters, maintaining an ethical standard is important, she noted.

Other concerns included establishing too-high barriers that result in unintended consequences, creating another bureaucracy with reporting requirements imposed on the courts, and generating grounds for appeal by having classifications of interpreters.

Motion: Judge Hancock moved to not support the court interpreter credentialing program. **Seconded:** William Gibbs. **Motion passed:** 11-9.

C. Determining Eligibility for Appointment of Counsel under Criminal Rule 6.4(b).

David Withey, AOC chief legal counsel, discussed an issue relating to appointment of counsel for indigent defendants. He explained that this issue came to the AOC during an operational review of a limited jurisdiction court. In that situation, a new judge denied a defendant's request for appointment of counsel; the judge's ruling was overturned upon appeal on the basis that the judge made insufficient inquiry about the defendant's financial circumstances. Criminal Rule 6.4(b) requires an examination of the defendant, under oath, regarding the defendant's financial circumstances. Many judges rely on information the defendant has provided on Form 5(a) regarding his or her financial circumstances.

Mr. Withey is trying to determine what action, if any, is needed for limited jurisdiction courts. He presented two proposals. The first would provide for more extensive commentary in the LJC Bench Book, explaining the process and factors to be considered when deciding whether to appoint counsel for the defendant. The second proposal would be possible amendments to Form 5(a) to clarify the defendant's financial ability to acquire counsel.

Members discussed the relevance of the questionnaire, noting that a defendant may be illiterate, under the influence, angry, or antagonistic. The form may not be filled out completely or may be unintelligible. The form is not completed under oath. Even so, it is rare that a request for appointment of counsel is denied and even rarer that appeals to superior court are made on this issue. The consensus was that this is training issue, and to comply with Rule 6.4(b), the defendant should be sworn in and questioned.

D. Pre-Trial Services Assessment Programs. Kathy Waters, director of the AOC's Adult Probation Services Division, and Tom O'Connell, APSD pre-trial program manager, spoke about the new pre-trial services assessment program. Ms. Waters explained that the Chief Justice is interested in evidence-based pretrial implementation. Her goal is to implement pretrial services in the adult probation division, working county by county to find funding and capacity for pretrial programs. She helps to determine each county's needs for assessment and supervision, if supervision is required based on risk and conditions of release. She also spoke about the validity of the pre-trial services assessment (PSA), which is a universal assessment tool.

Discussion focused on funding for pretrial services and the validity of the information in the PSA. The assessment considers a defendant's criminal history. It was suggested that a county be allowed to customize the assessment so that it accounts for risk factors in a specific county. Ms. Waters noted that the human factor builds in bias, but she added that the assessment is just one piece of the judge's decision and is not meant to impact the judge's discretion. The assessment is simply part of the totality of information that judges use to determine risk and supervision.

Counties are not required to participate in the PSA program, but those that do must use the PSA tool. In a pilot project in Mesa, court staff were trained in how to interpret criminal histories. Probation staff are not required to gather this information, and its

collection does not involve an interview with the defendant. It was suggested that since interviews with defendants are not required, counties could pool resources to complete the PSAs. As to reporting requirements, the AOC pulls data and creates reports from APETS.

- E. Task Force on the Arizona Rules of Civil Procedure.** Mark Meltzer, AOC Court Programs Unit, provided an overview of the Task Force on the Arizona Rules of Civil Procedure. He called attention to the tremendous amount of dedication, time, and effort the task force members have spent on this project. The task force is working to align Arizona's Rules of Civil Procedure closer to the federal Rules of Civil Procedure, paying meticulous attention to detail to ensure that the formatting of the rules is uniform with the federal formatting. The task force expects to have a draft of all the rules in a single document available at the November 6, 2015, COSC meeting for vetting. In the meantime, another draft will be emailed to COSC members for review and comment. The task force plans to file a rule petition in January 2016.
- F. Rules Agenda Meeting.** Mark Meltzer, AOC Court Programs Unit, provided a summary of the outcome of the August rules agenda meeting of the Supreme Court. Of note is the restyling of the Arizona Rules of Protective Order Procedure (R-15-0010) in their entirety and amendments to the Arizona Rules of Family Law Procedure, specifically Rule 67.1 (uniform collaborative law) and Rule 74 (parenting coordinators).

Rule petitions of interest to superior courts include:

- **R-15-0004, Civil Rule 11:** proposes curbs on reported abuses of Rule 11 by adopting the federal rule provisions on "certification." The amendments would also require that a motion for sanctions under the rule be filed separately from any other motion and that the motion specifically describe the conduct that warrants a sanction. This petition was continued.
- **R-15-0021, Civil Rule 55(a):** seeks to clarify a void following the depublication of *Neeme Systems v. Spectrum* (COA 1, 2011). To clarify the notice requirement in Rule 55(a)(1)(ii), the petition proposes language that would require notice to any attorney who represents the defaulting party either "in the action in which default is sought or in a related matter," whether or not the attorney has formally appeared. This petition was adopted.
- **R-15-0005, Criminal Rule 7.5:** allows the court to issue a warrant or a summons upon receiving a written report from pretrial services, or if the court does not want to issue a warrant or a summons, the court can issue a notice scheduling a hearing. This petition was adopted as modified.
- **R-15-0011, Criminal Rules 15.5 and 39:** would require all redactions to be identified in documents produced in discovery, and the party making the redaction must state the legal basis for the redaction if it is not clear from the context. This petition was adopted as modified.
- **R-15-0017, Criminal Rules 9.1, 14.2, 14.3, and 26.3:** these amendments, along with four amended forms, serve to advise the defendant that failure to appear at

sentencing may result in the loss of the right to a direct appeal. This petition was adopted as modified.

- **R-15-0024, Criminal Rule 41 (forms):** creates a single version of a warrant as opposed to multiple versions of a warrant. This petition was adopted.
- **R-15-0026, Criminal Rule 41:** is an amendment to Forms (4a) and 4(b) to inquire into the defendant’s military service, homeless status, desire to have an interpreter and English proficiency. This petition was adopted as modified.
- **R-15-0013, Juvenile Rule 44:** proposed multiple changes to Rule 44, which provides procedures for disclosure and discovery of information in child welfare matters. This petition was continued, with the exception of a proposed change to Rule 44(B)(2)(d), which is adopted effective January 1, 2016.
- **R-15-0027, SCR Rule 123:** states that with regard to certain redactions for home address and contract information, résumés of applicants for “high-level administrative positions would be open to the public. The amendment also defines “high-level administrative positions.” This petition was adopted as modified.
- **R-15-0006, ARFLP Rule 74:** earlier this year the Supreme Court, by administrative order, created the Parenting Coordinator Rule Petition Review Committee, which was tasked with reviewing comments on the petition, filing an amended petition, revising Form 11, and recommending a statewide order regarding parenting coordinators. This petition was adopted as modified.
- **R-15-0019, ARFLP Rule 67.1:** proposes to implement the Uniform Collaborative Law Rule in Arizona. This proposal is voluntary. Section F of this amendment states that persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to resolve a collaborative matter related to the proceeding. The parties shall promptly file the agreement with the tribunal, and the filing operates as a stay of the proceeding. This petition was adopted as modified.
- **R-14-0032, Rules of Procedure regarding Enforcement of Tribal Court Judgments and Orders:** removes requirements that the Clerks of Superior Court certify that no objections have been filed after the time for objections has passed. The proposed amendments bring the rules in line with the practice in civil and family law default judgments that have been effect statewide for two years. This petition was adopted as modified.
- **R-14-0029, JPR Rules, Rule 2:** proposes that the commission no longer have a legislator as a member and that the chair may not be a judge member. This petition was adopted as modified.
- **R-15-0018, Supreme Courts Rules 31, 34, 38, 39, and 43:** filed by the Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law, this petition adds clarifying language while maintaining the text and intent of the rules. A proposal to require all mediators, even those employed by the court, to be members of the State Bar—a proposition that COSC opposed—was not adopted. The petition was adopted as modified, except that consideration of ER 1.6 (confidentiality of information “relating to the representation”) is continued.

III. OTHER BUSINESS

B. Good of the Order/Call to the Public

The 2016 meeting dates were announced. They are February 5, May 6, September 9, and November 4.

No one from the public was present during the Call to the Public.

C. Next Meeting:

Friday, November 6, 2015; 10 a.m.

Arizona State Courts Building, Conference Room 119 A/B

1501 West Washington Street

Phoenix, AZ 85007

Meeting adjourned at 1:41p.m.