ARIZONA JUDICIAL COUNCIL
JW Marriott Starr Pass Resort
3800 W. Starr Pass Blvd., Tucson H-J
Tucson, AZ 85745

June 18, 2012

Meeting Minutes

Council Members Present:

Chief Justice Rebecca White Berch
Judge Louraine Arkfeld *(retired)*
Jim Bruner
David Byers
Judge Norman Davis
Mike Hellon
Judge Douglas Holt
Judge Joseph Howard
Michael Jeanes
Emily Johnston
Joe Kanefield
Gary Krcmarik
Judge David Mackey
William J. Mangold, M.D., J.D.
Judge Robert Carter Olson
Judge Antonio Riojas, Jr.
Judge Sally Simmons
George Weisz
Judge David Widmaier
Judge Lawrence Winthrop

Council Members Absent:

Jose A. Cardenas, Esq.
Judge Rachel Torres Carrillo
Athia Hardt
Yvonne R. Hunter
Janet K. Regner

Administrative Office of the Courts (AOC) Staff Present:

Mike Baumstark
Ashley Dammen
Karl Heckart
Paul Julien
Kevin Kluge
Jerry Landau
Jennifer Liewer
Amy Love
Alicia Moffatt
Nina Preston
Jodi Rogers
Jeff Schrade
Lorraine Smith
Nancy Swetnam
Cindy Trimble
David Withey

Presenters and Guests Present:

Justice Scott Bales
Bob Beecher
Jeanette S. Bloss
Julie Borgna
Margaret McKenna
John Phelps
Tom Peterson
Lisa M. Price

Judge Peter Cahill
Roger Coventry
Amelia Craig Cramer
Tom Curti
Robert Fleming
Gwen Gorbette
Phil Grant
Amy Hubbell
Yolanda Kennedy
Elizabeth Koch
Teresa Lancaster
Judge Jay Polk
J.R. Rittenhouse
Evelyn Saunders
Dannette Schultz
Bob Sears
Denice Shepherd
Judge Roxanne Song Ong
Sylvia A. Stevenson
Beverly Tencza
Peggy Van Norman
Theresa Whitfield

Chief Justice Rebecca White Berch, Chair, called the meeting to order at 1:30 p.m., at the JW Marriott Starr Pass Resort, 3800 W. Starr Pass Blvd, Tucson, Arizona. The Chair welcomed those in attendance and recognized Mr. Gary Krcmarik, the Council's newest member, replacing Ms. Karen Ferrara as the Court Administrator member. The Chair noted Vice Chief Justice Andrew Hurwitz has been appointed and confirmed to the Ninth Circuit Court of Appeals. She welcomed Justice Scott Bales to the meeting.

Approval of Minutes

The Chair called for any omissions or corrections to the minutes from the March 29, 2012, meeting of the Arizona Judicial Council. There were no other substantive changes.

> **MOTION: To approve the minutes from the March 29, 2012, meeting of the Arizona Judicial Council, with minor stylistic edits.** The motion was seconded and passed. AJC 2012-08.

Committee on Improving Judicial Oversight and Processing of Probate Court Matters Update

Mr. Mike Baumstark, Deputy Director of the AOC, provided introductory remarks on the history and process of the Committee. He presented an overview on four parts being recommended for approval: training; Arizona Code of Judicial Administration (ACJA) § 7-202: Fiduciaries; probate forms; and statewide fee guidelines. Mr. Baumstark noted the proposals represent a starting point for implementing the Committee's recommendations, not the end. He stated the overall recommendation is to stay the course as recommended by the Probate Committee.

Mr. Jeff Schrade, Director, and Mr. Paul Julien, Judicial Education Officer with the Education Services Division of the AOC, presented information and an outline on the proposed training for judicial officers, court appointed attorneys, and unlicensed fiduciaries serving as guardians, conservators, and personal representatives. Mr. Julien noted that the programs will be taped and made available for future use beyond the initial trainings.
Mr. George Weisz suggested the training include the catalysts that got us to this point, as highlighted in the *Arizona Republic* articles. He suggested that the training show those abuses and what can happen as a result.

Mr. Mike Hellon stated his primary concern is the potential conflict of a family member guardian looking out for their inheritance, rather than the well being of the ward. He asked for some assurance that the training program includes a strong recommendation to the Probate Court to put an ongoing mechanism in place to try to identify when such a situation occurs and how to deal with it.

Ms. Nancy Swetnam, Director of the Certification and Licensing Division for the AOC, presented information on the proposed training and curriculum outline for court- appointed investigators. Ms. Swetnam noted that staff has not received any objections to the proposed outline.

> **MOTION: To approve the training outlines for both probate and court investigators, as presented.** The motion was seconded and passed. AJC 2012-09.

Ms. Swetnam presented proposed code changes to ACJA § 7-202: Fiduciaries. She noted public comment was received and a public forum for stakeholders was held, and based on feedback received, changes were incorporated. Ms. Swetnam stated the most significant issue concerns the services a licensed fiduciary may perform in uncontested cases without the assistance of an attorney. She noted the majority of fiduciaries would recommend an attorney review the account and prepare the petition for the filing of the account. Ms. Swetnam reported an informational session for fiduciaries will be offered over the summer.

Ms. Cindy Trimble and Ms. Ashley Dammen, AOC Probate Project Coordinators assigned to oversee implementation of the probate report recommendations, presented information on ACJA § 3-302: Probate Forms to include forms 1-4 (preferred original forms) and forms 5-9 (conservator account forms) and their instructions. Ms. Trimble provided additional handouts on the forms. She noted court authorization is needed for Form 9: Simplified Conservator's Account. Ms. Trimble stated they have received and reviewed stakeholder comments and tried to incorporate where possible.

Judge Olson expressed concern regarding assets not denominated in dollars. He noted if investments are moved down below in the form, this could result in reporting errors.

Ms. Swetnam presented ACJA § 3-303: Fee Guidelines. Mr. Gary Krcmarik provided comments regarding competitive bidding. He noted that Coconino currently pays $55 an hour.

The Chair called for public comment on the three code sections presented and limited public comment to five minutes per person.
Ms. Lisa M. Price, Principal Fiduciary for Entrust Fiduciary Services, provided comment on ACJA 7-202. She expressed concern with fiduciaries being allowed to prepare certain legal documents and stated the petition and approval of the accounting should be done by counsel. Ms. Price noted this could lead to fee disputes. She expressed concern regarding fee guidelines and the outlining of timeframes to complete certain tasks. Ms.

Price noted that putting in restrictions will lead to more court time and more administrative costs, and she would like to see them removed from the guidelines. Ms. Price stated that as a professional, she still doesn't understand the forms and was not sure if a non professional would be able to figure them out. She noted they are extraordinarily complicated, and she doesn't see a benefit to the courts, clients, or interested parties. Ms. Price commented that she didn't think the other schedules (inventory and sustainability calculation) are necessary.

Ms. Price suggested that if the forms are approved, a data collection should be done to see what the increased administrative and court costs are

Mr. Hellon expressed his concern with the new forms not capturing unrealized gain or loss of an asset, i.e., change in market value of a home or stock portfolio. He noted the old forms capture this information, but the new forms go in the wrong direction

Mr. Robert Fleming, attorney in Tucson, provided public comment. He stated the fee guidelines are wrongheaded, enshrine the hourly fee, and punish innovation and efficiency. Mr. Fleming spoke on the fiduciary filing issue. He noted that as an attorney of record, as an ethical matter, he would continue to offer the same services unless he withdraws, then he is unrepresented for "all" purposes.

Mr. Fleming referenced the "Fickett" case regarding a malpractice issue for a lawyer not supervising work being done by his client. He noted that Arizona was one of the first states to adopt National Guardianship standards, and these new forms will jettison all of this work to save costs. Mr. Fleming stated that attempting to simplify this for pro pers won't happen unless it is permissive and not mandatory. He added that the process will not be more transparent if it doesn't have account information. Mr. Fleming suggested the solution is to make the use of the forms permissive and allow judges in individual cases to mandate them.

Mr. Michael Jeanes asked about a possible solution for the guidelines. Mr. Fleming suggested using a simple rule that no fiduciary or attorney is permitted to charge a fee of more than a designated dollar amount for a year without prior court approval.

Ms. Denice R. Shepherd, attorney and fiduciary, provided public comment. She noted that having an attorney review is not a duplication of effort if it deals with a legal review. Ms. Shepherd stated she reviews to make sure it has been done according to the rules, that it makes sense, and will save court time, which is a benefit to the ward. She noted that fiduciaries should not be asking for affirmative relief.

Ms. Shepherd stated that bonding companies do not want to issue bonds for fiduciaries not represented by an attorney, and a bond is only way the estate stays whole. She noted that if someone wants her as their attorney, she must review their account, and she will tell them this up front, which is the only way to ensure the ward is protected.

Ms. Shepherd stated that lawyers and fiduciaries need time to understand these new changes, and she asked that we allow a period of time for these rules to take effect, if approved.

Ms. J.R. Rittenhouse, licensed professional fiduciary, provided public comment. She noted she supports the three previous speakers. Ms. Rittenhouse stated she knows what she is doing, but she is not an attorney, and if she misses something, she will be held accountable for it. She expressed concern with equating expense with justice, and urged that we not lose sight of what is most important in terms of providing safety for vulnerable adults and making sure they are being taken care of.

Judge Jay Polk, speaking on his own behalf, provided public comment and suggested changes to code section 7-202, Page 19, c.(4) to remove the word "client" and replace with the words "ward or protected person."

Judge Polk stated that lawyers do lend value, and it would be penny-wise and pound-foolish to allow fiduciaries to file the petition. He expressed concern with the sentence that says "this authority does not include the preparation of the filing of documents in contested probate proceedings pursuant to Rule 27 when an objection is made to the petition for approval of the conservator account." He stated a person won't know when there is an objection until the accounting has been filed, and the sentence does not make sense.

Judge Polk suggested extra time be allowed for people to get used to using the forms and implement them, but in long the run, we will be better off having them.

Judge Polk expressed concern with the fee guidelines. He stated the fee guidelines do not recognize that Arizona statute currently says that a fiduciary, attorney, and accountant are entitled to a reasonable fee. He noted that when the Committee drafted these guidelines, the intent was to provide guidelines to help the court determine whether the fees in question were reasonable, and these guidelines don't express that, and that could lead to some confusion. Judge Polk referenced B.2., which refers to the "fee guidelines applying to the compensation of the following individuals" and uses the word "estate." Judge Polk noted he has talked with other judges who share a concern whether that means in an uncontested decedent's estate that is being administered informally. He stated that if so, under our statutes, the court needs to be hands-off, and cannot inject itself into every personal representative fee. Judge Polk stated this was not their intent at the committee level, and it needs to be clarified. Judge Polk then suggested that a "valid POA" be added to the list in B.2.b.

Judge Polk referenced Page 4, 3.c. regarding "list of proposed hours." He suggested striking the words "upon request" in 3.c., and suggested if the fiduciary exceeds the amount of time, that they automatically give an explanation when they request approval.

Judge Polk referenced Page 6, F.2., regarding "competitive bids." He stated this will cause problems in Maricopa County because of the way they operate, and this area needs to be fleshed out.

Mr. Dave Byers noted the idea regarding competitive bidding in Maricopa County was that it would be done up front. He explained that if you were a lawyer wanting to do this business, you would get a specified percent fee, plus now be competitive on your hourly rate. Mr. Byers added that if the lawyer was competent, and had a lower rate, he/she would be more likely to be on the list. He noted the question is whether you can have good lawyers and still have a reasonable cost for the wards.

Discussion took place regarding changing the effective date of the fee guidelines and ACJA 7-202 to January 1, 2013.

Judge Polk suggested the need for an office for protected persons (similar to Office of Public Defender). He stated it could be funded by having a rate set by the Board of Supervisors, and if the estate has money, the county would get reimbursed from the estate at a set rate.

Mr. Roger T. Coventry, Childers & Berg, provided public comment. He spoke on A.R.S. § 14-5651, which requires a cost-benefit analysis by the fiduciary before undertaking civil action litigation. Mr. Coventry stated this will have unintended consequences if there is nothing to be gained from the estate. He added that the problem with these regulations is the one-size-fits-all type of solution used in counties that are very different. Mr. Coventry stated the market should drive the rates. He added that regarding the sustainability analysis, the size of estate has no relation to the needs of the person. He noted the proposal provides a superficial analysis.

The Chair opened up the floor for discussion, asking whether the proposals before the Council do some good and are worth trying out.

Mr. Hellon stated that anything new is going to have to be tweaked. He moved that the Council approve all of the recommendations, with the understanding that they will evolve and be adjusted as we go forward. The motion was seconded with the addition of including the suggested amendments provided by Judge Polk. Mr. Hellon agreed to the amendment to the motion.

Judge Norm Davis stated he did not agree with the motion. He added the proposed fee schedule and ACJA § 3-303 takes us backwards, and a fee schedule that caps fees for the size of the estate is the only reasonable solution. Judge Davis noted he would vote against ACJA § 3-303, and he is not in favor of fiduciaries preparing their own petitions, which removes professional responsibility and checking for client abuses.

Judge Davis noted that the proposed forms took a great deal of work, and they are close to something that works. He stated the forms should be permissive, and forms 5-9 should not be made mandatory at this time. Judge Davis noted there are many unresolved issues, i.e., the transaction log adds to the confusion, accounting issues, etc., and we would be going backwards to adopt them now for the pro se world until the issues are worked out.

Mr. Jim Bruner stated he appreciates the work of the Committee, but some of the forms seem overly complicated. He suggested the concerns raised by the public speakers be vetted by Committee staff, and the September 1 implementation date be extended. Mr. Bruner stated he would vote against the motion.

Judge Carter Olson stated the questions raised have already been substantially vetted. He noted the fee guidelines and forms were never intended as a silver bullet or as a stand-alone, holistic solution. He added that the rule and statutory changes were part of the mix of recommendations to try to improve transparency and efficiency, and the workgroup anguished over the process of developing the forms and instructions. Judge Olson noted the budget is the only new thing being introduced.

Judge Olson suggested the following friendly amendments be made to the motion: (1) in the forms, go back to investments being in the general assets, and (2) address the concerns regarding competitive bidding. The motion maker and second agreed to the amendments.

Judge David Mackey noted that we are nearly there with the forms. He suggested making them preferred and not exclusive until we deal with the concerns raised and work out the issues that may arise once the forms are in use.

Judge Mackey stated with respect to ACJA § 7-202 regarding allowing licensed fiduciaries to file without attorney review, it makes sense to allow it (family members can do it now), but he does understand the concern. He noted he does not favor the fee guidelines because he believes we already have the framework in place.

Judge Sally Simmons agreed with Judge Davis' position of not filing petitions without an attorney, and stated she would vote against that portion of the motion.

Mr. Hellon noted there are lots of reasons not to do something, but we need to take something and move forward. He stated we can then learn from implementation and make adjustments as we move forward.

Mr. Bruner suggested waiting until January, review the issues, and then tweak them.

Mr. Byers stated the need to accomplish something that is beneficial to the wards.

Judge Olson noted the September 1, 2012 effective date essentially means the forms would not be used theoretically until September 2013, as the forms will only apply to the new cases that come through the door September 1 going forward, and current cases won't be required to use the new forms until a year out (with the exception of form 5).

> **MOTION: To approve the ACJA §§ 7-202: Fiduciaries, 3-302: Probate Forms and 3-303: Fee Guidelines with the amendments provided by Judge Jay Polk and Judge Robert Carter Olson.** The motion was seconded and passed. AJC 2012-10 (11 approved; 8 opposed)

ACJA 1-307: Judge Pro Tempore Financial Disclosure

Mr. David Withey, Chief Legal Counsel for the AOC, presented ACJA § 1-307: Judge Pro Tempore Financial Disclosure, which he noted is a consent item.

> **MOTION: To approve the ACJA § 1-307: Judge Pro Tempore Financial Disclosure, as presented.** The motion was seconded and passed. AJC 2012-11.

Rule 123 Discipline Records Amendment

Mr. Withey presented the pending rule petition. He noted that under current Rule 123(e)(1), discipline records should be closed because they are not among the listed exceptions to closure. Mr. Withey stated the pending change would clarify the rule by expressly stating discipline records are closed and provide a means to open them for good cause. He noted the committees that reviewed the amendment wanted to leave it closed with no exceptions

The Chair noted the issue is whether to keep the rule as it is, entirely closed with no exceptions, or to allow good cause exceptions.

> **MOTION: To approve the alternative proposed amendment closing all records concerning employee misconduct and discipline except on a showing of good cause.** The motion was seconded and passed. AJC 2012-12. (2 opposed).

Commission on Technology (COT) Update

Mr. Karl Heckart, Chief Information Officer and Mr. Kevin Kluge, Chief Financial Officer for the AOC, presented the COT update, proposed Judicial Collection Enhancement Fund (JCEF) operating budget amount, and technology-related project spending as recommended by the Commission on Technology for the Council's consideration and approval.

> **MOTION: To approve the Judicial Collection Enhancement Fund (JCEF) operating budget amount and technology-related project spending, as presented.** The motion was seconded and passed. AJC 2012-13.

Technology-Related RFPs

Mr. Heckart provided an update on the three RFP's currently in process: Fine/Fees and Restitution Enforcement (FARE) Program, Remote Access to Court Documents and Bulk Data System (eAccess), and eFiling.

Judicial Branch Budget Update

Mr. Kluge briefed the Council members on cuts to the Judiciary, with overall cuts of $55.7 million. He noted the 2013 budget has been appropriated at our baseline budget, but excludes the Judiciary from receiving any appropriation increases to cover retirement increases (ASRS) and EORP), which is a cut for our budget. Mr. Kluge added that they continue to not fund the health and dental costs for our superior court judges, and there is more than $800,000 in general fund cuts.

Mr. Kluge reported on the big issue of the fund sweeps of $6 million for 2013 and 2014 and the funding sources used to cover these sweeps.

Judicial Branch Legislative Update

Due to time constraints, no presentation was made. Members were referred to the information under Tab 6 of their meeting materials.

Call to the Public/Adjourn

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

The Chair acknowledged the following Council members with terms expiring June 30, 2012: Mr. Joe Kanefield, President of the State Bar of Arizona; Judge Douglas Holt; and Judge Louraine Arkfeld (retired). The Chair thanked the members for their service on the Council.

A motion was made to adjourn the meeting at 5:05 p.m.