

Committee on Civil Justice Reform
State Courts Building, Phoenix
Meeting Minutes: February 16, 2016

Members attending: Don Bivens (Chair), Ray Billotte by his proxy Phillip Knox, Hon. Robert Brutinel, Hon. Dawn Bergin, Hon. Jeffrey Bergin, Krista Carman, Roopali Desai, Jodi Feuerhelm, Glenn Hamer personally and by his proxy Christine Martin, Hon. Charles Harrington, Tim Hogan, Andrew Jacobs, Dinita James, Michael Jeanes, Jack Jewett, William Klain, Stephen Montoya, Michael O'Connor, Mark Rogers, Hon. Peter Swann, Hon. Timothy Thomason, Geoffrey Trachtenberg, Hon. Patricia Trebesch, Steven Twist, David Weinzweig

Absent: Colin Campbell

Guests: Brittany Kauffman, Shelley Spacek Miller

Staff: Jennifer Albright, Mark Meltzer, Theresa Barrett, Julie Graber

1. Call to order; remarks by the Chief Justice and the guests. The Chair called the meeting to order at 10:02 a.m. and welcomed the members to the committee's first meeting. He then invited remarks from Chief Justice Scott Bales.

The Chief Justice commented on several recent civil justice reforms and initiatives, including amendments to the Federal Rules of Civil Procedure ("FRCP"), a proposed streamlining of the Arizona Rules of Civil Procedure ("ARCP"), and recommendations from the Institute from the Advancement of the American Legal System ("IAALS") and the Conference of Chief Justices ("CCJ"). He stated that the goal of this committee is to build on these previous efforts, to find further ways to reduce costs and disposition times for civil cases in the superior court, and generally to improve current civil case processing. The Chief Justice cited a decrease in the volume of civil case filings in Arizona over the past several years, and mentioned a perception that non-judicial dispute resolution alternatives resolve cases less expensively, more quickly, and more responsively than civil courts. He noted an interest by courts nationwide in early and active judicial case management, differentiated case management, changing the culture of judges and lawyers to promote the fair and efficient resolution of legal disputes, and a long menu of other topics and issues. He commended this committee for the quality of its individual members, and for its representation of diverse interests, including judges in urban and rural courts, private and public litigators, and in-house corporate counsel. He urged the committee to develop recommendations that will keep Arizona at the forefront of court innovation.

The Chair thanked the Chief Justice for his remarks. The Chair then reviewed several administrative items, including the open meeting requirements, the availability of minutes after each meeting, and the introduction of committee staff. The Chair proceeded to introduce two guests - Brittany Kauffman, director of IAALS' Rule One Initiative, and Shelley Spacek Miller, a senior court research analyst with the National

Center for State Courts (“NCSC”) – and he invited their comments. He also requested the guests to consider the members’ discussion of ideas throughout today’s meeting, and to share their perspectives on those ideas.

Ms. Kauffman advised that a former Colorado justice established IAALS a decade ago to assist jurisdictions nationwide with implementing new ideas in the civil justice system. Ms. Kauffman is the director of IAALS’ Rule One Initiative, which has the objective of improving civil practice at the federal level and in every state court. Her work has encompassed summary and expedited litigation programs. Ms. Kauffman’s work with IAALS led to her staffing the CCJ project and its rules subcommittee. She emphasized that changes in rules and practices require commensurate changes by judges and attorneys in their respective cultures. She wants to shape the courts of tomorrow by improving service to court customers. She offered committee members her assistance by reporting what other jurisdictions have done, and discussing ways to implement new ideas.

Ms. Miller has worked in improving court operations, including program evaluation, case flow management, staffing, and metrics. She noted that court operations and court rules work in tandem rather than independently. She stated that enforcement of court rules is a critical responsibility of judges, and this often requires a shift in existing culture. She also explained that when a court makes changes it should measure results, such as whether a change brought about the desired effect, and whether the change assists the litigants who the court serves. Her interest is not limited to high dollar cases, which have a low volume, but is rather on high volume cases that constitute the majority of court operations. She also is willing to serve as a resource to the committee.

2. Review of A.O. 2015-126; approval of committee rules. The Chair then reviewed Administrative Order 2015-126, which established this committee. He noted that the Order requires recommendations for the superior court only, and those recommendations should be applicable to the superior court statewide, not just urban venues. The Order requires the committee to report its recommendations by October 1, 2016, so the members should have a working draft by the end of this summer.

The Chair also reviewed draft rules for conducting committee business, which were included in the meeting materials. Because of the addition of two members by Administrative Order 2016-04, those rules should reflect that a quorum now is fifteen members.

Motion: To approve the draft rules for conducting committee business, with the correction concerning a quorum noted above. Seconded and passed unanimously.
CJRC-001

3. Members' ideas and observations. Before the meeting, the Chair had requested each member to identify interests and concerns that the member would like to bring to the full committee's attention, and to suggest data that might be necessary to evaluate particular recommendations. Each of the members present then took about five minutes and offered their observations, summarized as follows.

(1) The first member recently attended a symposium on the future of the jury trial. The premise was that very few cases -- only 0.7% -- now go to trial. This number represents a combination of bench trials (0.2% of case filings) and jury trials (0.5%). The number is substantially less than the 4% figure of several years ago. The symposium concluded that courts now strive to get litigants out of the system by alternative dispute resolution ("ADR") and by other means, but a court trial should be as efficient, quick, and inexpensive as ADR. Jury trials are a right, but regrettably, a vanishing one. Trials serve to educate the next generation of lawyers and judges on the trial process, they promote the development of common law through appellate decisions, and they educate citizen jurors on their role in government and the court system.

This member said that judges need to exercise greater management of their cases, the extent of discovery should have a relationship to the value of a case, and courts should collect data that demonstrates to citizens that courts are cost-effective. He added that the recommendations of this committee should have application to superior courts statewide, including three Arizona counties that have only one superior court judge.

(2) This attorney noted that Rule 1, which has as its objective "the just, speedy, and inexpensive determination of every action," is a promise that the courts make to citizens, but the system has not fulfilled the promise. He suggested that litigation is too slow, too expensive, and too intrusive. Discovery of electronically stored information ("ESI") is "out-of-control," and its cost is borne not only by parties, but also by third parties who must respond to civil subpoenas. Postponements are too easily obtainable. Defamatory allegations in litigation have no consequence.

(3) The next member posed the question of how the civil justice system maximizes human and financial value for everyone. The member proposed that judges be more empowered to deter unproductive and inefficient litigation. He supports the concept of assigning judges who are experienced in particular areas of the law to specialty courts. He also encouraged the innovative use of technology, which allows attorneys to efficiently collect information and thoughtfully present it to the court. Finally, he asked the members to consider the ultimate meaning of "justice" as a benchmark for their work.

(4) There is room for improvement in court administration. Technological innovation should benefit self-represented litigants ("SRL"), as well as attorneys. Electronic filing is off to a good start, but it needs to (a) permit the initiation of civil cases, and (b) be available in all fifteen counties. Standards for electronic exhibits would be

helpful. For example, several vendors now manufacture police body cameras, but they have different technology platforms that make electronic filing of these videos challenging for the court.

The recent drop in case filings has negatively affected funding for superior court clerks, who derive revenue from civil case filing fees. The dip in revenue has affected the court's ability to adopt innovative technology, and to pay competitive salaries for personnel in the clerk's office.

(5) This attorney has found that almost half of a case's litigation budget goes toward the cost of depositions and expert witnesses. Because of expensive pretrial expenses, counsel may find it challenging to reserve enough funding for a subsequent trial. Yet depositions have marginal returns; too many pages in a deposition have no bearing on dispositive issues. The attorney recently had a New York case in which local procedure did not allow expert depositions, which was a welcome relief.

(6) This judge believes that lawyers need trial experience. Without that experience, lawyers do not fully comprehend what is important, and what fact-finders really need to know. Attorneys often devote their trial preparation to "turning over every stone," which increases costs, allows cases to be won by attrition, and fails to focus on crucial issues. Cases that are now resolved by arbitration used to be the cases in which young lawyers learned about trial; arbitration deprives them of that experience. The member recommended putting a portion of these arbitrable cases directly on a track to trial, with fewer jurors (he suggested six), a shorter time for service of process, and discovery limits. Judgments would still be appealable. The member also suggested that judges have additional training in demeanor and enforcing rules so they can clearly convey the realities of litigation to the parties.

(7) This judge shared information about the pilot commercial court in Maricopa County. Judges are trying different management strategies, such as bifurcating discovery on liability and damages, making themselves available to other pilot court judges for settlement conferences, and encouraging trials to the court rather than to a jury. The member observed that expert witnesses are a considerable cost component of these cases; resolving cases without trial reduces the cost of litigation.

The member also commented that the commercial court judges receive dozens of document filings daily, yet the judges have no law clerks, and the responsibility for managing these documents typically falls on an underpaid judicial assistant. The judicial assistants and judges also spend a disproportionate amount of time explaining the legal process to SRL. Judges and staff would save time, and SRL would benefit, if the court had additional resources for these litigants, including a more robust self-service center.

(8) This attorney commented that the efficiency with which a case is resolved often depends on whether attorneys have a relationship of trust. Developing these relationships is an important element of litigation culture. While the CCJ report suggested that court staff function as a team to manage litigation, underpaid staffers are not well suited for that responsibility, and achieving the team approach requires trained and fairly compensated staff. The CCJ report includes Maricopa County's justice court civil cases as well as superior court cases; the member would like to have data that is solely from the superior court. Finally, the member suggested the court and litigants utilize inexpensive technology such as Facetime, which is widely available on smartphones and might be just as useful as more expensive vendor products.

On this last comment, Ms. Miller noted that some courts are experimenting with online dispute resolution. Michigan, for example, is trying this approach with low-level criminal cases. The approach requires standardizing the process, but the cases still use judges as decision-makers, the courts save costs, and parties save the time and expense of traveling to the courthouse for a personal appearance.

(9) This attorney said that management of ESI consumes the majority of corporate litigation budgets. Preservation (or over-preservation) of ESI is driving that cost, especially in high dollar cases. The member also has concerns with the cost of lower value cases, which are more numerous, and result in an average award of about \$5,000. He questioned whether Utah's new rules regarding proportionality went far enough to limit discovery for these smaller cases.

The Chair commented that he spoke with his Utah colleagues about Utah's new rules. He noted they spoke favorably of the new discovery limits and explained that the rules allow litigants to ask the court to permit additional discovery if the case warrants it.

(10) This member said that access to justice requires that litigants have access to comprehensible rules of procedure. Rules need to be comprehensible to SRL, and judges should not need to take considerable time to explain complex rules to these litigants. SRL need the process explained to them at an elementary level. He noted the CCJ's recommendation 4 for a streamlined pathway, and he supports a truncated process that results in more trials. A truncated process requires truncated rules and a limitation on the expense of going to trial. Although the law currently allows an award of attorney's fees to the prevailing party, SRL, who have no attorney, do not always grasp that, and he suggested that judges encourage parties in these cases to waive or limit fee awards.

(11) This administrator has considerable experience with case management on local, national, and international levels, and he offered to provide the members with a relevant data landscape. He noted, for example, that in the most recent fiscal year, there were approximately 32,000 civil filings in the superior court of Maricopa County. About

9200 of these cases were subject to arbitration, and about 120 cases, including arbitration appeals, proceeded to trial. Because the court resolves less than one percent of cases by trial, he questioned why a trial date should be set for the 99 percent that would not need one. He believes that mandatory pathway assignments fall short of truly differentiated case management. A.O. 2015-123 charges this committee with recommendations for the superior court, but he believes the Court should undertake a similar study concerning justice court civil cases, which have considerably higher filing volumes. He noted that a recent change in the law concerning transcripts of justice court judgments resulted in a significant reduction in superior court revenue. He characterized ADR as “privatization” of the justice system.

(12) This judge acknowledged that jury trials are vanishing, but noted that juries have become an inefficient way of resolving cases. He believes that SRL as well as corporate litigants want cases resolved efficiently and fairly, and that ADR usually accomplishes those objectives. The proposition that parties do not know enough about a case to engage in early settlement negotiations is disingenuous. Less than 0.2% of cases that conclude by judgment involve a judgment of more than \$40,000. The average case involves about \$5,000, is not complicated, and does not require a lot of discovery or a lot of time to try. He suggested greater use of bench trials, or a binding arbitration process, both of which could quickly resolve disputes. He noted that when there are SRL on both sides of a case, they mutually disregard the rules of evidence, try their cases quickly, and have their day in court. He questioned whether sanctions for an unsuccessful appeal are sufficiently severe, because some frequent litigants, such as insurance carriers, often do not take arbitration seriously and appeal a high volume of arbitration awards.

The Chair asked whether the mandatory arbitration threshold still serves its intended purpose. The monetary cap has not increased in years, and by local rule, it is rarely as high as the enabling statute allows. A member added that a short list of experienced private attorneys who are willing to serve as arbitrators might be preferable to the current system in which all attorneys serve.

(13) This attorney also acknowledged the vanishing jury trial, but added that if the system eliminated ADR and required parties to go to trial, many parties could not afford the cost. Trial also injects uncertainty into the process, and ADR offers a sense of control, although not complete control, over the outcome. Private ADR adds the further benefit of knowing who will ultimately decide the case, and allows parties to select a decision-maker based on the subject matter. The member believes that not every case needs “Cadillac treatment.” Many cases could be resolved with abbreviated discovery and a bench trial only a few months after service of process. With regard to data, the member would like to know the percentage of cases subject to compulsory arbitration and concluded by that process. In contrast to the current system, he suggested that the court use a small cadre of arbitrators with subject matter expertise. Better decision-making might reduce arbitration appeals, or even allow for the elimination of those

appeals. He also encouraged committee members to review the recent rule petition filed by the Supreme Court's Civil Rules Task Force, and in particular proposed amendments to ARCP Rules 11, 26, 26.1, and 37. The petition is number R-16-0010, and it is available on the Court's Rules Forum. Because the Court has not yet decided whether it will adopt the proposed amendments, there is no way of measuring their potential impact. The pilot commercial court may also be too new for meaningful accumulation of data.

(14) This corporate counsel appreciates the availability of trials, but he reported that he spends most of his litigation budget on larger cases, which are a small percentage of the total. ESI is a major cost, and for a large company, a request to search for even a few terms in a massive volume of documents is expensive. He supports differentiated case management, more efficient resolution of cases, and an increase in the dollar limit of compulsory arbitration, possibly to \$100,000. He would prefer that arbitration decisions be final, but if appealed, that there be sanctions against an unsuccessful appellant. For large cases, assignment of a judge for the life of the case would enhance the certainty of its outcome and help to control costs. Discovery masters are useful in select cases. From his perspective as in-house counsel, outside lawyers may not always appreciate the company's concerns with cost, time, and uncertainty.

(15) This judge member observed a growing number of SRL in the superior court, which collectively requires a greater allocation of judicial resources. SRL need education on court processes with easily understandable language and graphics; Commissioner Christoffel's "simpli phi lex" program offers interesting simplicity. He added that judges also need additional education, particularly in how to enforce court rules professionally and respectfully, and in assuring that litigants are confident that they had their day in court. The courts should better utilize available technology, including videoconferencing that would permit local, out-of-county, and out-of-state parties to participate in a court proceeding without the need to appear physically in court.

(16) The next member believes that interactions with a judge require time and money, and the court could lower litigation costs by reducing the number of those interactions. He does not approve of "rightsizing justice," because it implies someone predetermines how much justice parties might have in their case. He supports the Arizona Civil Rules Task Force's proposed draft of Rule 26, because it lists factors other than the amount in controversy to assure that everyone receives their day in court. He also supports pre-filing conferences between parties and judges to reduce the number of motions parties might need to prepare and litigate in court.

This member suggested a variety of other changes in the litigation process. He would require a meaningful answer to a complaint, similar to what is required for a response to a request for admission, rather than commonplace vague and general denials. He would require presumptive disclosure of statements of percipient witnesses, rather than shielding them by a claim of work product. Because smartphones can easily video-

record proceedings such as medical examinations, he would allow recordings without the need for court orders. He proposed a rule that would require experts who testify routinely to keep testimony logs and thereby avoid the need and expense to request this pertinent information in every case. He proposed that parties make objections to documentary evidence well in advance of trial, and in the absence of any objections, to admit the evidence without a need to call records custodians to the courtroom. He would allow depositions routinely, provided they are of short duration. He would increase sanctions on unsuccessful arbitration appeals; he believes that the sanction rule's change from 25 to 23 percent was not a meaningful improvement.

The member concluded that because disputants who utilize other forums might be seeking a "better quality of justice," the courts might consider copying certain attributes of those other forums. For example, the courts might utilize arbitrators who have specialized knowledge in certain areas. Litigants might be more satisfied with outcomes if they were more comfortable with the qualifications of decision makers.

On the issue of sanctions, another member commented on the incongruity of requiring SRL to pay the opposition's attorney fees when the SRL cannot afford their own counsel.

(17) This attorney member handles election cases, which move quickly, as well as commercial cases, which can languish. Can the same principles that efficiently move election cases also speedily move commercial cases? Just as customers can track a shipped package, the member also proposed using technology in a way that allows litigants to obtain the status of their cases online. Leveraging technology could also automate and streamline case processes in other ways.

(18) Federal district courts do not have the same case management issues as the superior court, and federal court litigators are consequently more satisfied. Federal court judges have permanent assignments to a case. Parties know which judge will decide it, and this enhances predictability of result and efficiency of the process. Federal cases have firm trial dates, and this contributes to cases resolving before trial. A jury is not a repository of wisdom, and a jury trial is involuntary if there are no alternatives to trial. Contracts with mandatory arbitration clauses may also inhibit alternative for dispute resolution. Cases are best resolved with a firm trial date and a case management plan in place. The cost of litigation may be self-inflicted; attorneys charge a lot, and well-heeled litigants may unnecessarily use highly compensated consultants, for example, for ESI issues, which also increases costs.

(19) There is no comparison between federal and superior court case management because their respective case volumes are dramatically different. The superior court cannot set a trial date in every case because there are too many cases and not enough days to set each case for trial. In any event, the occurrence of a trial is unlikely

for any particular civil case. A number of litigants lose their cases because they cannot afford to litigate. Trials are not all the same, but many trials are woefully inefficient. No litigant really wins if a quarter million dollar case goes to trial because it is too costly for everyone. Litigants want their cases resolved by neutral, competent, and thoughtful decision makers. They want economically efficient resolutions and a process that protects their legal rights.

ADR is a term that people use loosely, and it includes mediation, contractual arbitration, and compulsory court arbitration. These are different processes and members should deal with each separately. Compulsory court arbitration involves conscripted attorneys. Some attorneys have no interest in serving as arbitrators, and therefore they may not deliver quality justice. The rules should not allow sanctions against a party who appeals from an arbitration proceeding in which a quality process did not take place. The committee should propose a process that, if compulsory, at least gives litigants a hearing before someone who is knowledgeable and interested in fairly deciding their case. The committee also should consider issues arising in litigation from ESI, and the boundaries of document discovery. Lawyers and judges are currently discerning ESI issues in the light of rules adopted during the middle of the last century and long before there was such a thing as ESI. Certain components of the civil justice system may require reengineering or rebuilding to meet present needs, and the committee should make constructive recommendations.

(20) Attorneys who practice in several counties would like to have uniform court practices statewide. For example, the arbitration limit in Yavapai County is higher than it is in Maricopa. In smaller counties, a judge is more likely to have a case from inception to resolution, but in large counties that is less likely, which is disadvantageous to the litigants. The use and perception of pro tempore judges varies between counties; the court should utilize pro tem judges in the best possible ways. Regardless of the county in which a case is pending, court-appointed arbitrators should have knowledge of the subject matter, and leave the parties with the belief that they had their “day in court.”

(21) The committee’s recommendations should be data driven. If those recommendations require spending public funds, the committee should determine the sources of funding and who will ultimately pay the expense. The court may have data on how much time it takes to resolve civil cases, but how much would it cost to shorten the processing time? He would separate recommendations that require additional funding from those that do not. He noted, for example, that the courts could reduce processing time if there were more judges, but the cost of doing so is a deterrent.

The member supports increasing access to the courts for SRL, and decreasing the time and expense of civil litigation for those individuals. He would like to review data

concerning the number of arbitration appeals, and how frequently appellants get sanctions. He believes it is inappropriate to sanction a litigant for exercising a right.

(22) This judge noted massive changes in the past to the court's child welfare system. It required rule changes and additional training, and there was considerable dissent, but the changes were effective. In light of that experience, the member would like this committee to have measureable events and outcomes. Among the issues the member believes the committee should address are arbitration, SRL, judicial education, and judicial enforcement of rules regarding time and court dates.

(23) This member, who also has a corporate perspective, believes that Arizona should be among the most competitive states in which to do business. The cost of civil justice, and particularly the expense of civil discovery, is a major issue for the business community. The member is looking for ways this committee can reduce litigation costs and increase predictability in civil litigation.

(24) The charge to this committee is civil justice reform, and reform, whether in education, health, or justice, is difficult to do well. However, this committee has an opportunity to advance justice in the twenty-first century, and Arizona may have the right composition and size to achieve that goal. The member believes that the committee should focus on what most needs reform. It should be something the system can accomplish in the near term, and that the courts can point to do as a tangible reform that benefits the citizens of this state.

4. Follow-up remarks by the guests. The chair invited the guests' responses to the members' observations.

Ms. Kauffman noted that other jurisdictions have diverse practices for their arbitration and ADR systems. IAALS maintains research data on this topic. A CCJ subcommittee discussed those practices and it concluded that courts should divert only a limited volume of cases to mandatory arbitration. The parties' use of private arbitration might occasionally increase their cost for dispute resolution. Courts in other jurisdictions have experimented with expedited processes, such as short trials, but unless those processes are mandatory, they will be underutilized. The CCJ recommends a mandatory but proportional expedited pathway, which includes an option for a jury trial. Ms. Kauffman noted that Oregon allows neither expert reports nor expert depositions, but that is an extreme response to the cost of experts. Utah and Colorado allow either shorter expert depositions, or an expert report without the opportunity for a deposition.

Ms. Miller advised that the NCSC has prepared performance measures for the courts, which are available on the NCSC website. The NCSC designed these measures to enhance efficiency and the quality of decisions. She added that these measures have less

significance if citizens are not utilizing the judicial system but are still going to private forums.

5. Committee roadmap. The Chair stated that rather than establishing workgroups at today's meeting, he would first review his notes of the members' observations. Among the potential workgroup areas are the following: compulsory arbitration; truncated pretrial and trial procedures; SRL; ESI; leveraging technology; and enhancing the effectiveness of trial judges. He would like to review the provisions of the Arizona Arbitration Act, A.R.S. §§ 12-1501 et. seq., and give further consideration to mediation and mandatory settlement conferences, which the members did not discuss in depth today. The second page of the CCJ report also includes a list of potential workgroup topics. Later this week, the Chair will send an email to the members who, after hearing everyone's comments today, might suggest objectives for workgroups, and identify workgroups on which they would like to serve.

The Chair proposed the following dates for future meetings, all of which are on Tuesday: March 15, April 12, May 17, June 14, July 19, August 23, and September 13. These dates are subject to change.

6. Call to the public; adjourn. There was no response to a call to the public. The Chair thanked the members for a robust discussion. The meeting adjourned at 2:03 p.m.

Committee on Civil Justice Reform
State Courts Building, Phoenix
Meeting Minutes: March 15, 2016

Members attending: Don Bivens (Chair), Ray Billotte, Hon. Dawn Bergin, Krista Carman, Roopali Desai, Jodi Feuerhelm, Glenn Hamer, Hon. Charles Harrington, Andrew Jacobs by his proxy Sara Agne, Dinita James, Michael Jeanes, William Klain, Michael O'Connor, Hon. Peter Swann, Geoffrey Trachtenberg, Hon. Patricia Trebesch, Steven Twist, David Weinzweig

Absent: Hon. Robert Brutinel, Hon. Jeffrey Bergin, Colin Campbell, Tim Hogan, Jack Jewett, Stephen Montoya, Mark Rogers, Hon. Timothy Thomason

Guests: Hon. Lawrence Winthrop, Amy Wood, Jim Price, Brittany Kauffman (by telephone), Shelley Spacek Miller (by telephone), Christine Martin

Staff: Jennifer Albright, Mark Meltzer, Theresa Barrett, Julie Graber

1. Call to order; approval of meeting minutes; preliminary remarks. The Chair called the meeting to order at 10:04 a.m. He welcomed Sara Agne as proxy for Andrew Jacobs and greeted Ms. Kauffman and Ms. Miller, who were personally present at the first meeting and who were appearing at today's meeting by telephone. The Chair advised that subsequent to the first meeting, Ms. Albright attended the Fourth Civil Justice Reform Summit, a two-day conference hosted by the Institute for the Advancement of the American Legal System ("IAALS"). The Chair then asked the members to review draft minutes of the February 16, 2016 committee meeting. A member then made the following motion:

Motion: To approve the draft February 16, 2016 meeting minutes. Seconded and passed unanimously. **CJRC-002**

The Chair announced that today's meeting would begin with three presentations, followed by workgroup breakout sessions. He then asked Amy Wood, manager of the Caseflow Management Unit of the Administrative Office of the Courts ("AOC"), to present on time standards.

2. Presentation on time standards. Ms. Wood advised that the concept of time standards for case processing surfaced several decades ago, initially in criminal cases but later expanded to other case types. The National Center for State Courts ("NCSC") prepared model time standards in 2011, and encouraged their adoption by individual states. A 2012 Supreme Court Administrative Order established a Steering Committee on Arizona Case Processing Standards. Justice Brutinel serves as chair of that committee. After public comment and extensive study of applicable statutes and rules, the committee to date has recommended provisional time standards for nineteen case types. Implementation of civil time standards occurred in 2014. Ms. Wood stressed that time standards are aspirational as well as achievable. The standards should complement but

not override the just resolution of cases. They should set realistic expectations for attorneys and the public about the length of time required for case resolution.

Civil cases generally fall within three tiers established by the NCSC. The first tier includes “easily resolvable cases.” Defaults and dismissals, for example, are in the first tier. The second tier generally contains cases in which one or two issues require judicial resolution. The third tier is for complex cases and cases that proceed all the way to trial. The standards require courts to collect data to measure the time from the filing of an initial complaint to its ultimate disposition. Some delays, such as a bankruptcy filing or the filing of a special action, are beyond the control of a trial court, and the time computations exclude those delays. Arizona’s standards require the resolution of 60% of civil cases within 180 days, 90% within 365 days, and 96% within 540 days. The remaining 4% are outliers that can require more than 540 days, such as complex cases. Ms. Wood said that initial reports from 2013 indicated that Arizona civil courts met the time standards for the first tier of cases, and were very close in tiers two and three.

Time standards have several benefits. The most significant is that they will allow individual courts to assess how they compare against other courts. Standards also should help individual courts identify bottlenecks in their case processing. They will assist courts in flagging and then clearing older cases, and closing cases that might remain open solely because of omitted data. Questions and comments from the members followed.

- Can we compare Arizona’s superior court time standards results with those from other jurisdictions? Ms. Wood responded that comparisons might be complicated because Arizona has a large volume of justice court civil cases that some other states would process as tier one cases in a court of general jurisdiction.
- One member had concerns about the uniform entry of data, and whether judges, judicial assistants, or clerks enter data codes. Ms. Wood advised that the AOC has business requirements that have been shared with all courts to ensure that everyone is counting in the same way. The AOC provides training for courts using the AOC’s case management system (“CMS”), but courts with their own CMS, notably Maricopa and Pima counties, must conduct their own training.
- Maricopa County is the fifth largest trial court in the country yet it has a relatively small bench, so judges have large caseloads, and this should be a consideration in evaluating case processing time.
- Motions to extend time as well as cases in an arbitration track may expand the time required to process cases. A case continued for trial because of “double-booking” a trial date also may require more time to disposition.
- Ms. Wood noted that some circumstances may be within the court’s institutional control (for example, a court could hire more staff, or change its business practices) whereas others are not (for example, certain cases are subject to the Servicemember’s Civil Relief Act).
- A majority of civil cases are resolved without court involvement.

- Judges in Maricopa and Yavapai counties currently receive monthly reports on the status of their caseloads.
- One member believes it would be useful if this committee had data on the size of caseloads and the number or percentage of those cases that are in an arbitration track. The Chair advised that staff is attempting to obtain that data.

The Chair thanked Ms. Wood for her presentation. Before starting the next presentation, the Chair invited Judge Dawn Bergin to provide an update on Maricopa County's specialty civil courts. Judge Bergin then announced the recent assignment of a fourth judge to the pilot commercial court. Two of the three complex civil litigation court judges will not be available in the future (one because of retirement and another is rotating to a different calendar), and their complex caseloads will be assigned to and divided among the commercial court judges. The superior court has not yet determined whether those commercial court judges will continue to have the customary 3-year assignment to commercial court, or if they will have a 5-year assignment previously accorded to the complex judges. One member commented that the court should dispense with judicial rotations. Judge Bergin explained that in Maricopa County, rotations are necessary because of the stress of family court assignments on judges. However, she also noted the advantage of juvenile court judges having assignments extending for the life of a juvenile case because there are benefits when judges stay with a particular family's case over a period of several years. The Chair invited the members to consider judicial rotations during workgroup discussions. He then introduced the next presenter, Jim Price, e-filing project manager for the AOC's Information Technology Division.

3. Presentation on court technology. Mr. Price offered a perspective on the current state of Arizona court technology, and possible future developments. He began by discussing the use of technology in areas encompassed within the "DAART" acronym: Discovery, Assembly, Analysis, Reasoning, and Taking Action. Mr. Price proceeded to discuss metadata, and reminded the members that every court filing includes metadata as well as data content. Filers feed metadata and data into a vendor's e-filing portal, which is ingested by a court's case management system. Arizona TurboCourt uses a questionnaire process to obtain data, particularly from self-represented litigants who may need their information structured within a particular form. However, the questionnaire process is too time-consuming for attorneys who file documents frequently and simply want a more direct way to upload their case information. Some attorneys also want to do "batch filings," for example, collection attorneys who are filing multiple applications for default. The AOC is considering a multi-vendor support model to promote competition and innovation in electronic filing. Law firms would then have a choice of e-filing vendors. E-filing is available in Maricopa and Pima counties. Mr. Price said that Yavapai County's superior court is currently serving as a pilot for a new Arizona e-filing product, "e-Universa," which is capable of supporting a multi-vendor model.

New court technology products also include e-Bench and e-Access. e-Bench allows a judge to efficiently access and search data, and issue orders electronically. This reduces processing time, and judges who have used it like this functionality. e-Access allows attorneys and the public to access court information online. Attorneys can currently access documents in a case in which they have appeared, but they would like to be able to access documents in any other case, and this is under development. e-Access is destined to become a self-supporting, fee-based service, and it would be subject to the filters and privacy requirements of Supreme Court Rule 123. Another contemplated project is e-Notification, which would enable courts to automatically notify parties of any changes in the status of their cases. The Chair asked if there were questions or comments.

- A judge member remarked that the e-filing system does not send certain documents, such as routine complaints, directly to a judge. The system routes subsequent filings to the judicial assistants, not to the judges, and because of this process and the volume of documents that a judicial assistant receives, a judge may not see a document immediately after filing.
- Mr. Jeanes mentioned that Maricopa County has internal standards that require document processing within one business day. He added that he supports the multi-vendor model. He said that an e-filing vendor is analogous to an envelope that contains a paper document. As long as the e-filing vendor meets ordinary business requirements, the clerk's focus is on the contents of an electronic filing, just as his focus is on the contents of a physically delivered envelop.
- Another member commented that the federal court's electronic filing system seems to process court orders more quickly than our state court. Mr. Jeanes said that the speed with which a superior court clerk processes an order depends on the time the clerk receives it from a judge. Most orders are processed overnight following receipt. A judge member believes that the federal court's electronic system automatically generates a number of its orders, whereas the superior court produces orders individually and only after consideration by a judge.
- Mr. Jeanes also mentioned that his clerk staff has a 40% rate of turnover. This is primarily because of salary limits imposed by the clerk's budget. Moreover, the clerk's office could benefit from improved technology if it had additional financial resources. A judge member noted that notwithstanding their comparatively low case volumes, Arizona appellate courts could also gain efficiencies from technology improvements.
- Another judge member commented that a significant number of e-filers submit proposed orders in PDF format rather than in Word. This can cause delays because proposed orders often require revisions, and PDF documents are not modifiable. A member noted that federal courts accept proposed orders in PDF, and some filers may not be aware of a different requirement for Word submissions in state court. The judge member recommended that the superior court's website include a list of tips for proper e-filing. The judge would expand the list to include such items as when judges set oral arguments on motions. For example, some

judges always set summary judgment motions for argument, but rarely schedule argument for Rule 12 motions. The members discussed striking the appropriate balance between uniformity and autonomy in judicial practices.

- A third judge member suggested a need for training judges on how to efficiently process documents, such as proposed orders. The judge believes there is currently a lack of practical training on this subject.
- A member expressed concern with bulk sales of court documents, especially when the documents include impertinent or inaccurate information at the time of their release. Another member had a similar concern with sales of documents that might contain sensitive data, as specified in Rule 5(f).

The Chair thanked Mr. Price and then introduced Judge Lawrence Winthrop, Court of Appeals, Division One, chair of Arizona's Commission on Access to Justice ("Commission.").

4. Access to Justice Commission. The Chief Justice established the Commission in 2014 in furtherance of the equal access to justice goals of his strategic agenda. (A majority of states now have similar commissions.) Arizona's Commission includes judges, lawyers, and other stakeholders statewide. Judge Winthrop described three specific circumstances that motivated the creation of Arizona's Commission.

(a) *The poverty rate in Arizona:* Although the national poverty rate has stabilized, the poverty rate in Arizona continues to grow. The current Arizona rate is 21%, which equates to 1.2 million Arizonans at poverty level. Most of these are family members rather than people generally perceived as homeless individuals. Some of those at poverty level have jobs, but their income is meager. Regardless, they have legal issues similar to those faced by others, particularly in the areas of domestic relations, consumer debt, and housing, and they cannot afford counsel. These individuals qualify for free civil legal aid; however, the demand for those services far exceeds the resources available to our civil legal aid agencies.

(b) *Reductions in funding:* There are two revenue streams for civil legal aid organizations. One of them is Congressional funding, but this is subject to political considerations and funding levels are unpredictable. The other is Arizona's IOLTA (interest on lawyers' trust accounts), but IOLTA revenue has plummeted during the past several years, from about \$200,000 a month in 2009 to about \$40,000 month currently, as interest rates have been artificially depressed.

(c) *Increase in self-represented litigants:* Because the number of individuals at the poverty level who are eligible for legal aid has increased, while funding has fallen, the proportion of people who actually receive free legal assistance has dropped significantly. About one in three eligible individuals obtain assistance, but the majority does not. In addition, a substantial proportion of Arizona's middle class is ineligible for legal aid, yet

these people cannot afford the cost of an attorney. Those factors have caused a significant increase in the number of self-represented litigants (“SRLs”) in Arizona courts. In about 80% of domestic relations cases in every county, one or both parties are self-represented. Tenants in eviction cases rarely appear with legal counsel.

Judge Winthrop discussed some of the Commission’s recommendations for responding to these circumstances, including the following, as approved by the Arizona Judicial Council:

- A “court navigator” program in Maricopa County trains and supervises undergraduates from Arizona State University in assisting SRLs in family court. SRLs frequently do not understand court procedures or expectations in terms of pleadings and proof, and generally are ill equipped to effectively deal with the adversary process. Navigators can clarify their expectations, as well as educate them on court procedures, help them prepare their own court documents, and assist them in navigating the process. Funding from AmeriCorps will sustain the program for the next three years.
- Other non-attorney assistants also may be helpful for SRLs. Although Arizona already certifies legal document preparers (“CLDP”), most SRLs cannot afford CLDP services. Washington State has begun certifying limited law license technicians to assist primarily in family court cases, and the Arizona Commission, along with several other states, is monitoring developments and waiting for data from that program.
- To increase the amount of legal information available to the public, Coconino County is hosting a statewide virtual legal information website. The website will include simplified forms and instructions, will regularly host webinars, and provide links to “how-to” videos. It also will provide links to other Arizona court and legal aid/legal information websites.
- The Commission has adopted the work of Commissioner Dean Christoffel and the Pima County Superior Court’s “Simpli Fi Lex” initiative as it relates to simplified instructions for navigating family court forms, and has expanded the concept by creating simplified instructions and uniform notices and forms for eviction actions.
- Every Arizonan may not live close to a courthouse, but most reside in or near a community with a public library. Through the Law4AZ project, public librarians in each county are trained to assist their patrons in accessing relevant legal information. Additionally, the community libraries have agreed to host regular weekend and evening legal clinics staffed by volunteer attorneys.
- Courts could also utilize technology to benefit SRLs. Remote appearances by phone or video conference could benefit SRLs who might otherwise need to spend considerable time traveling to a courthouse.
- The Commission has updated the Supreme Court’s legal information versus legal advice question and response handbook, which should facilitate court clerks

providing more over-the-counter information to SRLs. It is anticipated that dedicated training on this subject, and in assisting SRLs, will be provided in the coming months to judicial officers and court staff.

- The Commission believes there should be a more reliable and predictable funding model for legal aid agencies; however, this would likely require legislative action. Arizona currently offers an income tax credit for donations to qualifying charitable organizations, including those who provide legal aid to the poor. The Commission has launched a sustained campaign to publicize this tax credit, and those efforts have resulted in a significant increase in tax credit donations. Pending legislation would double the amounts of the available credit and leverage those contributions.

Judge Winthrop added that the American Bar Association has been a useful resource for the Commission. Chairs of similar commissions from other jurisdictions have been meeting annually and engaging in regular regional phone conferences. A member noted that family courts previously had early disposition conciliators. He suggested that similar mediation services in debt and housing cases also might promote efficient and just resolution of these high volume civil cases. Judge Winthrop said the suggestion merited further consideration, but he cautioned that funding for civil conciliators might not be available. He concluded by encouraging the Civil Justice Reform Committee's recommendations to enhance citizens' access to justice, particularly in the area of consumer debt, which would be consistent with the objectives of the Commission.

5. Establishment of workgroups. The Chair had distributed a memo on March 9 that assigned each committee member to a workgroup. Each workgroup would discuss and make recommendations to the full committee on particular subject areas. At today's meeting, the Chair advised that in addition to their assigned workgroup, members also could attend other groups. The Chair attempted to compose each workgroup with a diversity of viewpoints. Workgroups may meet by telephone, and no minutes are required, but the Chair would like each workgroup coordinator to present initial suggestions to the full committee at the April meeting. The committee then recessed for about an hour while the workgroups briefly met. The committee then reconvened, and each workgroup identified a variety of preliminary topics and issues, including the following:

Workgroup 1 (Compulsory arbitration reforms): There are differing views about whether to keep the current process or replace it. Should arbitrators be knowledgeable in the subject matter at issue? If there was no compulsory arbitration, what would replace it? What would be the design of a replacement process? Should there be a higher number of jury trials? How should courts deal with contractual arbitration provisions?

Workgroup 2 (Case management reform): How could the courts more broadly apply effective case management techniques of the pilot commercial court? What case management training would benefit judges? Should attorneys have a mandatory continuing legal education requirement to learn of this committee's eventual case management recommendations?

Workgroup 3 (Court operation reforms): How should courts find the resources needed for technology improvements and competitive staff salaries? Are there additional education needs for judges? Should there be consistency in document flow? What should the courts do, if anything, about judicial rotation?

Workgroup 4 (Civil discovery reform): The workgroup should review the Civil Rules Task Force recommended versions of Rules 11 and 45, and rules concerning experts and electronically stored information.

6. Roadmap; call to the public; adjourn. The Chair suggested moving the next meeting date from Tuesday, April 12, to Monday, April 18. Staff will notice the meeting for April 18 unless several members advise Ms. Albright of their unavailability on that date.

There was no response to a call to the public. The meeting adjourned at 1:22 p.m.

Committee on Civil Justice Reform
State Courts Building, Phoenix
Meeting Minutes: April 18, 2016

Members attending: Don Bivens (Chair), Ray Billotte, Hon. Dawn Bergin, Hon. Robert Brutinel, Roopali Desai, Jodi Feuerhelm by her proxy Scott Minder, Glenn Hamer, Hon. Charles Harrington, Andrew Jacobs, Dinita James, Hon. Michael Jeanes, Jack Jewett, William Klain, Michael O'Connor, Mark Rogers, Hon. Peter Swann, Hon. Timothy Thomason, Geoffrey Trachtenberg, Hon. Patricia Trebesch (by telephone), Steven Twist by his proxy Christine Martin

Absent: Hon. Jeffrey Bergin, Colin Campbell, Krista Carman, Stephen Montoya, David Weinzweig

Guests: Carrie Cariati, Leslie Foldy, Heather Bushor, Shelley Spacek Miller (by telephone), Brittany Kaufman (by phone)

Staff: Jennifer Albright, Mark Meltzer, Julie Graber

1. Call to order; approval of meeting minutes; preliminary remarks. The Chair called the third meeting to order at 10:02 a.m. He introduced the proxies. He expressed his appreciation for the progress made by the workgroups, and he looked forward to hearing their reports at today's meeting. He announced that Mr. Hogan resigned from the committee because of an unusually large caseload. The Chair then asked the members to review draft minutes of the March 15, 2016 committee meeting. A member made the following motion:

Motion: To approve the draft March 15 2016 meeting minutes. Seconded and passed unanimously. **CJRC-003**

2. Presentation by Workgroup 1: Compulsory arbitration reform. Judge Harrington presented on behalf of Workgroup 1 and began by summarizing the current arbitration process. A statute authorizes arbitration for cases under \$65,000. By local rule, Maricopa and Pima counties set the arbitration limit at \$50,000. Other counties set a considerably lower limit. The court appoints an arbitrator if the plaintiff certifies a case is subject to arbitration. The rules of evidence are relaxed, and an expert can provide opinions by a written report. An aggrieved party can appeal an arbitration award and obtain a trial de novo in the superior court, but there are penalties if the trial verdict is less than the arbitration award.

Judge Harrington advised that the workgroup initially considered the following issues. Should a "fast track" trial replace the arbitration process? Alternatively, should the court retain the arbitration process, with either minor or major modifications? He presented the following statistics from the superior court of Maricopa and Pima counties.

	Pima 2015	Maricopa 2015
Arbitration cases filed	793	14,624
Cases with awards filed	220	1,135 (2014)
Median arb award	\$15,204	Not available
Appeals filed	73	329
Trials (jury and bench)	5 (2 contract, 3 PI)	32

Judge Harrington then raised a hypothetical question of how many of the cases noted above would have proceeded to trial if arbitration was unavailable. He noted that Pima has 7 judges assigned to civil calendars, and the 220 cases in which awards were filed would have increased the load for each of those judges by about 30 cases. In Maricopa, the increase would have been about 60 cases per judge.

Judge Harrington illustrated two alternatives to the current system. The first illustration uses a combination of arbitration and fast track trials that would depend on the value of a case. A case with a value of less than \$20,000 would go to arbitration, and any appeal of the case would be a fast track trial. A case with a value between \$20,000 and \$65,000 would proceed directly to a fast track trial. Fast track trials could have the following characteristics: two months for abatement of a summons (versus the current 4 months); limited discovery; either an expert report or a deposition, but not both; each party would pay its own expert witness expenses (no Rule 68 sanctions); shorter times for briefing dispositive motions; and a two-day jury trial.

Judge Harrington noted a cost benefit of utilizing expert reports in arbitration hearings. He observed that on appeal from arbitration, a party (typically a defendant) who had done minimal discovery often retains experts for trial and serves an offer of judgment. As a practical matter, this can expose a plaintiff to tens of thousands of dollars of defense costs if a jury verdict is unfavorable to the plaintiff, and can effectively discourage the plaintiff from participating in a trial de novo. This led to the workgroup's recommendation that each party pay its own expert witness expenses.

The workgroup's other alternative involves the use of "professional hearing officers" rather than "conscripted" arbitrators, in combination with fast track trials. Unlike the first alternative, where cases go to arbitration rather than a fast track trial based on value, this alternative requires a plaintiff to choose the process. Under this alternative, a plaintiff would need to either elect an arbitration hearing before a hearing officer, or proceed directly to a fast-track trial. Plaintiff would be required to waive the right to appeal when electing an arbitration hearing. Only a defendant could appeal the arbitration award, and the appeal would proceed to a fast track trial. The Chair then asked if the members had comments or questions.

A judge member of Workgroup 1 stated a preference for eliminating arbitration altogether. He said that parties have a constitutional right to a jury trial; there is not a constitutional right to arbitration. Courts should provide the parties with what the constitution mandates. However, he expressed concern for a deluge of trials if there was no longer an arbitration process. Accordingly, he supported the workgroup's proposal for a small core of professional hearing officers. He theorized half a dozen full-time officers would be sufficient to conduct arbitrations for the superior court of Arizona statewide. These hearing officers would function in a judicial capacity, and they would increase public satisfaction by giving litigants an opportunity to present their cases to robed judges. This cadre would also increase the predictability and consistency of awards. The customary legislative process could fund the hearing officers. Alternatively, attorneys now subject to "conscriptio" for arbitration proceedings could "opt out" by paying a specified fee, and that would be the funding mechanism. This member emphasized that any proposed arbitration system should be more neutral than the current one, which arguably favors claimants.

Another judge member of the Task Force supported the workgroup's concepts, and added an alternative that retired judges serve as the envisioned professional hearing officers. Every retired judge has a robe, knowledge of the law, and judicial experience. Two attorney members expressed the desirability of utilizing arbitrators who are motivated to do the work. One described an appointed attorney arbitrator who so disregarded his duties that the parties eventually had him appear before a judge on an order to show cause. Several members also preferred that the hearing officers have experience concerning the subject matter of the arbitration. Judge Harrington advised that Pima County years ago tried to match arbitrators' practice areas with the issues presented in particular cases, but found this resulted in repeated appointments of the same attorneys. If the court continues to appoint attorneys as arbitrators, some members thought they should have training on how to conduct an arbitration.

One member asked Judge Harrington if the arbitration system served its intended purpose. The answer was that arbitration did relieve a backup of civil cases on the court's docket, at least in Pima County. The other judge member of the workgroup commented that although arbitration reduced backlogs, it also had the practical effect of depriving parties of their right to a jury trial. The workgroup's proposal should help preserve that right. He noted that jury verdicts may often favor defendants, but the purpose of the constitutional guarantee of a jury is not to enhance results for one side, but to assure that people have that right. He theorized that a jury composed of lawyers would produce skewed verdicts, yet we have a similar result when attorneys serve as arbitrators. Judge Harrington added that the workgroup's concept might also address the issue of disappearing civil jury trials, and provide young attorneys with some trial experience. On the other hand, one member noted the monetary cost to litigants if they were required to present a \$15,000 case to a jury.

Members also made these comments:

- A pilot program could empirically test the workgroup's proposals.
- Experienced attorneys do not ask arbitrators for excessive awards, because they know the other side will appeal those awards.
- An arbitration "appeal" is a misnomer. It is not a traditional appeal based on the record. It is a "do-over."
- Arbitration is a product of a bureaucracy that has created layers of process beyond what the constitution requires. The committee should consider an efficient system of case resolution that does not include arbitration.
- Arbitration provides low-cost access to the civil justice system.
- Concern with the imposition of sanctions deters some self-represented litigants from pursuing their cases. They should not have sanctions hanging over them if they simply want to have their day in court.

A workgroup member requested Task Force members to provide the workgroup with any informal comments about whether the workgroup is on the right track. Judge Harrington advised that the workgroup would continue to develop its recommendations.

Workgroup 3: Civil discovery reform. Ms. Feuerhelm requested Judge Swann and Mr. Trachtenberg to make presentations in her absence.

Judge Swann addressed issues concerning electronically stored information ("ESI"). Judge Swann serves on the Task Force on the Arizona Rules of Civil Procedure ("TF.ARCP"). He advised that the TF.ARCP recently filed a rule petition with proposed changes for ESI that are "leaps and bounds" better than the current rules and are more efficient, technologically adept, and economical. He served on a panel with federal judges earlier this year that effusively commended these proposed Arizona rules, and some of those judges are considering using these rules in their own courts.

Although these proposed rules are procedurally sound, there are continuing challenges in dealing with the substance of ESI. He noted that society has produced more data in the past few years than in all of previous human history. He believes lawyers and clients will not be able to keep up the obligations to sift through, preserve, and investigate all of the ESI associated with a litigated event. Too often lawyers feel a need to do a "CSI" search that includes such things as imaging entire hard drives and sending massive preservation letters. He thinks such overreach not only is immensely costly for businesses, but it also will eventually cause a breakdown of the civil discovery process. He observed that the case should not be about the data. Rather, parties should seek data about the facts of the case. The cost of discovery has become so high that even the winner of a quarter-million dollar case gains little. Judge Swann analogized current ESI discovery practice to requesting a single paper document and asking to search the adversary's entire file cabinet that contains that document.

Some of the subjects the workgroup will discuss further are: a clearly defined duty to preserve ESI, one that is not intrusive yet also will not encourage fraud; staged discovery, so parties can initially request documents based on relevance and accessibility; and functional and reasonable privilege logs. Judge Swann then invited comments, which included the following.

- The sequence of discovery should start with what is relevant, and then proceed to fill in any gaps. One side does not own the facts, and it is jaded and cynical for attorneys not to adhere to their duties under Rule 26.1.
- Attorneys on this committee are dissimilar from a number of others who routinely disregard their Rule 26.1 responsibilities.
- Attorneys have a duty to understand their clients' technology, and to be technologically competent. Attorneys will have higher confidence that their adversary produces whatever is required when they know the adversary has that competence.
- A lawyer's technological incompetence should not magnify an adverse party's cost of discovery.
- In addition to internal costs in complying with ESI requests, businesses incur significant expenses with third-party vendors who deal with discovery of ESI, which the court community may overlook. An ESI vendor's litigation charges can ruin a small business. Arizona should be a more business friendly venue for ESI.

Mr. Trachtenberg continued workgroup 2's presentation with a discussion of expert witnesses. The workgroup supports more initial disclosures concerning an expert witness, including required disclosure of the expert's rate of compensation, the expert's prior publications, and a log of the expert's prior testimony. In a straw poll, Task Force members supported the adoption of these more robust disclosure requirements. The workgroup believe that parties should not obtain discovery of an expert's preliminary draft reports; but the State Bar's Civil Practice and Procedure Committee discussed the advantages (keeping the process honest) and disadvantages (it can be burdensome), and did not come up with a recommendation. The workgroup also declined to require parties' experts to prepare written reports, although one member would require a report in a case that involves a truly scientific, *Daubert*-type issue. A judge member observed an increase in objections to experts' opinions in medical malpractice cases in which the experts had no reports, and the judge would require reports in those cases. Mr. Trachtenberg also noted a difference between requiring a report from a retained expert versus one who is nonretained.

Mr. Trachtenberg described a recurring issue arising under the Court of Appeals opinion in *Sanchez vs Gama*. That opinion held that a treating physician was a percipient witness and was not entitled to compensation as an expert, unless a party asked the physician questions that called for expert opinion. Mr. Trachtenberg noted situations

where a physician's deposition is confounded with distinctions between a physician's observations as an eyewitness and a physician's expert opinion, and the parties may ask the trial court to sort out those differences. The opinion has also generated animosity between the medical and legal fields because doctors have customarily expected payment for their testimony. Mr. Trachtenberg proposed a rule amendment in 2013 to address this issue, but the Court declined to adopt it, and he is continuing to seek a resolution. The workgroup would also like input from the Task Force about whether to allow a party routinely to recover expert witness fees as a litigation cost.

Mr. Trachtenberg concluded with Rules 35 and 11. He suggested that the rules permit a party to video record an independent medical examination without the need to show good cause for the recording. He noted that parties now need to file motions to permit a video recording. He stated that someone could make a good quality video with an I-phone, and this would be more informative than an audio recording, which Rule 35 currently allows. A judge member recommended that the proposed rule shift to the party opposing video recording the burden to show prejudice or detriment if a party records the exam. The workgroup requested to defer a discussion of Rule 11 until Mr. Twist was present.

4. Workgroup 2: Case management reform. Mr. Jacobs, presenting on behalf of the workgroup, advised that the group was examining the 2015 federal rules revisions, Utah's recent case management changes, and similar efforts in other jurisdictions. He noted some overlap in its work with issues of interest to Workgroup 3.

The primary objective of Workgroup 2 is to realize the promise of Rule 1 (that the civil rules "...secure the just, speedy, and inexpensive determination of every action.") The workgroup believes that civil discovery currently may create unnecessary issues. The TF.ARCP examined some of those issues - such as proportionality, scope, and "reasonably calculated" - but the workgroup is looking at them from a different point of view. The goals of the workgroup, similar to the goals of the recent federal rule amendments, are to eliminate "discovery about discovery," to make discovery a means rather than an end, and to save time and money. The workgroup noted, for example, that the federal rules require discovery that is "proportionate," whereas the TF.ARCP proposed discovery that is "appropriate." Mr. Jacobs postulated that this difference might result in increased litigation in the superior court. The workgroup believes that deviations from the federal rule, such as this one, might be mischievous, and this warranted the Court asking another committee to examine the proposed changes.

Mr. Jacobs stated that the workgroup has not yet fully developed its recommendations concerning the Utah rules. However, he noted that the National Center for State Courts supported Utah's rule changes, and he has received input that the rules are beneficial and not burdensome for Utah lawyers. He commended the Utah requirements that a party must provide early disclosure concerning damages, that the

rules promote early issue resolution, and that judges enforce compliance with discovery obligations and discourage “passive-aggressive” discovery tactics. He invited the members’ questions and comments.

A member responded that debates about scope and proportionality have existed for years. The member favors “appropriate” over “proportional.” He emphasized the word “just” in Rule 1, and stated that discovery that is “proportional” to the amount in controversy does not always lead to a “just” result. He suggested that Utah attorneys may be inflating the amount of damage claims to obtain a higher tier of discovery, and contended that a few dollars difference in the value of two cases should not demarcate the extent of discovery. The “hard line” established by the Utah tiers is a matter of concern. The member also noted that Utah had a different predicate than Arizona when it adopted these rules. Neither Utah nor federal courts have Zlaket limits, compulsory arbitration, or robust disclosures, as Arizona currently has. To the contrary, other states are looking at the Arizona model and are considering adopting the Arizona requirements. This member, who also served on the TF.ARCP, conceded that “proportional” and “appropriate” are similar. However, the Task Force concluded that stakeholders would interpret “proportional” by placing too much emphasis on the amount in controversy. TF.ARCP believed it best to consider all of the factors, and that an emphasis on the amount is moving away from the “just” result that Rule 1 intends.

A judge member of the Task Force added that a rule petition the Task Force filed in January discussed the issue as to whether to use “appropriate” or “proportional,” and although the petition was thereafter open for comments, there were none on this issue. He felt that the issue revolves around whether money drives the needs of justice. He believes it does not, and that Utah’s rules are inconsistent with obtaining just results. He also observed that the value of a dollar changes over time; will Utah’s need to adjust its tier limits for inflation, or index them to the cost-of-living? Arizona’s current system has worked well, and there is no necessity that Utah’s replace it. Another judge observed that as a lawyer, he knew his case well, but judges do not have that depth of knowledge concerning a case. Accordingly, it is a challenge for a judge to decide discovery issues.

Mr. Jacobs concluded that the rules and justice converge. He stated that features of the Utah rules, including provisions that allow parties to modify discovery limits by stipulation, serve that purpose. He believes the Utah rules encourage parties to process their cases in an economically efficient manner. He requested committee members to keep an open mind on the Utah rules.

5. Workgroup 3: Court operation reform. Ms. Desai presented the workgroup’s discussions on judicial rotation, training, technology, and consistency in court operations.

(a) *Rotation.* Judicial rotation requires a balance between the need of litigants for continuity in their cases, and the calendar needs of the court. There are currently about

98 judges in Maricopa County; 27 are assigned to a criminal calendar, 23 to civil, 27 to family, 18 to juvenile, and 3 others to such calendars as probate and tax. Each calendar requires knowledgeable and experienced judges, but this does not necessarily mean that every judge must spend an entire career on a single assignment. One member suggested advertising for particular experience when there is vacancy for a specialized calendar, such as the commercial court. Another member noted that while that may be feasible for commercial court, advertising for judges to devote a career on a family or juvenile bench is not practical because there are not enough interested or qualified applicants for such assignments. He observed that at least a dozen categories of cases have priority over civil cases. Eliminating rotation is not the solution because the court needs judges with general experience, and doing away with rotation would not address the underlying issues. Maricopa is the fourth largest trial court in the country, and 23 civil judges are fundamentally inadequate for the civil case volume. Pima County judges have 400 to 500 cases, a couple hundred fewer than Maricopa's judges. Rotation is not an issue confined to the civil bench. The court might consider extending the term of assignments, but otherwise, rotation in Maricopa County is "here to stay."

(b) Training. Ms. Desai described the current training at new judge orientation and the annual Judicial Conference as good, but the workgroup discussed expanding the training to include specific bench practices. The workgroup intends to review the civil bench book. A judge member recommended at least 40 hours of training before an assignment, which is more than is offered currently. Another member encouraged training for lawyers on the court's workflow practices, such as the proper form of submitting a proposed order.

(c) Technology. The workgroup acknowledged the desirability of upgrading the court's IT staff, but doing so would depend on having the requisite funding, and the workgroup did not proceed further on this subject.

(d) Consistency in court operations. Ms. Desai noted that some judges on the Maricopa judicial biographies webpage have added information concerning their courtroom practices, or "protocols," such as how they process motions. The workgroup would like to make those practices more consistent. The workgroup also would like to develop ways for increasing litigant satisfaction.

6. Roadmap; call to the public; adjourn. The Chair commended the caliber and thoughtfulness of the workgroup presentations. He asked each workgroup to meet at least once before the next committee meeting, which is set for May 17, and to be prepared to answer pointed questions. He would like the workgroup chairs to join him in a presentation at the Judicial Conference in June.

There was no response to a call to the public. The meeting adjourned at 12:50 p.m.

Committee on Civil Justice Reform

State Courts Building, Phoenix

Meeting Minutes: May 17, 2016

Members attending: Don Bivens (Chair), Hon. Dawn Bergin, Hon. Jeffrey Bergin, Ray Billotte, Hon. Robert Brutinel, Krista Carman, Roopali Desai by her proxy Andrew Gaona, Veronika Fabian, Jodi Feuerhelm, Glenn Hamer by his proxy Christine Martin, Hon. Charles Harrington, Andrew Jacobs, Dinita James, Hon. Michael Jeanes, William Klain, Mark Rogers, Hon. Peter Swann, Hon. Timothy Thomason, Geoffrey Trachtenberg, Hon. Patricia Trebesch by her proxy Sara Agne, Steven Twist, David Weinzweig

Absent: Jack Jewett, Stephen Montoya, Michael O'Connor

Guests: Brittany Kaufman (by telephone), Shelley Spacek Miller (by telephone), Scott Minder

Staff: Jennifer Albright, Mark Meltzer, Julie Graber

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fourth meeting to order at 10:03 a.m. He introduced the proxies and a new member, Ms. Fabian. The Chair advised that today's meeting would include discussion of the issues presented by each workgroup, but there would be no formal votes today on those issues. The Chair then asked the members to review draft minutes of the April 18, 2016 meeting.

Motion: A member moved to approve the draft April 18, 2016 minutes, followed by a second, and the motion passed unanimously. **CJRC-004**

2. Workgroup 1: Compulsory arbitration reform. Judge Harrington noted that arbitration was designed as an economical and speedy proceeding, but often it is neither. Court-appointed arbitrators may be reluctant to serve, or the assigned case may not be in the arbitrator's practice area. The increasing number of arbitrations may cause a commensurate decrease in the number of civil jury trials. Judge Harrington's workgroup discussed eliminating compulsory arbitration. The workgroup instead proposed a compromise that would keep arbitrations but offer an alternative of fast track jury trials.

Judge Harrington explained details of the workgroup's proposal. At the inception of a case, the plaintiff would choose either to proceed by arbitration or by a fast track jury trial. The process for plaintiffs who choose arbitration would be similar to the current one, except those plaintiffs would forego the opportunity to appeal an unfavorable award. However, a defendant would have the right to appeal an arbitration award. A

party could still make a Rule 68 offer of judgment under the arbitration option, but offers of judgment would not be available for the fast track trial alternative. To give meaning to the phrase “fast track,” the complaint must be served with two months (versus the current four months), and discovery must be completed within 190 days from service. A fast track trial would use a six-person jury, and the trial could not exceed two days.

Although there is no reliable way now to predetermine the percentage of plaintiffs who would opt for either alternative, a pilot program would provide that data. A pilot could include modified dollar limits for arbitration so more cases would be ineligible for arbitration and would instead proceed to a fast track trial. The workgroup’s proposal contemplated volunteer arbitrators, who would receive modest compensation or continuing legal education credits. Arbitrators would have subject matter expertise appropriate to the case at issue. Arbitration proceedings would occur in a courtroom before a robed arbitrator, which would add a heightened level of solemnity.

Judge Harrington shared that he had informally discussed the proposal with several attorneys, and their responses were generally supportive. Committee members had these questions and comments:

- Would a party still have the right to a peremptory change of an arbitrator? The workgroup did not determine this. A member suggested using a mechanism similar to Rule 42(f).
- This proposal preserves the parties’ right to a jury trial, while also providing an alternative to a jury.
- Because self-represented litigants (“SRL”) who select the arbitration alternative could incur sanctions under Rule 68, they could be “punished” for choosing the arbitration option. Judge Harrington noted that the current process already allows Rule 68 sanctions against SRL, and the fast track alternative provides a way for SRL to avoid those sanctions.
- Would experts need to appear personally at arbitration hearings? The workgroup did not address this.
- Would parties be required to complete discovery before the arbitration hearing? While this could be an option, it might not be feasible for lower value cases. Another member observed that parties should file smaller cases in justice court.
- What venue would be suitable for a pilot program? One member noted that Maricopa and Pima counties would produce a large sample of cases and more data, but the pilot should also encompass a smaller county.

3. Workgroup 2: Case management reform. The meeting materials included a scholarly memo from Mr. Jacobs in support of the workgroup's proposed changes to Rules 1, 4, 16, 26, 26.1, 30, 31, 33, 34, 36, and 37 of the Rules of Civil Procedure.

Mr. Jacobs noted the Court's charge to this committee, as expressed in Administrative Order 2015-126, directed the committee to review the December 2015 amendments to the federal civil rules. Mr. Jacobs suggested that this charge permits the committee to recommend adoption of the federal amendments in Arizona, and that is the workgroup's recommendation. This would enhance uniformity between Arizona's rules and the federal rules, and allow the development of parallel case law and standards. It would help to realize the vision of Rule 1, and encourage lower and more reasonable discovery costs. Mr. Jacobs also construed Order 2015-126 as an invitation to reexamine the rule changes proposed by the Court's Task Force on the Arizona Rules of Civil Procedure. Workgroup 2 believes that the concept of "proportionality" does not overly emphasize the amount in controversy, as the Task Force had concluded, and "proportionality" should be the standard in Arizona. The workgroup also believes discovery that is "reasonably calculated to lead to the discovery of admissible evidence" has expanded the scope of discovery beyond its proper boundaries, and this phrase should no longer be part of Rule 26.

In addition, the workgroup proposes the following:

- The time for service of the summons and complaint should be shorter.
- This committee should consider recommending a modified version of the Utah system of "tiered" discovery.
- Tiered discovery promotes an early understanding of issues in a case (i.e., "issue clash.")
- The proposed rules would permit a party to ask for a variance in the tier if warranted in a particular case.
- Disclosure precedes discovery, and its mutual obligations on the parties operates as a leveling feature. Discovery following disclosure can be asymmetric.
- Parties may stipulate to discovery that is beyond the tier's limit, subject to court approval, but in that circumstance, the attorneys must provide their clients with a litigation budget (because Rule 1 is a promise to the litigants and not to the lawyers).

Member comments and discussion ensued.

- Discovery should focus on the needs of a case, and not on the amount of money at stake. Tiers imply some cases are not as important as others are. Mr. Jacobs responded that for most cases, there is no rationale for 30 hours of depositions in

a \$10,000 case. For a \$300,000 case, 30 hours of depositions is a considerable and reasonable amount of time.

- Reducing the amount of discovery to decrease discovery costs overlooks the real problem, which is the reckless use of discovery.
- Economic considerations are already a factor in Rule 16. Cost analysis is case specific and depends on facts rather than tiers.
- If there is less discovery, there will be fewer summary judgment motions; summary judgment avoids trial and these motions therefore are useful in reducing the cost of litigation.
- The proposal will spawn more discovery motions, judges will need to decide more pretrial controversies concerning relevance, and this will increase litigation costs. Tiers are arbitrary, and asking a judge for an early determination concerning the amount of discovery that might be necessary is an inefficient use of judicial resources.
- One member said that those who drafted the federal rules considered the Utah rules an aberration. Combining the federal and Utah rules is not an effective hybrid. On the other hand, and citing to page 8 of Judge David Campbell's May 2, 2014 report, another member inferred that the federal advisory committee considered the Utah model favorably.
- The Utah rules have resulted in more cases being resolved without trials.
- A member licensed in Utah does not believe Utah's rules for tiers resulted in a substantial difference in the way attorneys conduct litigation. Rather, the member would like to see a change in the culture of litigation, where there is less gamesmanship by attorneys, and a more robust search for truth and justice.
- The workgroup's proposal in essence removes the current "lines in the sand" and replaces them with other lines. Arizona currently has a rule that precludes the plaintiff from specifying a sum certain in a complaint. A rule that would require plaintiff to specify an amount might have collateral consequences, for example, it might affect a company's accounting and balance sheet, or affect decisions by its lenders.
- The beauty of the Utah tiers is their simplicity, but the tiers do not always align with the needs of a case. An Arizona pilot might compare numerical and non-numerical discovery limits. Before adopting the Utah model, it would be useful to see how well the restyled civil rules proposed by the Task Force might work. The member also has concerns with removing the "reasonably calculated" standard, but Mr. Jacobs responded that "reasonably calculated" should not serve as a gateway to increased discovery.
- Another member did not foresee a "parade of horrors" if the workgroup's proposals are adopted. Arizona already has a dollar limit for compulsory

arbitration, so dollar limits have precedent in Arizona civil procedure. The amount of discovery in a case should have a relationship to what the case is worth.

- There was considerable opposition to the Zlaket rules after the Court initially adopted them, but those rules are now a national model. The workgroup's proposed rules would require similar changes in the culture of Arizona attorneys, as well as changes in the culture of Arizona judges, but these changes might be positive and beneficial.
- The current Arizona rules serve as a model for other jurisdictions and there is no necessity for making major changes.
- The rules should elevate economics by shifting costs to those who waste time, who incur unnecessary costs, and who have the means to pay those costs. Mr. Jacobs agreed that cost shifting on an ongoing basis is "compelling," and vigorous enforcement of newly proposed provisions in Rule 37 would facilitate the shift. For example, if a deposition is unreasonably long, the court could shift the cost.
- Rule 37 already permits judges to exclude evidence based on incomplete disclosure or lack of candor, but judges are reluctant to impose that sanction if less restrictive penalties are available.
- This committee should recognize that the federal rules may have decided issues inappropriately, and it should not adopt federal mistakes in the Arizona rules.
- This committee should review how the pilot commercial court is dealing with disclosure and discovery issues, and take its cue from that experience.
- The committee should consider the impact of the workgroup's proposal on access to justice for litigants with limited financial resources, and explore ways to communicate the workgroup's proposed ideas to allow for public input.

4. Workgroup 3: Court operation reform. Ms. Albright provided a summary of the workgroup's recent meeting. The workgroup is no longer considering the issue of judicial rotation. The workgroup discussed the desirability of uniformity in the judges' online profiles. It believes the profiles should include not only a judge's preferences for decorum, but also include the judge's pertinent case management practices. New judge orientation is good but it is very high level and the workgroup may have future recommendations for targeted training.

Mr. Weinzwieg elaborated. Many attorneys are unaware of the judicial profiles page on the superior court website. There should be more publicity concerning its existence to increase the attorneys' awareness. He said that initial judge training loses its effectiveness over time, and the workgroup accordingly discussed training that makes concepts fresh and immediately useful for judges. The training should be specific for the judge's assignment. Interactive, computer based training might be effective. A judge member suggested that a judge newly assigned to a civil calendar might benefit from

specific training on such topics as medical malpractice, personal injury, handling discovery disputes, or motion practice. A weeklong training session would be helpful upon assignment to a new calendar.

Another judge member recalled that the most useful training he received following a new assignment was a week of one-on-one tutelage from another judge who had that assignment. This member also noted that new judges would benefit from discussions with the clerk's office on such things as forms of judgment. Mr. Jeanes observed that there is no authority that judges must format particular documents in a certain way, but an orientation session with a newly assigned judge could promote standardization and avoid the judge "winging it." Pima County has large binders of "survival guides" for each bench. Bench books may quickly become out-of-date, but the Arizona Judicial Information Network's "Wendell" site has a variety of current resources. Members would encourage shared training; for example, Maricopa County invited Pima County judges to its recent election law program.

5. Workgroup 4: Civil discovery reform. Ms. Feuerhelm presented on behalf of the workgroup, with a focus on two issues: Rule 11, and rules concerning electronically stored information ("ESI").

Ms. Feuerhelm discussed the matter of Rule 11 sanctions in detail, and whether the operative word in this rule should be "must" or "may." The petition filed in January by the Civil Rules Task Force proposed mandatory sanctions under this rule, i.e., that the court "must" impose a sanction for a Rule 11 violation. The Arizona Chamber of Commerce supported this approach. The Pima County Bar recommended permissive ("may") sanctions, and when the Task Force filed an amended petition in April, it revised Rule 11 to align with that view. Ms. Feuerhelm noted this committee could file its own comment because the comment period was still open.

Mr. Twist advocated consideration of the burden of frivolous litigation on Arizona businesses, and reduction of that burden by a mandatory Rule 11 sanction. He emphasized the desirability of changing the culture of litigation with an unambiguous and judicially enforced sanction provision in Rule 11. A judge member of the committee agreed that judges should enforce Rule 11, but a judge could avoid the imposition of a mandatory sanction by not making the predicate finding of a violation. Another judge member favored discretion for imposing sanctions because judges would impose one when warranted by the circumstances. Mr. Klain explained that a requisite for a sanctions motion is a consultation with the opposing party and a request that the party refrain from abusive conduct, and that if the opposing party failed to take corrective action during this preliminary stage, the judge should sanction that party. However, he also noted that the federal rule is permissive, the recommendation of the State Bar as well

as the Pima County Bar was “may” rather than “must,” and these factors persuaded the Task Force to change its original position.

A house-counsel member questioned this rationale. He said that corporate attorneys rarely see judges enforce Rule 11, and the rule serves as a false promise. Mr. Twist added that pleadings may contain defamatory allegations, which become public documents upon filing, and he suggested that judges apply Rule 11 to address those situations. A judge member thought that although judges “know a Rule 11 violation when they see one,” better descriptions of what the rule prohibits might fortify Rule 11. “Unfounded defamation” may be a good start at defining what is improper. However, pleadings frequently have allegations that are unproven, and imposing Rule 11 sanctions on all of those pleadings would be impractical. A member recommended that the rule describe specific conduct to provide clear direction to attorneys and judges about when the imposition of sanctions is appropriate. The workgroup will to continue to discuss this matter.

Ms. Feuerhelm then spoke of the need to address the burden and expense of disclosure and discovery of ESI. One area of concern involves overbroad demands for ESI preservation, and a lack of certainty on what someone must do prior to litigation to avoid subsequent sanctions for a failure to preserve. Other areas of concern include excessive collection and production of ESI during the course of litigation, inaccessible and overlapping sources of ESI, and burdensome demands for imaging. Ms. Feuerhelm briefly reviewed what other jurisdictions have done to manage these problems, and current and proposed Arizona rules on these subjects. A new Rule 26.3 was drafted to address these issues comprehensively. Ms. Feuerhelm reviewed the draft rule, which includes a provision that requires a “discovery plan.” The timing for submission of the plan is still unresolved, but she considered various alternatives, such as tying submission to the filing of a Rule 16 joint report. The discovery plan could, among other things, frame the substantive boundaries of ESI discovery, triage sources of information, contain preservation agreements, and define cost-shifting principles. These comments followed:

- The draft rule allows the parties to “opt out” of a discovery plan, and a plan may be unnecessary in many cases, either because there is no or minimal ESI, or because there are no issues concerning ESI disclosure.
- Would the parties be required to update the discovery plan as new information becomes available? Would the failure to identify documents in the plan precipitate discovery motions?
- Litigation should be about the facts rather than the technology, and ESI rarely requires a “CSI” approach to documents production. In some cases, parties may address ESI simply by printing electronic documents and exchanging the paper copies.

- Cases may rarely spin out of control because of ESI issues, but it is a nightmare when that happens and this rule might be useful in those exceptional situations.
- The most problematic areas are not disclosure of ESI in the course of litigation, but pre-suit preservation demands and demands for ESI from third parties. The committee should consider amendments to Rule 45 that would allow a person in these circumstances to obtain a safe-harbor ruling from the court, or an order to narrow the scope of a request or to shift expenses. The workgroup will further discuss this suggestion.

6. Roadmap; call to the public; adjourn. The Chair advised that at the June and July meetings, the members should more definitively frame the issues and decide what it will recommend in its report. The members will need to determine the issues on which there is consensus, and develop a manner of reporting to the Court matters on which they have disagreement. The Chair requested that members give thought to these items before the next meeting, which is June 14, 2016.

The Chair announced that Ms. Feuerhelm and Mr. Jacobs, along with Brian Pollock, a partner at Lewis Roca Rothgerber, were jointly chosen as the State Bar's 2016 Member of the Year. They will receive the award at the Bar convention in June.

There was no response to a call to the public. The meeting adjourned at 1:45 p.m.

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: June 14, 2016

Members attending: Don Bivens (Chair), Hon. Dawn Bergin, Hon. Jeffrey Bergin, Ray Billotte, Hon. Robert Brutinel by his proxy Sara Agne, Krista Carman, Roopali Desai, Jodi Feuerhelm, Glenn Hamer, Hon. Charles Harrington, Andrew Jacobs, Dinita James, Hon. Michael Jeanes, William Klain, Stephen Montoya, Michael O’Connor (by telephone), Mark Rogers, Hon. Peter Swann, Hon. Timothy Thomason, Hon. Patricia Trebesch, Steven Twist, David Weinzweig

Absent: Veronika Fabian, Jack Jewett, Geoffrey Trachtenberg

Guests: Brittany Kaufman (by telephone), Shelley Spacek Miller (by telephone), Christine Martin, Janet Howe

Staff: Jennifer Albright, Mark Meltzer, Sabrina Nash, Theresa Barrett

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fifth Committee meeting to order at 10:02 a.m. He reminded the members that the Committee’s report is due on October 1, 2016, and the Committee therefore should have its report finalized by September. Today’s meeting will continue to determine the “sense of the room” on pending issues, but without formal voting. The Chair requested members to review draft minutes of the May 17, 2016 meeting.

Motion: A member moved to approve the draft May 17, 2016 minutes, followed by a second, and the motion passed unanimously. **CJRC-005**

2. Updates from Ms. Kauffman and Ms. Spacek-Miller. The Chair then asked for status reports from Ms. Kauffman, on behalf of the National Center for State Courts (“NCSC”), and from Ms. Spacek-Miller, on behalf of the Institute for the Advancement of the American Legal System (“IAALS”).

Ms. Kauffman advised that the Conference of Chief Justices (“CCJ”) would probably include in its final report a discussion of the role and importance of “proportionality.” This concept will have a critical role in the report. The discussion will include “rightsizing” the needs of each case and tailoring the judicial process to a case’s characteristics. The amount in controversy in a case is just one of a number of case characteristics. Tailoring the process will include alternatives to traditional trials, such as alternate dispute resolution and “short-trials.” She noted that Colorado has already adopted the notion of proportionality, and a growing body of federal case law is refining the concept.

Ms. Spacek-Miller provided highlights from a recent IAALS review of Maricopa County civil case data. She stated that Maricopa courts dismissed 18% of the cases and resolved 76% by default. Additionally, the courts adjudicated 3% of the cases, resolved 1% by summary judgment, 1% settled, and 1% had an unspecified entry of judgment. Most of the defaults involved contract and property claims. The average awards for contract and tort cases were respectively \$124,000 and \$142,000, but a few large awards skewed these figures. Realistic figures (i.e., the 75th percentile) are about \$30,000 for contract cases and about \$35,000 for torts. Plaintiffs had attorneys in about 97% of the cases, but defendants had a lawyer in only 4%, and both sides had counsel in about 3%. She will forward a written summary of her data to staff. She added that August 3, 2016 is the anticipated publication date of the final CCJ report, so the CJRC will have an opportunity to review that report before submitting its own.

A committee member expressed concerns about the validity of the data, because if the court dismissed or entered defaults in 94% of the cases, the court would have adjudicated fewer than 10% of the cases. The member believes the dismissal figure makes sense only if it includes cases that the court dismissed by stipulation following adjudication and settlement. Ms. Spacek-Miller acknowledged that the dismissal data may not distinguish those events, and Mr. Billotte offered to collaborate with her to see if the data might be further refined. The member also suggested that rightsizing was a valid concept if it took into consideration case characteristics beyond merely the amount in controversy. This requires more qualitative and nuanced evaluations than Utah's monetary tiers. Rightsizing should attempt to match the needs of the parties with the court's available resources. The civil cover sheet might provide additional information about incoming cases and facilitate the rightsizing of each case at the outset.

3. Workgroup 1: Compulsory arbitration reform. Judge Harrington reminded the members that during his presentation at the May meeting, he had requested comments on the workgroup's recommendations. He received thereafter a comment from the presiding judge of the superior court in Maricopa County. The comment included detailed concerns about the operation and financial impacts of the workgroup's draft recommendations. In summary, the comment expressed concern that under the workgroup's proposal, a large percentage of the cases that would go to arbitration under the current rules would instead go directly to a fast-track jury trial. There have been 1,000 to 1,200 annual arbitration awards in Maricopa County, and it would require each of Maricopa's 19 civil judges to conduct as many as 50 fast track trials each year, in addition to their existing caseloads, if most plaintiffs opted out of arbitration. These additional jury trials would also require the county to spend a substantial amount to pay trial jurors. Accordingly, Judge Harrington proposed a pilot program in another

county. He said that Pima County has preliminarily agreed to conduct a pilot, and he also would like to see a medium or small-sized county sponsor a pilot program.

A judge member thought that a proposed elimination of Rule 68 sanctions in the trial track would incentivize plaintiffs to choose fast track trials over arbitrations. To have apples-to-apples data comparisons with a pilot program, the member suggested also eliminating sanctions in the arbitration track. Judge Harrington noted that parties in arbitration proceedings could present expert opinions through written reports, and that is a countervailing incentive for plaintiffs to choose the arbitration process. The workgroup is attempting to balance costs and proportionality, while simultaneously encouraging parties to exercise their constitutional right to a jury trial. Because the majority of arbitrations involve motor vehicle torts, the Maricopa comment also had concern with assigning subject matter experts as arbitrators, because that would limit the pool of available arbitrators to a small number of subject matter experts. Maricopa also believes it does not have a sufficient number of vacant courtrooms for conducting fast track trials. A committee member expressed similar concerns regarding the availability of subject matter experts for arbitrations and courtrooms for fast track trials in Yavapai County. Judge Harrington indicated that Pima County would attempt to conduct all pilot program proceedings at the courthouse before robed judicial officers.

4. Workgroup 2: Case management reform. Arizona already has two tiers – arbitration and not-subject-to-arbitration – each of which has distinct monetary and case management characteristics. Adoption of more tiers in Arizona, in conformity with CCJ and IAALS reports, would be an extension of this existing concept. However, Mr. Jacobs envisioned, as suggested by Ms. Kauffman, deemphasizing tiers based on dollar amounts. The workgroup is considering three tiers, but it is still discussing how to triage or allocate cases to those tiers. Mr. Jacobs added that basis of discovery should be relevance and proportionality, and the parties should engage in robust meetings with each other and with the court to reach early agreements on a case’s most essential issues, including discovery issues. The following questions and comments ensued.

- The pilot commercial court is already using certain methods proposed by the workgroup. Is there coordination between the workgroup’s envisioned rule changes and Rule 8.1, the pilot court’s experimental rule? Mr. Jacobs advised that his workgroup met with the commercial court judges, he agrees that concepts underlying the pilot commercial court and those being considered by the workgroup have much in common, and he agrees that the workgroup’s proposals should integrate with the commercial court’s underlying principles and practices.
- Unlike commercial court judges, most civil judges do not have sufficient time to hold a mandatory Rule 16 conference in every case. However, this

Committee should support early meet-and-confer discussions between the attorneys.

- Those on the national level may be looking at discovery issues from a perspective that does not apply to Arizona. Discovery may be “broken” in other jurisdictions, but not in Arizona.
- Arizona is unique in its history and experience with disclosure. Data gathered by outside groups might be misleading or misconstrued.
- The committee should support the workgroup’s nuanced approach and focus on what case characteristics the court should identify, and when to identify them.
- Finding the most propitious time for determining case characteristics might require further study. Mr. Jacobs believes that a detailed civil cover sheet might have insufficient information for proper triage of a civil case. Even having a complaint and an answer may not provide enough information for making the determination. It might be more meaningful to wait until the initial exchanges of disclosure statements and documents. However, the court should identify case characteristics no later than the initial Rule 16 conference.
- Self-represented litigants may be unable to determine their case characteristics, and the court may need to assign those cases to a predetermined management track.
- Private parties with private disputes should be able to manage their own cases until and unless they have an issue that requires judicial intervention. Because the parties know their cases best, the court’s case management pathways should be less prescriptive, and more receptive to what the parties say they need to get their cases resolved.

5. Workgroup 4: Civil discovery reform. The workgroup presented three draft rules and a concept. Ms. Feuerhelm asked for the members’ input on each.

The first item concerned expert testimony under Rules 16, 26, and 26.1. The workgroup considered making preparation of expert reports mandatory, but decided not to make that recommendation. Instead, it proposed that expert reports be required when the expert’s testimony would involve the application of “scientific,” or alternatively, “medical, engineering, or mathematical” principles or methods. In circumstances where a report is not required, proposed amendments to Rule 26.1(c) would require a party’s expert witness disclosure to include the expert’s qualifications, a list of cases where the expert testified, and a statement of the expert’s compensation. The rules would also require that counsel confer on the form of expert disclosures. Members made these comments.

- Instead of “scientific” principles, the rule should require an expert report when one is appropriate under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
- Attempting to categorize cases where expert reports are required is like trying to capture lightning in a bottle. Leave it to the parties to determine whether their particular case requires expert reports.
- If an attorney fully discloses the expert’s opinion, it would fulfill the requirement of a report but it should cost less.
- Arizona should adopt the federal approach on disclosure of expert opinion.
- The federal rule works in high dollar cases, but most Arizona cases do not have comparable value. Some members believe it would be appropriate to require an expert report based on a “tiered” case value.

Ms. Feuerhelm also noted a proposed provision in Rule 26(b) that would protect communications between an attorney and the expert. This derives from a federal rule. One member commented that he did not believe the rule should provide that protection, but other members did not support that view.

The workgroup’s proposed modifications to the second rule, Rule 11, concerned the imposition of sanctions based on the type of conduct at issue, and more specifically, whether there should be a particular category where sanctions are mandatory. If there is such a category, what conduct should it describe? A judge member observed that it is often difficult for judges to have sufficient and appropriate information for deciding whether to impose a Rule 11 sanction consistently with due process requirements. One member suggested that because the sanction is punitive in nature, the court should impose one only when it is justified by clear and convincing evidence. Others felt the sanction was compensatory rather than punitive. Another member requested that sanctions be required for allegations in a pleading that the pleader knows to be false. However, a member noted that the proposed rule might contravene a broad, well-established, policy-based privilege for statements a party makes in court pleadings and proceedings. If an allegation proves to be false at the conclusion of a case, the court has discretion under the current rule to impose a sanction, and the proposed modifications add no additional tools. Most members agree that judges know a violation when they see one, and they will not impose a sanction unless they believe it is justified, even if Rule 11 says that they “must” impose it.

Ms. Feuerhelm explained that parties sometimes use Rule 11 as a cudgel, invoking it frivolously and without consequences. The proposed amendments would require the attorneys to meet-and-confer concerning the objectionable conduct, followed by a ten-day written notice to the offending party to take corrective action. An attorney would be able to move for Rule 11 sanctions only after fulfilling these preliminary requirements.

The existence of these additional requirements might cause the court to consider a motion for Rule 11 sanctions with greater gravity. Even if the rule provides that the court “may” – rather than “must” – impose a sanction, these new requirements may actually serve to increase the frequency with which judges impose them.

The third rule was a proposed “Rule X” entitled “dispute resolution procedures regarding preservation of electronically stored information [‘ESI’].” The rule concerns requests for preservation of ESI that are made either to a party in a pending action, or to a non-party. If a party objects to a request, the parties must confer; and if they are unable to resolve the dispute, they must present it to the court in a single joint motion. A non-party who objects may file a verified petition requesting the court to determine under Rule 45.3 the existence or scope of the non-party’s duty to preserve the requested ESI. The rule would require service of the petition on the requestor, and would provide an opportunity for the requestor to file a response. The petition would be a new form of action and would require a case number, and implementation of this rule would require coordination with the clerks’ office. The proposed rule provides that a party or nonparty who complies with a preservation order under this rule is deemed to have taken reasonable steps to preserve ESI under Rule 37(g). Members had these comments.

- Preservation of ESI can be as burdensome to businesses as production of the information.
- This rule would presumably allow the court to impose cost shifting when warranted, but it should specifically mention cost shifting.
- The title of the rule should change from “dispute resolution procedures regarding preservation of electronically stored information” to “preservation demands,” which is simpler and equally informative.
- The summons that accompanies a verified petition under this rule should include information on the effect of a preservation demand.
- Section (g) of the proposed rule concerns contractual limitations on preservation, but it also should mention limitations imposed by discovery agreements.
- One member had concerns with creating a cause of action by court rule, rather than by legislation or case law, but another member noted that court’s special action rules establish precedent for doing so.

Ms. Feuerhelm presented the “concept” item as a work-in-progress. The concept was a proposed Rule XX with the tentative title, “standards and dispute resolution procedure regarding the discovery and disclosure of electronically stored information.” The draft rule provides “a framework for determining the reasonable scope of discovery or disclosure of electronically stored information, including whether the requested information is not reasonably accessible because of undue burden or expense, whether

good cause exists to require disclosure or production of information that is not reasonably accessible, and whether conditions should be imposed on the discovery or disclosure, including cost-sharing or cost-shifting.” The draft specifies factors for considering “undue burden” and “good cause,” and guidance for determining “reasonable expenses” and “presumptive limits.” The draft rule includes footnotes that describe items that generally are not discoverable, such as “slack data,” “ephemeral data,” “cache,” and “cookies.” Members made these comments.

- It would be beneficial to have a clear policy statement of what ESI production means and requires.
- The basic obligation of a party is to locate and produce relevant documents that are accessible. It generally should not require everything or anything else, including how a party searched for the data, how a party found the data, whether identical information may be on flash drives, and a multitude of other collateral matters. Parties should not always suspect the spoliation of data.
- ESI should make discovery easier rather than multiply the cost of discovery.
- The “prevailing party” model may work at the conclusion of litigation, but it does not work well for shifting costs in the middle of litigation, and this draft rule might provide appropriate criteria in those circumstances.
- Technology is rapidly changing, and the draft rule should avoid mentioning specific types of technology or attempting to predict what technologies might evolve in the future.

6. Workgroup 3: Court operations reform. Ms. Desai advised that the workgroup is continuing its study of judicial training, electronic resource libraries, judicial profiles and preferences, and making judicial practices more efficient. The workgroup will present additional information at the Committee’s next meeting.

7. Roadmap; call to the public; adjourn. The Chair anticipates that members will vote on each workgroup’s specific recommendations at the next meeting, which is set for July 19, 2016. It might be necessary for the meeting to begin earlier or to go longer than previous meetings.

There was no response to a call to the public. The meeting adjourned at 1:18 p.m.

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: July 19, 2016

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

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

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

Staff: Jennifer Albright, Mark Meltzer, Sabrina Nash

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: August 23, 2016

Members attending: Don Bivens (Chair), Hon. Dawn Bergin by her proxy Michael Stepaniuk, Hon. Jeffery Bergin, Ray Billotte (by telephone), Hon. Robert Brutinel, Krista Carman (by telephone), Roopali Desai, Veronika Fabian, Jodi Feuerhelm, Glenn Hamer by his proxy Christine Martin, Hon. Charles Harrington, Andrew Jacobs, Dinita James, Hon. Michael Jeanes by his proxy Aaron Nash, Jack Jewett, William Klain, Mark Rogers, Hon. Peter Swann, Geoff Trachtenberg, Hon. Patricia Trebesch, Steven Twist, David Weinzweig

Absent: Stephen Montoya, Michael O’Connor, Hon. Timothy Thomason

Guests: Shelley Spacek Miller (by telephone), Brittany Kauffman (by telephone), Scott Minder, Sara Agne

Staff: Jennifer Albright, Mark Meltzer, Julie Graber

1. **Call to order; preliminary remarks; approval of meeting minutes.** The Chair called the seventh Committee meeting to order at 10:0 a.m. He introduced the proxies and welcomed individuals on the telephone. He advised that all four workgroups will present their work product today, and at the conclusion of each presentation, the Chair will consider a motion to approve the product. On September 1, the Chair will confer with workgroup leaders concerning a draft committee report. The Chair noted that members’ terms do not expire until the end of 2016, and the Committee may have another meeting after September 13. The Chair then asked members to review draft minutes of the Committee’s July 19, 2016 meeting.

Motion: A member moved to approve the July 19, 2016 draft meeting minutes, which was followed by a second, and the motion passed unanimously. CJRC-007

2. **Case management reform workgroup.** Mr. Jacobs made a presentation on behalf of the workgroup that included nine proposals described in his August 19, 2016 memo.

1. The workgroup’s proposed draft of Rule 16(a)(3), unlike the version proposed by the Civil Rules Task Force, precisely tracks the proportionality language in the workgroup’s proposed Rule 26(b)(1). Mr. Jacobs outlined the advantages of the workgroup’s version, which include greater harmony with the federal rules.

Some members expressed doubt that the term “proportionality” would clarify Arizona’s rules. One member observed that there are more than one hundred federal

decisions on the meaning of proportionality, which suggests that jurists do not have a uniform understanding of the term. Civil procedure professor Arthur Miller has criticized use of the term in the federal rules. The member expressed reservations about “hitching our wagon to a train that’s running off the tracks.” Another member supported that Task Force recommendation to use “appropriate” rather than “proportional,” and urged that we should trust Arizona judges to do what is “appropriate.” Because the Task Force used the same specified factors as the federal rules to determine what might be “appropriate,” Arizona judges could still look to federal decisions for their persuasive value. Mr. Jacobs responded that it is unlikely that the use of “appropriate” will lead to a meaningful body of case law. The term also encourages unfettered discretion. Ultimately, there may not be a vast difference between these two terms.

2. A new provision in Rule 26(e) provides that “a party may not seek discovery from any source before that party’s initial disclosure obligations under Rule 26.1 are fulfilled.” Subsequently, there was concern that the rule should include a “safety valve” to permit earlier discovery. Accordingly, the provision now includes the words, “unless the court orders otherwise or for good cause.”

3. Members raised concerns with a provision in a previous draft that required parties to wait until a party took all discovery below tier limits before seeking additional discovery. To ameliorate that, the workgroup added a provision that would permit a party to request over the limit discovery at an earlier time.

4. A previous draft required an attorney who is seeking discovery beyond the tier limit (now Rule 26.2(f)) to provide the client with a “discovery budget” and obtain the client’s approval of the budget. Members did not favor the requirement that the client approve a “budget.” The workgroup accordingly substituted “statement of the additional expense” for that term. The members further modified the provision to require the client to approve the request to obtain discovery beyond the tier limit, rather than approving the statement of the additional expense.

5. There was a change to Rule 26.2(b)(1) similar to the preceding one. A subtitle of Rule 26.2(b)(1)(B) will be revised to conform to this change.

6. The next proposal would permit a party to take every deposition that Rule 30(a) entitles them to take, up to a limit of two hours per deposition, even if that affords the party more hours of deposition than the relevant tier limit. A new comment to Rule 26.2 explains the practical application of this provision. The members discussed changing the word “notwithstanding” in proposed Rule 26.2(g) to “the greater of,” but after discussion they agreed that “notwithstanding” was more suitable.

7. The workgroup proposed shortening the deadline in Rule 26.1(e)(1) from 40 days, as allowed under the current Rule 26.1 provision, to 30 days. There was no objection.

8. The provisions concerning tiers as proposed at the July committee meeting were located in Rule 26(e). Given the length of these provisions, the workgroup relocated those provisions into a new freestanding Rule 26.2. Rule 26.2 has a new section (a) that introduces the subjects of the new rule. Section (b) concerns the methods of assigning tiers, and section (c) governs when the court assigns a tier. Section (c) includes the phrase, "it [the court] must assign the case to a tier no later than 30 days after the parties file their Report of Early Meeting under Rule 8(g)(3)."

Mr. Jacobs noted that the "limits" provisions are stated on a "per side" basis, which is further specified as "plaintiffs collectively, defendants collectively, and third-party defendants collectively." Members requested further development of the concept of "per side." One member suggested an addition to the rule that would provide for different "side" configurations based on "an alignment of interests." The member suggested that such an alignment might result in a multi-party multi-claim case having only two sides. Another member expressed concern with a need to "carve up" discovery if parties on the same side had divergent interests. "Side" infringes on a party's right to do necessary discovery when there is no alignment of interests with co-parties. The member suggested using the word "party" in lieu of side, and added that other discovery rules allow discovery by a "party" rather than by a "side." One member suggested the draft rule might be susceptible to gamesmanship, for example, when a plaintiff names additional defendants with the goal of limiting discovery because multiple defendants are on the same "side." There may also be situations, for example, a third party complaint with cross-claims, when there are four or more "sides." The Chair suggested that the Committee should not attempt to rewrite this provision today, and instead a small group should meet to discuss ways to improve it. The Chair will exempt this provision from today's vote, and the Committee will revisit this matter at the September meeting.

9. Mr. Jacobs' ninth proposal would create a new Rule 26(d) that contains an expedited procedure for resolution of disclosure and discovery disputes. The rule would require the parties to submit a brief joint statement, following which the court would conduct an expedited hearing and then issue a minute entry memorializing its resolution of the issue. Mr. Jacobs agreed with a member's suggestion to delete a provision of this rule permitting a party to have e-mail contact with the court.

Mr. Jacobs noted that he had a productive conversation recently with Ms. Feuerhelm, who leads the civil discovery workgroup, about reconciling overlaps in their respective drafts regarding two subjects: expert witness reports and dispute resolution

procedures. Ms. Feuerhelm agreed that the rules should incorporate Mr. Jacobs' expedited dispute resolution procedure. However, Ms. Feuerhelm's detailed standards and factors, enumerated in draft Rule 26.4, would remain, and Mr. Jacobs and Ms. Feuerhelm will work to harmonize the two new rules in the Committee's final draft. Mr. Jacobs deferred to Ms. Feuerhelm on issues concerning expert reports. Members then made these motions:

Motion: To approve the work product of the case management reform workgroup, as presented by Mr. Jacobs and as shown in the supplemental meeting materials, subject to exceptions noted above and to amendments that conform to today's discussion. A member made a second to this motion, hereinafter referred to as the "main motion."

Motion: To sever from the main motion the issue of whether the Committee should recommend use of the term "proportional" in the discovery rules, or the term "appropriate." A member made a second to this motion, hereinafter referred to as the "motion to sever."

The members then discussed whether to defer a vote on the motion to sever until the September meeting. The Court will hold its rules agenda on August 29, 2016. The agenda includes the Civil Rules Task Force petition R-16-0010, which recommends use of the term "appropriate." If the Committee defers the vote, it could obtain guidance from the Court's disposition of R-16-0010. On the other hand, if the Committee votes today, the Court could have the Committee's input on this issue. After further discussion, the Chair put both motions to a vote, beginning with the motion to sever.

Vote on the motion to sever: To sever from the main motion the issue of whether the Committee should recommend use of the term "proportional" in the discovery rules, or the term "appropriate." The motion was defeated on a vote of 7 ayes and 14 nays. **CJRC-008**

Vote on the main motion: To approve the work product of the case management reform workgroup, as presented by Mr. Jacobs and as shown in the supplemental meeting materials, subject to exceptions noted above and including amendments that conform to today's discussion. The motion passed unanimously, with one abstention. **CJRC-009**

3. Civil discovery reform workgroup. Ms. Feuerhelm presented several rule proposals, as follows.

1. The workgroup refined the previous draft of Rule 26.3, which concerns a dispute resolution procedure for preservation demands. The revised version governs

disputes that arise in a variety of contexts, including prior to litigation or involving a non-party to litigation. The rule has a section for procedures where there is a “pending action” and another section for procedures when there is “no pending action.” Ms. Feuerhelm noted that the materials included a new Form 15, which contains an explanatory notice of the Rule 26.3 procedure.

Ms. Feuerhelm suggested that this rule require parties to an action to adhere to the expedited Rule 26(d) process proposed by Mr. Jacobs. Mr. Jacobs agreed, and Ms. Feuerhelm will add a cross-reference. A member inquired whether a non-party’s Rule 26.3 dispute might precipitate a second action, and therefore require a hearing before a judge other than the one assigned to the principal action. Ms. Feuerhelm acknowledged this possibility. A judge member suggested that the rule make clear that when there is a pending action, the third party must file a Rule 26.3 petition in the pending action. Ms. Feuerhelm will revise the draft to provide for this. Another member asked whether the rule improperly places the burden on a non-party to initiate a Rule 26.3 petition, rather than placing the burden on the party making the preservation demand. Ms. Feuerhelm responded that the workgroup’s intent was to give the non-party an option of seeking relief, rather than being compelled to appear in court in response to a filing by the party seeking preservation. The members agreed with Ms. Feuerhelm’s approach.

2. Ms. Feuerhelm reviewed several new provisions in Rule 26 concerning electronically stored information (“ESI”). A member suggested that Rule 26(b)(2)(C), which concerns “disputes” regarding ESI, cross-reference new Rule 26(d), and Ms. Feuerhelm agreed that it should. Several members had concerns with Rule 26(b)(1)(C), which would require the court to enforce any freely negotiated pre-litigation agreement that limited a party’s obligation to preserve ESI. The concerns focused on the application of this new provision to consumer transactions. Ms. Feuerhelm responded that the “freely negotiated” phrase should exclude boilerplate contracts, but the members requested additional text or a clarifying comment. One member noted the drafters’ intent was that the provision only applies to sophisticated commercial parties, and suggested that definitions in Rule 8.1, which exclude consumer transactions, might provide guidance. During a short recess, a member suggested this solution: after the word “agreement,” insert the words “between commercial parties;” and delete text after the word “discovery,” including the “freely negotiated” phrase. Ms. Feuerhelm announced this suggestion after the recess, and she and the members concurred with it.

Ms. Feuerhelm also described other ESI provisions, including an amendment to Rule 26(b)(6) that would allow simplified privilege logs; an amendment to Rule 26(c) that would allow a person receiving an ESI preservation request to seek a protective order; and an amendment to Rule 26.1(c) with additional requirements concerning the duty to confer regarding ESI. In light of the earlier discussion about utilizing Mr. Jacobs’

expedited dispute resolution procedure, Ms. Feuerhelm would remove Rule 26.4(b) entitled “duty to confer; other requirements.” With regard to the standards in Rule 26.4(c), a member asked whether information stored on cloud servers is “reasonably accessible” to a party, compared to a server that is on-site. Another member observed that technology rapidly evolves. He cautioned against focusing on current storage technology and suggested that the rule approach this subject generally; the other members agreed. Ms. Feuerhelm also noted changes to Rule 37 that conform that rule to ESI revisions in other rules.

3. Ms. Feuerhelm then turned to Rule 45. She began by noting that the draft rule now provides additional protections for persons who are not parties to the litigation, including Rule 45(c)(2)(D) concerning inaccessible ESI. Another new provision would require a subpoenaing party who requests a privilege log to pay the subpoenaed person’s reasonable expenses in preparing one. An amendment to Rule 45(c)(6)(C) would impose a duty to confer before a movant may file a motion to compel, to quash, or for a protective order regarding compliance with a subpoena. (Ms. Feuerhelm noted that these motions would not be subject to expedited Rule 26(d) dispute resolution procedures.) Another amendment, to Rule 45(d)(3), would parallel a federal rule and require a party to provide a copy of the subpoena to other parties before it is served. This provision differs from the federal rule because it requires providing the subpoena to other parties five days before service.

A new Rule 45(e)(1)(A) precludes a party from serving a subpoena that seeks production of materials “that have already been produced in the action or that are available from parties to the action.” One member requested deletion of the last phrase of the sentence because he believes he cannot always obtain all the requested information from another party. Another member noted that different people may have different files about the same event, and it may be significant to determine which of them has a particular document in their file. Ms. Feuerhelm agreed and she will discuss revisions with the workgroup. The Chair advised he would excerpt this provision from the forthcoming vote on the workgroup’s recommendations. A new Rule 45(e)(1)(B) would require the party seeking discovery to pay the reasonable expenses of the subpoenaed person; the subpoenaed person would be required to provide an advance estimate of those expenses. Some members were concerned that this would allow the subpoenaed person to add charges without limit, but the adjective “reasonable” before “expenses” mitigated those concerns. An omitted word, “sanction,” was added to the draft of Rule 45(e)(1)(C). Ms. Feuerhelm also noted changes to Form 9, the form of subpoena, to conform the form to changes in the rule.

4. Ms. Feuerhelm continued with provisions in Rules 26 and 26.1 concerning expert reports. She noted provisions in Rule 26 that the members previously discussed,

which contained protections for draft reports, and for communications between a party's attorney and an expert witness. In draft Rule 26.1(c)(3)(F) and (c)(4)(E), the members agreed to strike these words: "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.~~" The rationale is that the five words before the semicolon were unnecessary, and that deleting the remainder of the sentence was appropriate because an expert who testifies frequently should be able to provide a list.

5. Ms. Feuerhelm then introduced modifications to a previous draft of Rule 11. She noted that section (b) of the draft reverted to earlier language that "factual contentions [and denials] are well-grounded in fact." The workgroup preferred this phrasing to "having evidentiary support," because "evidentiary support" would include such things as testimony of a witness who lacked credibility. The workgroup also substituted "reasonable" for "nonfrivolous," and added a sentence that "a legal contention may be reasonable even if it does not succeed on the merits." Some members opposed use of the word "reasonable." They thought "nonfrivolous" and "reasonable" did not have equivalent meaning, and they expressed concern that a judge may find any losing argument to be "unreasonable." These members believe that "nonfrivolous" is in and should remain part of the litigation vernacular, because judges and lawyers understand its meaning. After further discussion, a member suggested substituting the word "colorable" in section (b) in lieu of "reasonable." Ms. Feuerhelm and the other members agreed with this change.

6. The final rule in this presentation was Rule 35, which currently allows audio-recording of an examination. The proposed change would also allow video recording of the examination, but the court may limit the recording on a showing that it might adversely affect the outcome of the examination. A workgroup member noted that adoption of this rule change would preempt a significant volume of motions requesting the court's permission to video record an exam.

Before voting on the workgroup's recommendations, members made three suggestions. The first suggestion was to add to Rule 26.1(c)(3) and (4) that an expert must identify any learned treatise on which the expert expects to rely. Ms. Feuerhelm and the members agreed with this change. The second suggestion was to add any use of computer modeling to the expert's disclosure. Although disclosure of the expert's "facts" or "data" may already cover this, Ms. Feuerhelm and her workgroup will attempt to devise language. The third suggestion was to include in the standards section of Rule 26.4 a reference to where or how data is stored. After discussion, the members agreed to add to this section the phrase, "data which is in the custody of another." A motion followed the discussion.

Motion: To approve the work product of the civil discovery reform workgroup, as presented by Ms. Feuerhelm and as shown in pages 11 through 56 of the meeting materials, except for Rule 45(e)(1)(A), and including amendments that conform to today's discussion. The motion passed unanimously. **CJRC-010**

4. Arbitration reform workgroup. Judge Harrington noted that the proposed pilot program would allow a choice of compulsory arbitration or a short trial. A short trial has the benefits of saving time and cost, and it expediently provides parties their day in court. The workgroup prepared a set of rules that would govern the pilot program. These rules include a few amendments to the existing arbitration rules (Rules 72 through 77) and a new set of rules for short trials (Rules 72.1 through 77.1).

New Rule 72(f) states that a plaintiff who chooses under Rule 73.1 to proceed by arbitration waives the right to a Rule 77 appeal of the award, and waives the right to trial. A proposed amendment to Rule 73(c) requires the clerk or court administrator to "endeavor to select and assign an arbitrator with experience in the subject matter of the action...."

The proposed short trial rules accelerate deadlines and require a trial within 270 days after the filing date of the complaint. The rules also impose discovery limits. The rules reduce the jury size to six jurors, and require the concurrence of five jurors to reach a verdict. There are also special rules for experts, which under these rules include a treating physician. An expert witness' fee at a deposition would be capped at \$500. (A treating physician could also be paid this fee, notwithstanding Division One's 2013 opinion in *Sanchez v Superior Court*, which held that treating physicians are not generally entitled to reasonable compensation when compelled to testify about a patient's medical treatment.) An expert's deposition would be limited to two hours (one hour per side), and the expert's fee would be allocated among the parties in proportion to the time each side spends questioning the expert. A party would be allowed to video record an expert's deposition and introduce the video record at trial. The proposed rules eliminate Rule 68 offers of judgment in short trial proceedings.

Mr. Jacobs suggested that proposed Rule 74.1(c), which details the discovery limits in short trials, simply say that short trial discovery is subject to tier 1 limits, with the addition of one medical examination under Rule 35. Judge Harrington agreed with this suggestion. One member expressed concern with sealing video depositions; another member advised that a separate petition in the 2017 cycle would propose a civil rule concerning sealing. There was also concern with the waiver of the right to appeal under Rule 72(f). First, even if an arbitration award is not "appealable" for a trial de novo in the superior court, once the award becomes a final judgment, the judgment becomes statutorily appealable to the Court of Appeals. A judge member noted that a party may waive statutory rights, and the rule should encompass a waiver of appeal from the award and appeal from the final judgment. A member asked the workgroup to consider

requiring a written waiver to assure that any waiver is knowing and voluntary. Another member suggested an amendment that would allow a court-appointed arbitrator to decline an appointment if the subject matter of the action was outside the arbitrator's expertise. The difficulty with this suggestion is that most arbitrations are concentrated in a few subject areas, and a court administrator would repeatedly call upon the same attorneys who practice in those subject areas to serve. The Committee declined that suggestion, and there was no further discussion of the workgroup's recommendations.

Motion: To approve the work product of the arbitration reform workgroup, as presented by Judge Harrington and as shown at pages 57 through 72 of the materials, including amendments that conform to today's discussion. The motion passed unanimously. **CJRC-011**

5. **Court operations reform workgroup.** Ms. Desai presented the workgroup's proposals, which concerned three areas. The first proposal was on the subject of civil bench judicial rotation training. The workgroup recommended that judges who rotate to a civil calendar must receive timely and substantive training. The workgroup identified the content of training generally ("at a minimum, case management, civil disclosure, motion practice, jury trial procedures, and attorneys' fees.") A proposed amendment to A.C.J.A. § 1-302 would make completion of this training mandatory "within 6 months of an assignment to a civil calendar." Members had concern with the 6-month timeframe, inasmuch as it would allow a judge to complete a quarter of a two-year assignment before finishing the training. One member suggested reducing this to one month. Another member thought that because judges usually receive months of advance notice of a rotation, judges should complete training before the first day of the new assignment. After discussion, the members agreed to amend the provision to require judges to complete the training within 60 days after starting the civil assignment. Other members suggested that the provision allow judges to obtain training in locations other than the county where they sit and specify a minimum number of hours of training. The members took no action on these suggestions. A few members suggested that the Committee recommend eliminating the rotation system altogether, but most considered that recommendation impractical, and the Committee will not make it. Some members thought the rotation system was advantageous, and contemplated future refinements such as combining dockets or extending the length of assignments.

The second proposal would require civil judges to utilize standardized web-based judicial protocols. The objectives of the proposal would assure the every civil judge has an online protocol, and that all protocols address specified preferences and subjects. The protocol would be analogous to a standing order, which superior court judges use infrequently. The protocol includes a suggested template, which coincidentally might serve as an outline for the training of new judges. One member observed that a new judge might not yet have preferences, and Ms. Desai noted that there could be a default

protocol for judges in that circumstance. The third proposal was included in the meeting materials but it was incomplete, and Ms. Desai requested removing it from consideration today.

Motion: To approve the work product of the court operations reform workgroup, as presented by Ms. Desai and as shown in pages 73 through 79 of the materials, except for proposal 3, and including amendments that conform to today's discussion. The motion passed unanimously. **CJRC-012**

6. Roadmap; call to the public; adjourn. The Chair will prepare a draft report and meet with workgroup chairs and staff on September 1 to discuss revisions to the draft. The revised draft will circulate to the members in advance of the September 13 meeting. If the members cannot complete their discussion of the report on September 13, another meeting may be set thereafter. The Chair reminded the members that the content of the report is provisional until its final approval by the members.

There was no response to a call to the public. The meeting adjourned at 2:18 p.m.

Committee on Civil Justice Reform ("CJRC")

State Courts Building, Phoenix

Meeting Minutes: September 13, 2016

Members attending: Don Bivens (Chair), Hon. Dawn Bergin, Hon. Jeffery Bergin, Ray Billotte, Hon. Robert Brutinel by his proxy Sara Agne, Krista Carman (by telephone), Roopali Desai, Veronika Fabian, Jodi Feuerhelm, Glenn Hamer by his proxy Christine Martin, Hon. Charles Harrington, Andrew Jacobs, Dinita James, Hon. Michael Jeanes by his proxy Aaron Nash, William Klain, Mark Rogers, Hon. Peter Swann, Hon. Timothy Thomason, Hon. Patricia Trebesch by her proxy Danny Green, Steven Twist, David Weinzweig

Absent: Jack Jewett, Stephen Montoya, Michael O'Connor, Geoff Trachtenberg

Guests: Haley Westra, Shelley Spacek Miller (by telephone), Brittany Kauffman (by telephone)

Staff: Jennifer Albright, Mark Meltzer, Sabrina Nash

1. **Call to order; preliminary remarks; call to the public; approval of meeting minutes.** The Chair called the eighth Committee meeting to order at 10:03 a.m. He welcomed proxies and individuals on the telephone. The Chair noted a possibility that the Committee might meet again before its term expiration at the end of 2016. He also advised that the report's recommendations might require further Committee action, such as filing a rule petition, which could result in an extension of the Committee's term. He requested that members notify him if they would prefer not to serve in 2017.

The Chair made a call to the public, and Ms. Haley Westra, vice-president of the Arizona Court Reporters' Association, addressed the Committee. She was concerned about any affects the Committee's recommendations might have on court reporters. The Chair advised her that the Committee's recommendations concerning differentiated case management might result in a reduction in depositions, but it is unknown whether the recommendations will be implemented and, if so, how they might actually work in practice. He invited Ms. Westra's organization to submit a written comment within the next week. The Chair then asked members to review draft minutes of the Committee's August 23, 2016 meeting.

Motion: A member moved to approve the August 23, 2016 draft meeting minutes, followed by a second, and the motion passed unanimously. **CJRC-013**

2. **Discussion of the September 8 draft Committee report.** The Chair provided the September 8 draft report to the members last week. The Chair advised that several members had subsequently submitted written comments to him, although he has

not yet incorporated these comments in another version. He noted in light of the Court's adoption last week of the Civil Rules Task Force amendments (R-16-0010) that a "redline" of the CJRC's proposed rule changes will be superimposed on those recent civil rules amendments, which will become effective on January 1, 2017, rather than on the current rules. The Chair also advised that a signature page was available if the members wished to sign it.

The Chair requested that members provide their input on the draft report today. Several members had no new comments, other than commending the Committee's work and work product. Other members had the following comments.

- One member reviewed his written notes from the first Committee meeting, when the Committee discussed the objectives of lowering the cost of litigation and increasing the quality and value of the court process. He believes the Committee's proposals will effectively achieve those objectives.
- The draft report's analysis of differentiated case management states that the Committee "disagrees with the Utah system." A member commented that the Committee derived a number of useful concepts from Utah's system, and suggested modification of that phrase.

With regard to proposal 6, and the procedures for resolving disputes involving electronically stored information ("ESI"), the member suggested the proposal mention that the draft rule would allow business organizations to agree on, and courts to enforce, provisions that limit discovery of ESI. The report should also mention a provision that absent good cause, parties may not mirror image the entirety of what is stored on another party's electronic device. The members agreed these were innovative provisions and the Chair will mention them in the report.

With regard to proposal 9, which concerns burdensome subpoenas, the member suggested the report mention that the party who subpoenas documents must pay a responding person's reasonable expenses. The concept that a subpoenaed person should not bear the cost of responding is a significant one, and the members concurred with including this in the report as well.

The draft report did not mention a proposed amendment to Rule 35 that would allow video recording of an independent medical exam without a court order. The Chair will include this in the report.

- A judge member had two comments. The first comment was whether draft Rule 26 should require counsel who seek discovery beyond the tier limit to

explain to the client the consequential costs of exceeding the limit. The judge concurred that counsel have a duty to communicate this information, but he questioned whether the civil rules are the appropriate place to codify the duty.

The judge's other comment concerned a proposed modification to a compulsory arbitration rule that would require the clerk or court administrator to endeavor to assign a case to an arbitrator with experience in the subject matter of the action. He does not believe that subject matter experience should be a requirement for serving as a decision-maker in an arbitration proceeding. Another judge member agreed and noted that a more important qualification is the arbitrator's willingness to serve. A third judge member observed that most complaints concern not the arbitrator's lack of knowledge but rather the arbitrator's failure to perform the required duties. Yet another judge member expressed concern with transactional attorneys serving as arbitrators; this judge believed that litigators have familiarity with the procedural rules regardless of their area of practice and a litigator should be capable of serving as an arbitrator; transactional lawyers may lack that familiarity.

- A member conveyed to the Committee Mr. Trachtenberg's support for the report. The member may submit written comments to the Chair regarding competing interests when determining whether discovery is "proportional."

This member also asked whether the rule sufficiently addressed whether the amount of punitive damages should be included in the tier calculation. The member believed that a punitive damage claim could necessitate increased discovery and the calculation should include these claims. Another member noted that current Civil Rule 72 includes punitive damages when determining if a case is subject to compulsory arbitration. However, if the Committee's proposed rule allowed inclusion of punitive damages in a tier calculation, parties could use those claims to "bootstrap" a case into a higher tier. The consensus of the Committee was that a plaintiff should bring to the judge's attention cases where a punitive damages claim might warrant additional discovery, but otherwise, punitive damages should not be included in the tier calculation.

- One member would like the report to include specific references to proposed rules or a rule-by-rule analysis of those rule proposals.
- The final comment raised the issue of how the proposed rules might affect the conduct of trials. Will less discovery have the effect of making trials longer? Will introducing evidence be more challenging? Will there be a need to call more records custodians? Several members responded that there are rules that

allow the court to shift the cost of calling records custodians. A judge member observed that the proposed rules could have unexpected consequences, possibly including fewer summary judgment motions. However, he added that the proposed rules should provide enough flexibility to deal with that possible scenario. Another member noted an inherent risk of changing any process, but he believes the benefits here of less expensive and more expedient justice far outweigh that risk.

3. **Roadmap; adjourn.** The members discussed the preparation of a final version of the Committee's report to the Arizona Judicial Council. A member thereafter made the following motion to approve the report.

Motion: To approve the substance of the draft report, subject to non-substantive refinements at the discretion of Chair and the workgroup leaders when preparing the report in final form for submission to the Arizona Judicial Council. A second followed, and the motion passed unanimously. **CJRC-014**

The Chair commended the members for their work on this Committee, and the members commended the Chair for his leadership. The meeting adjourned at 11:08 a.m.

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: January 6, 2017

Members attending: Don Bivens (Chair), Hon. Dawn Bergin, Hon. Jeffery Bergin (by telephone), Hon. Robert Brutinel, Roopali Desai, Veronika Fabian (by telephone), Jodi Feuerhelm, Glenn Hamer (by telephone), Hon. Charles Harrington (by telephone), Andrew Jacobs (by telephone), Hon. Michael Jeanes by his proxy Chris Kelly, William Klain, Mark Rogers (by telephone), Hon. Peter Swann, David Weinzweig

Absent: Ray Billotte, Krista Carman, Dinita James, Jack Jewett, Stephen Montoya, Michael O’Connor, Hon. Timothy Thomason, Geoff Trachtenberg Hon. Patricia Trebesch, Steven Twist,

Guests: None

Staff: Jennifer Albright, Mark Meltzer, Sabrina Nash

1. Call to order; preliminary remarks; call to the public; approval of meeting minutes. The Chair called the ninth Committee meeting to order at 10:01 a.m. He welcomed individuals on the telephone and introduced a proxy. The Chair then asked members to review draft minutes of the Committee’s September 13, 2016 meeting.

Motion: A member moved to approve the September 13, 2016 draft meeting minutes, followed by a second, and the motion passed unanimously. **CJRC-015**

2. Discussion of the draft rule petition and appendices. The Chair advised members that the draft rule petition and appendices, which staff distributed to members before the meeting, would be filed by the January 10, 2017 filing deadline. He requested Ms. Feuerhelm and Mr. Jacobs to note any revisions to these most recent drafts, and that members provide their corrections and comments. Ms. Feuerhelm mentioned a change to Rule 45 that clarified the process by which a non-party who received a documents subpoena could obtain compensation for preparing a privilege log. Mr. Jacobs advised that his changes to the documents generally conformed to what members had previously approved. A judge member requested that draft Rule 8(h)(3), requiring submission of a report “within 5 days,” specify the event from which the 5 days are measured. The judge may submit other, similar suggestions shortly. An attorney member noted that page 5 of the draft petition provides that a new rule would require parties to state in their pleading the amount at issue; but Rule 8(b) would allow a party to plead that damages qualify for a tier in lieu of stating a specific amount of damages. The member recommended that the petition clarify this point, and Mr. Jacobs will refine this sentence of the petition.

The members also discussed the sanctions provisions of Rule 37. One item concerned use of the word “harmless” in the draft of Rule 37(c)(1). A member noted that case law in this area uses the term “not prejudicial,” and this term should replace “harmless” in the draft. The member also requested that (c)(1) take into consideration a “calculus” of factors such as intent, opportunity to cure, time to trial, cost shifting, and other remedies when a party requests the court to impose sanctions. Another member proposed addressing this by including a cross-reference in (c)(1) to (g)(2). After discussion, members agreed that this revision should provide the necessary guidance. Members briefly discussed whether the petition should note that the committee is proposing these changes to Rule 37 “despite any case law to the contrary,” notably *Allstate v O’Toole*. They concluded that rule changes subsequent to that decision and evolving case law now minimizes the impact of *O’Toole*, and the proposed note may be unnecessary. The objective of the proposed changes to Rule 37 are to “put more teeth” into the rule, and to improve the process for imposing sanctions. Mr. Klain offered to work with Ms. Feuerhelm and Mr. Jacobs to revise the petition to conform to today’s discussion.

At this point, members voted on the following motion:

Motion: To approve the current draft of the rule petition, subject to suggestions made today to harmonize and clarify certain points; and to authorize Ms. Feuerhelm, Mr. Jacobs, and the Chair to make those revisions before filing the petition. The motion received a second, and the members passed it unanimously.
CJRC-016

3. Roadmap; call to the public; adjourn. Members and staff then discussed the process for filing the rule petition. Mr. Jacobs and Ms. Feuerhelm are custodians of the master drafts of the petition, and the clean and redline versions of the proposed rules. Because the goal is to file the documents electronically on January 9, they will add the date on the date line and “/s/ [name of chair]” on the signature line of the petition. They will then provide staff with final versions of the three documents, in both Word and PDF format (six documents), for filing. Staff noted that after filing, the Court would open the petition for comments, with a probable comment deadline of May 20, 2017. The committee would then have the opportunity to file a reply to the comments before June 30, 2017. The Chair would like the committee to reconvene after May 20 to review the comments and to prepare a reply, and he will discuss a tentative meeting date with staff.

The Chair would also like to publicize the committee’s rule petition. The Chair will include this topic in a presentation he will make in February to the Maricopa County Bar. Ms. Feuerhelm, Mr. Jacobs, and Mr. Klain are presenting at a State Bar seminar on civil rules in January, and they will include the petition in that presentation and at a CLE-by-the-Sea conference later this year.

The Chair asked Judge Harrington for an update on the committee's proposed pilot arbitration program in the Superior Court of Pima County. Judge Harrington advised that practitioners had mixed views concerning the proposal. He will discuss the pilot further with the other members of his bench.

There was no response to a call to the public. The Chair again commended the members and staff for their work on this project, and the meeting adjourned at 10:31 a.m.

Draft