

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: December 18, 2014**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes, Hon. Douglas Metcalf, Hon. Mark Moran (by his proxy Hon. Cathleen Brown Nichols), Prof. Catherine O'Grady, Brian Pollock, Greg Sakall (by telephone), Dev Sethi (by telephone), Hon. Peter Swann

**Absent:** Hon. Randall Warner

**Staff:** Mark Meltzer, John W. Rogers, Theresa Barrett, Sabrina Nash

**1. Call to order, introductions, and rules for Task Force business.** The co-chairs called the first meeting of this Task Force to order at 9:00 a.m. They advised that during this initial meeting, Mr. Klain would address substantive items, and Mr. Rosenbaum would deal with administrative matters. The co-chairs then asked each of the members and staff to introduce themselves.

After the introductions, Mr. Rosenbaum reminded the members that this Task Force is subject to the open meeting requirements of the Arizona Code of Judicial Administration. He then referred the members to proposed rules for conducting Task Force business that were included in the December 18 meeting packet. Those rules establish policies for a quorum, decision-making, and proxies.

**Motion:** A member moved to adopt the proposed rules, which was followed by a second and unanimously passed by the members. **TF.ARCP: 2014-01**

**2. Review of Administrative Order 2014-116 and the Rule 28 process.** This Task Force was established by entry of Arizona Supreme Court ("Court") Administrative Order number 2014-116 on November 24, 2014. Mr. Klain noted that the Order contemplates the filing of a rule petition by January 2016, which is a timeline that will require the members' concerted effort.

Mr. Klain observed that when the Arizona Rules of Civil Procedure (ARCP) were adopted in 1956, they followed the Federal Rules of Civil Procedure (FRCP). In subsequent years, the Arizona rules were amended on a piecemeal basis and departed from the federal rules in matters of style and substance. The Arizona Rules of Evidence and the Arizona Rules of Civil Appellate Procedure have been restyled during the past few years, and the federal civil rules were restyled in 2007, but until now, there has been no corresponding and comprehensive restyling of Arizona's civil rules.

One goal of this Task Force is to enhance access to justice for civil litigants. Many self-represented litigants struggle with legal jargon in the current rules. The second paragraph of the Administrative Order states that the purpose of the Task Force is to:

“...review the Arizona Rules of Civil Procedure to identify possible changes to conform to modern usage, to clarify and simplify language, and to avoid unintended variation from language in counterpart federal rules. These changes should promote access to the courts and the resolution of cases without unnecessary cost, delay, or complexity. The Task Force shall seek input from various interested persons and entities...”

Mr. Klain emphasized the importance of this Task Force reaching out to stakeholders as its work progresses to obtain broad input. He noted that the Order extends the term of the Task Force to December 31, 2016. Although the Order anticipates that a Rule 28 petition will be filed by January 2016, the Task Force will thereafter review and respond to public comments through the summer of 2016. Mr. Klain also raised the possibility of the Task Force filing an amended petition during the Rule 28 process. He added that the State Bar’s Civil Practice and Procedure Committee (CPPC), chaired by Mr. Jacobs, would evaluate this Task Force’s recommendations as they become available.

**3. Resources.** Mr. Rosenbaum advised the Task Force members that they would review the restyling effort undertaken by the federal civil rules committee. He noted that the 2007 volume of the federal rules includes the pre-2007 version of those rules as well as the restyled version, which is presently in effect, and both of these versions would be useful for comparison to the current Arizona rules. Mr. Rosenbaum has a few copies of the 2007 volume available for Task Force members. He asked the members also to inquire if their libraries still had copies of the old volumes.

Mr. Rosenbaum informed members that Thomson-Reuters is preparing a Word version of the current Arizona rules for use by the Task Force. This version will be circulated to the members when it becomes available. He added that a number of amendments to federal civil rules are currently pending, and these would probably be effective by the end of 2015. The members should consider whether any amendments to the Arizona rules should be harmonized with the pending federal amendments.

**4. Discussion of stylistic and substantive changes.** Mr. Klain observed that the Task Force was not limited to amendments concerning style, and noted that there are differing views on this point. If the Task Force makes substantive changes, he recommended they be highlighted to make the legal community aware of them. He noted that in some ways, Arizona rules have preferable deviations from federal rules. Two examples are ARCP Rule 26.1 regarding disclosure, and the 10-day grace period allowed under Rule 55(a) before a default becomes effective. However, Mr. Klain cautioned about unintended departures from the federal rules. He also noted that if the Task Force becomes split on an issue, the members should note those differences in its rule petition and provide alternatives for the Court’s consideration.

Mr. Klain then invited remarks from the members. Remarks included the following:

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- The federal rules project began in 1993, but it derailed when members began making substantive changes. That project got back on track in 2004 by limiting itself to stylistic changes, but even those took two years. This Task Force should exercise caution about trying to make substantive changes, in addition to changes in style, within the available one-year window.
- The Rule 28 process is based on a limited number of amendments in a single rule petition. Stakeholders' review of a petition amending more than 100 civil rules will be challenging even if the petition proposed only stylistic changes. It will be considerably more difficult for the legal community to review and comment on a petition involving more than 100 rules that includes changes of both style and substance.
- The rules on discovery alone will be a massive endeavor. Even the length of a deposition was a controversial issue in the federal project.
- Caution is well-advised, but the intent of the Administrative Order is to do more than apply federal styling to the current Arizona rules. The Court wants civil courts to be more accessible to Arizona litigants. Moreover, the federal project had to deal with issues on a national scale and a federal bureaucracy. This Task Force can do its work without bureaucratic constraints. It should avail itself of this once-in-a-generation opportunity and maximize improvements to the ARCP.
- Rules are the court's creation and they should be written for fairness and clarity. They should not be traps for the unwary and they should not require interpretation by appellate courts. The Task Force should look at substantive unfairness and inefficiency in the current rules and address those issues.
- If a rule proposed by this Task Force requires case law for interpretation, it is deficient. However, one member responded that when a rule allows discretion, case law provides guidance about how the court should exercise its discretion.
- What is the Task Force's philosophy: to follow the federal model, or to make rules more comprehensible for self-represented litigants?
- Innovation is good, but the Task Force has only a year to achieve the community's buy-in, and widespread innovation may generate stakeholder resistance.
- The Task Force should not hesitate to make substantive changes, although it should refrain from suggesting changes that the Court has previously rejected.

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- The rules should promote due process. Notice and an opportunity to be heard are essential elements of due process under the civil rules.
- Beware of unintended consequences. One of the unintended consequences of the recent revisions to Rule 38(b) allows a jury demand in a medical malpractice case up to the date on which the court sets a trial date.
- Substantive matters belong in the rules rather than the comments. If comments to a rule are necessary to understand the rule, then the rule is inadequate. The Court does not favor comments.
- Participants in the federal project spent considerable time discussing comments. The federal rules are now written “hand-in-hand” with their comments. The federal rules do not follow the Arizona philosophy of limiting comments, and this may be an area where Arizona and federal rules cannot be uniform.
- Certain rules have substantive consequences. State court cases may get removed to, or remanded from, federal court, and it is valuable in those circumstances to have comparable substantive rules. Uniformity in those rules is beneficial.
- Rules, including the recently adopted Justice Court Rules of Civil Procedure, exist to define the process of litigation for judges and parties. Self-represented litigants may not fully comprehend the process, but they can obtain guidance in other ways, such as by mandated notices, forms, and self-help materials.
- The rules should be easier for self-represented litigants to understand. The article by Bryan Garner, which was included in the materials for today’s meeting, should assist in this regard. One member opined that the language of Arizona’s rules should be “neither Shakespeare nor Seuss.”
- Arizona lawyers don’t have equal levels of sophistication. Moreover, federal cases usually have highly skilled counsel, and state court cases may have attorneys without comparable skills. State court rules must accommodate the needs of all lawyers.
- The Arizona district court handles a fraction of the case volume seen by the superior court. The Task Force needs to be mindful of the large number of cases in the superior court. Superior court judges, who have no law clerks, and attorneys who practice in high volume state courts, must have clear, comprehensible rules.

- It would be helpful if Arizona could rely on federal case law interpreting similar rules. However, another member opined that cases interpreting federal rules no longer have the value for state court judges they may have had in years past.
- Some of the restyled federal rules are not that clear, and this Task Force might improve upon the wording of rules produced by the federal restyling project.

**5. Restyling conventions.** The co-chairs at this point invited Mr. Rogers to discuss a list of proposed restyling conventions. The list was included in the meeting materials. During the members' discussion, the Chief Justice briefly entered the room and expressed his appreciation of the work the Task Force is undertaking.

Before discussing the list of restyling conventions, Mr. Rogers advised that during the summer of 2013, he worked on a project for the State Bar's CPPC comparing the 109 rules of the ARCP to corresponding rules in the FRCP as they were restyled in 2007. About forty percent of the Arizona rules are identical or nearly identical to correlative federal rules as they existed in 2007. Another forty percent of the state rules are substantially different (or have at one substantially different component) from their federal counterparts, but would still be relatively easy to restyle based on the federal restyling conventions. However, the remaining twenty percent of the Arizona rules - including, for example, Rules 4.1, 4.2, and 42(f) - have no federal counterpart and will be relatively difficult to revise because they are poorly written, ambiguous or internally inconsistent. Mr. Rogers suggested that the Task Force should defer the revision of this last group of rules until concluding its work on the less difficult rules.

Mr. Rogers noted that the proposed conventions were merely tentative restyling "ground rules" to facilitate the work and to minimize later editing. The list of conventions may not be complete, and Task Force members may not favor every convention on the list. One member objected to adopting any conventions until the issue of style versus substance had been resolved, and noted that if the objective of this project was merely to conform Arizona rules to their stylized federal counterparts, creation of a Task Force might not have been necessary. The following comments ensued.

- A.O. 2014-116 specifically mentioned consideration of the federal rules.
- Historically, states are free to act as laboratories of the federal system. The federal rules may be a starting point for the Task Force, but this country has a system of dual-sovereigns. This Arizona Task Force should evaluate the substance of the federal rules on a rule-by-rule basis but make its own determinations regarding its preferences for each individual rule.

- Arizona trial courts should not rely on federal case law to interpret the state's own rules. For example, Arizona judges can decide for themselves the meaning of "reasonable" without the need to consult federal opinions.
- The Court intends to restyle other sets of rules in the future. A set of conventions would be helpful to guide those projects and to assure a uniform style in the rules.

The co-chairs agreed that the matter of restyling conventions did not have to be resolved at today's meeting, although some of the conventions are not controversial and should serve as a starting point. The Task Force will continue this discussion at subsequent meetings. However, the co-chairs encourage certain restyling conventions, such as adding informative subheadings and eliminating use of the word "shall."

**6. Roadmap and workgroups.** The co-chairs directed staff to circulate to the members Mr. Rogers' 2013 comparison of Arizona and federal rules. His document will serve as a guide for rules that are relatively easy to restyle, which the Task Force will address first, and those rules that are more difficult, which the Task Force will review at a later time. Other items the Task Force should consider include:

- Whether forms are useful and cost-effective, and whether a form can specify the essential elements of a rule and thereby supplant the rule;
- The manner in which the federal rules have changed the computation of time, and how this might impact other rules;
- The manner in which statutes might impact rules, including statutes containing procedural time limits.

The co-chairs established four workgroups and assigned portions of the ARCP to each workgroup. Mr. Jacobs, Mr. Pollock, Ms. Feuerhelm, and Mr. Hathaway will serve as workgroup chairs. The co-chairs will be *ex officio* members of the workgroups. Each workgroup will include a judge member. Each workgroup may meet at times and places of its convenience, including telephonically. Task Force staff would like to attend all workgroup meetings, and staff has requested to be advised of the meeting times and locations. Each workgroup should develop a plan of action and be prepared to discuss that plan at the next full Task Force meeting. Workgroups should identify any rules that may transcend assignment to a single workgroup.

Future Task Force meetings will begin at 10 a.m. to allow more travel time for non-Maricopa members.

**7. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 11:05 a.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: January 23, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady (by her proxy Prof. Robert Dauber), Brian Pollock, Greg Sakall (by telephone), Dev Sethi (by telephone), Hon. Peter Swann, Hon. Randall Warner

**Absent:** None

**Guests:** Jessica Alvarado, Aaron Nash

**Staff:** Mark Meltzer, John W. Rogers, Theresa Barrett, Sabrina Nash, Nick Olm

**1. Call to order, approval of meeting minutes.** The co-chairs called the meeting to order at 10:30 a.m. They began by commending the four workgroup chairs on the accomplishments of each workgroup since the initial Task Force meeting.

The co-chairs then invited the members to review draft minutes of the December 18, 2014 Task Force meeting. There were no corrections.

**Motion:** A member moved to approve the December 18, 2014 minutes, which was followed by a second and unanimously passed by the members. **TF.ARCP: 2014-02**

**2. Discussion of style, format, and other issues affecting the rules as a whole.** The co-chairs proceeded to a discussion of general issues concerning the work product of the Task Force.

**Format.** The co-chairs observed that the workgroups prepared their proposed rules in varying formats. For uniformity, they suggested that going forward, the workgroups prepare their documents in Word using 12 point Times New Roman font. Staff will edit the drafts in the future and conform them to the required formatting. Mr. Pollock advised that his workgroup is using strikethrough and underlines to delineate revisions because color-coding does not always display the desired changes. Mr. Rogers agreed; the final versions should not use color-coding because, among other things, the Court's system for tracking petitions does not reproduce colors. The consensus was, going forward, to use strikethrough and underline to reflect proposed revisions, even though this may require more manual input than using a "track changes" feature.

**Versions.** The rule petition that the Task Force intends to file will include two versions. It will have a mark-up version showing proposed changes to the existing Arizona rules, and a "clean" version of the proposed amended rules. The co-chairs recognize that a number of Arizona rules have no counterpart in the federal rules. While

the workgroups will find it useful to prepare documents that compare federal rules with proposed changes to Arizona rules, the co-chairs advised that “compare” versions will not be submitted with the rule petition.

Deviations from the federal rules. If a workgroup recommends adopting the federal restyling of a particular rule, can the workgroup nonetheless deviate from the federal rule’s language? The members agreed that phrasing in the federal rules was not always optimal; should the Task Force accept language in a federal rule that it could improve? This question generated the following comments:

- Why should the Task Force adopt less than its best work product?
- There will be enough times when Arizona will deviate from the federal rule for more substantial reasons. Therefore, the Task Force should not depart from the federal rules for minor reasons.
- The federal rules inconsistently apply drafting conventions.
- Even some experienced attorneys have difficulty understanding certain federal rules; the Arizona rules will be used by many individuals with less legal sophistication. The Task Force should strive for clarity over uniformity.

Mr. Klain suggested that the Task Force avoid unintended departures from the federal rules, and if a difference between the proposed Arizona rule and a corresponding federal rule is of minor consequence, Arizona should follow the federal. On the other hand, he recognized that the federal restyling is not without faults, and the consensus at this time was that the Task Force should improve upon a federal rule when it can.

“Must,” “shall,” and “may.” While lexicographer Bryan Garner suggested replacing every “shall” with “must,” one member noted that the words are not interchangeable. “Shall” leaves room for interpretation, and judges interpret the word to make the rules workable and fair. “Must,” “shall,” and “may” allow for a spectrum of judicial discretion -- including the intermediate level permitted by the word “shall” - and this was an intended feature of the original rules. The recent federal rules avoid “shall.” Another member responded that if there are differences between words used in respective federal and Arizona rules, practitioners will question why those differences exist. Mr. Rosenbaum added that the recent Justice Court Rules of Civil Procedure and Arizona Rules of Civil Appellate Procedure eliminated use of the word “shall,” but he asked the workgroups to consider the meaning of the word “shall” in each instance it is used in the current rules. The Task Force decided that in the future, the standards implied by these three words - no choice, some choice, and discretion - might need to be the subject of a new, explanatory rule.

Comments to rules. Mr. Rogers observed that notes following some of the current Arizona rules are variously entitled "State Bar Committee Note," "Court Note," "Court Comment," or simply "Comment." He suggested that the Task Force defer the decision on selecting a uniform title. He also noted that some comments are inserted at the beginning, or in the middle, of a rule, rather than at the end. Mr. Klain recommended that all comments appear at the end of the rule. However, if a comment deals solely with a subpart, the comment must contain a reference to the subpart. Mr. Rosenbaum recommended that the workgroups prepare comments concerning proposed changes, not necessarily for inclusion in the proposed rules, but rather to aid in the Task Force's discussion of those changes.

Time computations. Mr. Klain noted that one of the workgroups adopted the federal approach for calculating time under the rules. Because time is a feature in a variety of civil rules, he requested that members make a preliminary determination about whether to use the federal approach, or to retain the approach currently used in Arizona. Mr. Rogers noted that other Arizona rules of procedure, such as the civil appellate and probate rules, are dependent on the method used in the civil rules. Altering the civil rules also will result in differences between civil rules and criminal rules, and many local rules have time calculations that rely on the civil rules. There are also statutory time calculations that must be considered, particularly in the area of administrative appeals and creditor-debtor proceedings. Because many of these issues are beyond the scope of this Task Force, and the Arizona approach seems to be functioning well, Mr. Klain recommended staying with the current Arizona approach. A recently adopted comment to Rule 6(e) explains Arizona's rule clearly, and reduces traps for the unwary. A judge member added that calculation of time is an important subject of the rules, and that it could take a while for practitioners to adapt to any changes in computation. He agreed with Mr. Klain on retaining the current approach. The consensus of the Task Force was to retain the current method in the Arizona rules for computing time.

Workgroup reports. The co-chairs then advised that the Task Force would now consider a brief report from each of the four workgroups. While each workgroup will review during workgroup meetings every rule that is assigned, today's reports should focus on issues on which the full Task Force's guidance is needed. The meeting materials reflect proposed changes to rules other than those discussed during the meeting.

**3. Workgroup #1: Rules 1-20.** Mr. Jacobs began by noting that his workgroup adhered to the federal restyling, including use of passive voice.

Rule 1 ["Scope of rules"]. Rule 1 currently governs "all civil actions." Does this mean that these rules govern a marriage dissolution, which is civil, even though a separate set of Rules of Family Law Procedure expressly apply? The members agreed to retain the phrasing of the current rule because an attempt to make it more accurate could make it more cumbersome and confusing. The members also discussed whether to clarify that the Rule be interpreted "by the courts and the parties..." as was done with recently amended ARCAP Rule 1. The members agreed not to add that phrase.

Rule 2 [“One form of action”]. Rule 2 is probably a relic stemming from the merger of actions at law and in equity. Although it appears to be outdated, the consensus of the members was to leave it “as is.”

Rule 5 [“Service and filing of pleadings and other papers”]. Self-represented litigants and even practitioners are sometimes bewildered by the distinction between “service” of an original pleading under Rule 4, and “service” of subsequent filings under Rule 5. The workgroup added a new provision to Rule 5(a)(1) that explains the distinction. A member suggested that Rule 5(a)(1) should also distinguish service of documents that are not filed with the court (e.g., discovery papers), which still require “service.” Staff noted that Rule 5(c)(4) also requires Rule 4 service of certain documents that are filed after entry of judgment.

Proposed Rule 5(a)(3) [“if a party fails to appear”] presents a conflict with a requirement of Rule 55(b)(1) concerning service on a party in default. One member felt that the Task Force should not address the conflict because doing so would transcend the objective of restyling the rules. But another member noted that there are intentional policy differences between the federal and Arizona rules on default, and that these substantive differences need to be considered by the Task Force. Mr. Klain observed that the restyling project on the Arizona Rules of Evidence made substantive changes (for example, on the standard for admissibility of expert witness testimony.) The charge to the Task Force encourages improvements to the Arizona rules and, if possible, getting “ahead” of the federal rules. The consensus was that Rule 5(a)(3) as proposed is incorrect as a matter of law, it could mislead self-represented litigants, and it will need to be corrected.

Rule 8 [“General rules of pleading”]. Current Rule 8(f) requires construction of pleadings to do “substantial” justice. Is that adjective necessary? (Mr. Hathaway noted that this issue also arises under Rule 61.) A member stated that resolution of the issue requires consideration of an Arizona Supreme Court opinion [Cullen v Auto-Owners Insurance Co., 2008], but that self-represented litigants and attorneys should not have to read that opinion to understand the requirements of a notice pleading. The members agreed that the text of the rule should include the principles of that opinion.

Mr. Jacobs also raised an issue concerning the format of proposed Rule 8(c)(1). The current Arizona rule contains affirmative defenses in a single sentence with multiple commas. The current federal rule sets out the affirmative defenses in a list with bullet points. He noted that while Garner recommends the use of lists with bullet points, the federal rules apply this recommendation inconsistently, and it is difficult to cite to a bullet-pointed item. Mr. Klain recommended, and the members agreed, that Arizona Rule 8(c)(1) use a list beginning with capital letters (“A, B, C,…”), to resolve difficulties about citing to an affirmative defense.

Rule 10 [“Form of pleadings”]. Proposed Rule 10(b) requires, “If doing so would promote clarity, each claim founded on a separate transaction or occurrence – and each

defense other than a denial” be “stated in a separate count or defense....” What does this mean in practice, and what are the consequences of not following the rule? One member characterized it as a trap for self-represented litigants, and that many would plead in contravention of this requirement. He thought that a failure to abide by the rule should not be fatal, and that judges should liberally construe the rule. A second member saw ambiguity in the phrase “separate transaction or occurrence.” A complaint will often involve a single occurrence, but contain multiple legal theories. Another member wondered whether any deviation in Arizona’s rule from the federal rule would create incompatible standards for cases that were removed or remanded. Yet another member felt that removals and remands were infrequent scenarios and should be low on the list of Task Force concerns. Someone suggested that the rule be stated as guidance (i.e., “should”), rather than construing the rule as a basis for dismissing a case; another member suggested removing the phrase “founded on a separate transaction or occurrence.” The members did not resolve these issues today, and the workgroup will take another look at the proposed rule in light of today’s comments.

Rule 15 [“Amended and supplemental pleadings”]. Mr. Jacobs noted that neither the rules nor the proposed scheduling orders (Forms 11(b) and 12(b)) contain deadlines for amending pleadings, and he suggested that they should. His workgroup believes that parties should define their claims and defenses far enough in advance of trial to allow for summary disposition. One member reminded the Task Force that the scheduling order forms were modeled on minute entry orders used by various superior court judges, which typically included no such deadline, and the omission was not intentional. However, another member noted that judges have wide discretion in allowing amendments, even after judgment, and that such a deadline may be beyond the province of this Task Force. The Task Force may want to revisit this issue.

**4. Workgroup #2: Rules 21-37.** Mr. Pollock advised that his workgroup was following Mr. Rogers’ conventions as well as the federal restyling, but the workgroup did not recommend adopting all the federal changes. He noted that his workgroup is spending more time on the rule review process than anticipated, largely because it is having extended discussions of words and phrases, beginning with Rule 21.

Rule 21 [“Misjoinder and non-joinder of parties”]. Mr. Pollock opined that the title of this rule is a misnomer. Non-joinder is covered by Rule 19; the word “non-joinder” is not used in the text of Rule 21. The workgroup also found considerable ambiguity in the word “misjoinder.” Does it mean the real party in interest? The workgroup concluded that Rule 21’s intent is to address joining a wrong party under Rule 20(a), and its proposed rule expresses that. The remainder of the proposed rule follows the federal rule, but the federal rule allows the court to order a “separate trial” of any claim against a party, whereas the Arizona rule allows the court to “sever” the claim. “Sever” is a separate action, not merely a separate trial under Rule 42(b). The workgroup retained “sever” and rewrote the last sentence of Rule 21 to clarify that a severed claim is a separate and independent action.

A discussion ensued about the workgroup's interpretation of the relationship between Rules 20 and 21. One member did not construe Rule 21 as addressing only Rule 20(a) and thought the proposed rule was too narrow. Another member observed that Rule 20(a) is permissive and the proposed rule restricts the court's flexibility to address broader joinder issues. Professor Dauber offered his interpretation of Rule 21. A member of the workgroup responded that no one knows what misjoinder refers to, and that inclusion of the phrase "drop a party" in the federal rule lacks a legal meaning. This member believes that the federal restyling missed an opportunity to clarify the rule, and that this Task Force should get "ahead" of the federal rules and provide a rule that is understandable. Mr. Klain said that he resorted to Black's Law Dictionary to find meaning, and that experienced lawyers and judges should not be required to do similar research to comprehend this rule. He believes that the workgroup's proposed language is explanatory and improves on the federal rule. Mr. Jacobs suggested adding further explanations or definitions about how all of the joinder rules (Rules 18, 19, 20, and 21) work together. A member recommended that Mr. Pollock remove a second reference to Rule 20(a) in his current draft of Rule 21. Mr. Pollock agreed, and stated that his workgroup will work further to clarify Rule 21. The Task Force will revisit the rule.

Rule 22 ["Interpleader"]. The workgroup reorganized and restyled the rule and proposed adding a definition of "interpleader." The proposed rule also includes existing Arizona provisions that the federal rule does not, which concern "a release from liability upon deposit or delivery." The Task Force agreed with these proposed changes.

Rule 24 ["Intervention"]. The workgroup's proposed rule restyled Arizona's existing rule, based in large measure on the federal restyling of Rule 24(a) and (b) ["intervention of right" and "permissive intervention."] Rule 24(c) differs from the federal version by adding provisions that require the filing of a pleading in intervention and, when appropriate, a response to that pleading. Mr. Rogers suggested that Rule 24(c)(1)(C) include the word "proposed" before the words "pleading in intervention." The workgroup also added to Rule 24(c) requirements that a motion to intervene comply with Rule 7.1(a) and that it state the grounds for intervention. One member thought this was superfluous and self-evident. Mr. Pollock believes it adds clarity, but he will further review the provision and the Task Force will consider any additional changes the workgroup suggests.

Rule 25 ["Substitution of parties"]. The workgroup recommended deleting current Arizona Rule 25(b) ["death of defendant after tort action commenced"] because the provisions are adequately addressed by a survival statute [A.R.S. § 14-3110] and by Rule 25(a). The Task Force agreed. The workgroup also concluded that Rule 25(e) ["public officers; death or separation from office"] would be more appropriate in Rule 17. Workgroups #1 and #2 will confer on this recommendation.

**5. Workgroup #3: Rules 38-57.** Ms. Feuerhelm advised that her workgroup also modeled its proposed rules on the federal rules, but made exceptions when there were

good reasons to do so, or when the federal language could be improved. She added that the group intended to work on 9 “easy” rules, but one of them proved to be “difficult.”

Rule 40 [“Assignment of cases for trial”]. The workgroup concluded that Rules 16 [“scheduling and management of cases”] and 38.1 [“setting of civil cases for trial”] made Rule 40 superfluous. If it is kept, it should be permissive. Courts might adopt local rules for assigning cases for trial, but Rule 40 is not necessary to authorize that and Rules 16 and 38.1 should in any event be sufficient. One member noted that Rule 40 includes a reference to “superior courts,” and questioned whether that was significant inasmuch as there is only one “superior court” in Arizona. The consensus of the Task Force was to intentionally omit Rule 40.

Rule 41 [“Dismissal of action”]. Arizona’s Rule 41 differs from the federal version. Under the federal rule, a stipulation to dismiss is self-executing. The Arizona rule requires entry of an order pursuant to the stipulation for the dismissal to become effective. The workgroup retained the Arizona feature. The Task Force agreed that this requirement provides clarity concerning the effective date, and that it is more complete from a court administration standpoint. The workgroup generally followed the federal rule in other respects, although it did make changes to ease readability, such as eliminating double negatives. The Task Force agreed with these changes.

Rule 42 [“Consolidation; separate trials; change of judge”]. The workgroup recommended the federal restyling with only a minor change (deletion of the word “federal”). However, the workgroup placed notes to the rule in chronological order, and it deleted references to sections that are shown as “abrogated,” “deleted,” or “renumbered.” (Rule 42(f) concerning “change of judge” would therefore become Rule 42(c).) The workgroup deferred consideration of Rule 42(f) as directed by the rule assignments. Mr. Klain suggested that Rule 42(a) [“consolidation”] include a provision, now largely addressed by local rule, which requires a motion to consolidate be assigned to the judge with the lowest case number. Otherwise, the members agreed with the workgroup’s proposed changes.

Rule 44.1 [“Determination of foreign law”]. Arizona’s rule includes a requirement for “reasonable” written notice that the federal rule omits; the workgroup recommended keeping the requirement. One member asked whether the word “reasonable” refers to the content of the notice or its timeliness; the rule is unclear. The rule also omits any requirement to file the notice with the court; although the notice should be disclosed to the parties, the court’s need to know should also be addressed by a requirement to file the notice. The workgroup will discuss Rule 44.1 further and the Task Force will revisit the proposed amendments.

Rule 46 [“Exceptions unnecessary”]. The workgroup found the federal version of this rule less than clear, but it was reluctant to make changes because of the abundance of case law interpreting the existing rule. One Task Force member suggested completing the object of the first sentence (“is unnecessary” for what reason?) Parenthetically, a

member suggested that Rule 46 precede Rule 45, and that if Rule 40 is deleted, it might suitably have that number. The discussion of Rule 46 concluded with a recommendation by the co-chairs that the Task Force consult an appellate lawyer (Thom Hudson was suggested) on this rule because it impacts appellate rights.

Rule 48 [“Juries of less than eight; majority verdict”]. This rule is based on Arizona statutes. The workgroup restyled the rule for clarity and simplicity. Federal Rule 48 has a provision for polling the jury, but the Arizona counterpart on polling is in Rule 49(f). Although Arizona’s current Rule 48 states that the parties may stipulate to a jury of less than eight, a member of the Task Force noted that parties frequently stipulate to a jury of more than eight to allow for alternate jurors. Occasionally the alternates participate in deliberations. The workgroup will do another draft of Rule 48 to cover these circumstances, and will add text regarding the number of jurors who would need to decide on a verdict when the jury has more or less than eight members (e.g., 7 of 9, 5 of 7, etc.) The Task Force will therefore revisit this rule.

Rule 52 [“Findings by the court; judgment on partial findings”]. In Arizona, on a case tried without a jury, a judge is only required to make findings if requested by a party. Under federal rules, a request is not required. Although self-represented litigants in Arizona may benefit from having findings in every non-jury trial, findings place an added burden on the trial judge. The Task Force agreed to retain the current requirement that a party must make a request for findings.

The members also discussed Rule 52(d) [“submission on agreed statement of facts”]. What if the statement of facts includes inconsistent facts, or the stated facts are nonsensical? Does the court need to “render judgment thereon as in other cases,” as provided by this rule? The members recommended adding the phrase, “unless the court finds the statement to be insufficient.” Also, the second sentence of this section requires that the agreed statement be “certified” by the court. The members were unclear what “certified” meant in the context of the sentence and suggested it be deleted. The Task Force will revisit this rule following additional revisions.

Rule 57 [“Declaratory judgments”]. The workgroup restyled this rule based on the federal counterpart, but it questioned language suggesting there is a right to jury trial. The Task Force believes that a declaratory action is equitable, that factual issues are determined by a judge, and that a judge can empanel an advisory jury, but that parties have no right to a jury. The Task Force agreed with the workgroup’s recommendations that the rule recite that “these rules govern the procedure” in a declaratory action; and that the rule retain the language concerning a speedy hearing because that option is not provided in the declaratory judgment statutes.

**6. Workgroup #4: Rules 57.1-86.** Mr. Hathaway advised that he assigned the workgroup’s rules to individual members for review after an initial conference with workgroup members. The proposed rules in today’s materials are the product of

individual workgroup members rather than the full workgroup, and his workgroup will review and discuss those proposals before the next meeting.

Rule 60 [“Relief from judgment or order”]. Mr. Hathaway noted one significant difference between the Arizona and federal versions of Rule 60(c). The Arizona version requires the filing of a motion within 6 months, while the federal version has a one year time limit. The consensus of the workgroup was to retain the 6-month requirement in the current Arizona rule.

**7. Roadmap and additional workgroup assignments.** Mr. Klain noted that there are three petitions in the 2015 rules cycle that concern civil rules: R-15-0004 [amendments to Rule 11]; R-15-0007 [amendments to Rule 23]; and R-15-0021 [amendments to Rule 55(a).] Workgroups having these rule assignments should consider the pending petitions. The Task Force should know the Court’s dispositions of those petitions by late summer, and the Task Force can incorporate those rulings in its January 2016 rule petition.

The meeting materials included a sheet with amended workgroup assignments. These assignments of certain “difficult” rules go beyond the initial workgroup divisions to equalize workloads. Mr. Klain emphasized that no Task Force member is excluded from any workgroup in which the member may have a particular interest, and that the workgroup process is collaborative. Mr. Klain also invited Mr. Rogers to workgroup meetings to serve as a knowledge resource. Mr. Rogers also provided a revised list of restyling conventions.

The next Task Force meetings are scheduled for February 20, March 20, and April 17. All of these are on Friday. Future Task Force meetings will begin at 10:30 a.m. to allow more travel time for non-Maricopa members. Mr. Jeanes announced that if he is unable to attend all or any portion of these meetings, Mr. Nash will serve as his proxy.

**8. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:00 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: February 20, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall, Dev Sethi (by telephone), Hon. Peter Swann, Hon. Randall Warner

**Absent:** Pamela Bridge

**Guests:** John MacDonald, Danielle Griffin, Kendra Kisling

**Staff:** Mark Meltzer, John W. Rogers, Theresa Barrett, Sabrina Nash, Nick Olm

**1. Call to order, approval of meeting minutes.** The co-chairs called the meeting to order at 10:35 a.m. After brief introductions, they advised that there had been 13 workgroup meetings thus far. They thanked Task Force members for their hard work and for the tremendous volume of materials they've produced.

The co-chairs invited the members to review draft minutes of the January 23, 2015 Task Force meeting. There were no corrections.

**Motion:** A member moved to approve the January 23, 2015 minutes, which was followed by a second and unanimously passed by the members. **TF.ARCP: 2015-03**

The co-chairs then stated that today's meeting format will be similar to the January 23 meeting, that is, each of the workgroup leaders will discuss issues regarding their assigned rules that need guidance or decisions from the full Task Force.

**2. Workgroup #1: Rules 1-20.** Mr. Jacobs began with an overview of revisions to Rules 4 ["process"], 5 ["service and filing of pleadings and other papers"], 5.1 ["duties of counsel"], 5.2 ["limited scope representation in vulnerable adult exploitation actions"], 6 ["time"], 7.1 ["civil motion practice"], 7.2 ["motions in limine"], 7.3 [new: "forms of documents"], 7.4 [new: "orders to show cause"], 8 ["general rules of pleading"], 9 ["pleading special matters"], and 10 ["form of pleading."] Mr. Jacobs noted that some of these draft rules include a narrative introduction to make the rule more understandable, for example, Rule 4 concerning the summons. Draft Rule 5(c) includes within its contents a new form for a certificate of service.

Mr. Jacobs suggested blending Rule 5.2, an experimental rule, into Rule 5.1. He sought input from Debbie Weecks, a practitioner in this area, and their discussions on Rule 5.2 are continuing. Rule 7.3 is a new rule concerning the format of court filings; the substance of this new rule comes from existing Rule 10(d). Because Rule 10(d)'s

formatting requirements now appear later in the rules, however, they lack the primacy they deserve, so Mr. Jacobs moved those requirements further toward the beginning. Rule 7.4 regarding orders to show cause is also new. The current rule on orders to show cause, Rule 6(d), is within Rule 6 regarding “time,” and the O.S.C. provisions seems out-of-place there. Mr. Pollock and Mr. Jacobs discussed Rule 25(e)(2), which concerns a suit against a public officer in an official capacity. Mr. Pollock suggested that this provision logically belongs in Rule 17 concerning parties, where a corresponding provision in the federal rules appears. The draft in today’s materials follows the federal approach.

The co-chairs then invited questions and comments for Mr. Jacobs.

Electronic filing and format. One member asked whether draft Rule 7.3 has sufficiently considered electronic filing. The draft rule still refers to paper filings. Mr. Jacobs acknowledged that further review of Rule 7.3 is necessary to accommodate electronic filing. Mr. Klain noted that the recently adopted civil appellate rules have two separate rules for filing, one for filing in paper, and the other for electronic filing. He suggested the workgroup review these for comparison, as well as Supreme Court administrative orders regarding electronic filing in superior court. A member also asked whether the rule should permit 28 lines of text per page (a Word document has 26 lines), and also recommended that the rule specify a minimum font size for footnotes. Workgroup 1 will consider these suggestions, too.

Explanations and definitions. Mr. Rosenbaum raised a concern about providing explanations of legal concepts in the proposed rules. First, those explanations would cause the Arizona rule to be stylistically different than federal counterparts. In addition, he believes the explanations may create new law and have the unintended consequence of creating new legal issues and arguments. If the Task Force is going to adopt an explanatory approach, every rule would require an introduction. He recognized the importance of self-represented litigants understanding procedural processes, but he recommended other ways (forms, instruction sheets, guidebooks) that might be more effective than explanations within the rules.

Mr. Klain noted that workgroup 2 adopted an introductory explanation in its proposed revisions to Rule 22 [“interpleader.”] However, he stated that the introduction to proposed Rule 4, concerning a summons, was legally incorrect, and the members discussed the inaccuracies. Mr. Klain emphasized that if explanations are adopted, they must be completely accurate. He also stated that those who use the Arizona rules may have different levels of sophistication than federal litigants, and promoting access to justice is an important consideration for revisions to the Arizona rules. He suggested an alternative: a new rule, possibly a new Rule 85, which would contain a glossary of terms in a single location.

A judge member stated that introductory explanations had value for a reason other than access to justice. The explanations also make it possible to include in a rule information that might otherwise be in another source, such as a procedural requirement

established by case law. For example, litigants should not have to read the *Orme School* opinion to know the requirements for a Rule 56 motion. These explanations therefore benefit attorneys as well as self-represented litigants. This judge agreed that the draft explanation concerning a summons was inaccurate, but more significantly, it omitted the rationale for a summons. A summons is the means by which a court acquires jurisdiction over a defendant.

Mr. Jacobs responded that notwithstanding the addition of these explanations, the draft rules are more similar to the federal rules than Arizona's current rules. He also noted that following the federal model and incorporating access to justice principles can be contradictory objectives. Another member believes that A.O. 2014-116 allows variances from the federal rules if done thoughtfully and deliberately, and she supports use of a glossary of terms. Mr. Rogers noted the challenge of providing explanations for all 109 rules. One judge did not envision a summary for each rule, but rather a summaries at the beginning of general topics in the rules. Another judge commented that words such as summons and misjoinder should be defined in the body of the rules, because litigants might not look at a glossary.

A third judge opined that these rule changes will probably not make the rules more accessible to non-lawyers; forms, checklists, and other materials that the clerk could make available to pro per litigants would be more effective ways of providing access to justice. Mr. Rosenbaum noted that self-represented litigants in limited jurisdiction courts may not even read the simpler justice court rules. However, those rules promote access to justice by requiring notices and warnings, and by providing other procedural protections. One judge accepted the premise that self-represented litigants might not read the restyled rules of civil procedure, but the body of the rules should nevertheless serve the goals of fairness and efficiency espoused in Rule 1. Accurate introductions will also help young lawyers understand the rules. Mr. Pollock favored a definition of "interpleader," but believed a form of summons, which is not in the current rules, would be more helpful than an explanation of a summons. Ms. Feuerhelm expressed concern that explanations would fail to capture nuances.

Although several members oppose the use of definitions, a straw poll indicated that they are favored by a majority of members. Mr. Klain stated that a workgroup could propose a definition if it is helpful, but he added that definitions and explanations should be used sparingly, and they must be completely accurate.

"Service." The members then discussed the distinction between "service" under Rule 4 and "service" under Rule 5. Mr. Jacobs commented that the current rules don't distinguish the two meanings of the word, and suggested that it might be appropriate to include an explanation. He felt this would be particularly useful if the Task Force intended to eliminate most of the comments to the rules. Mr. Rosenbaum believes that including an explanation of "service" in these rules adds minimal practical benefit to lawyers and would be of no value at all to self-represented litigants. A judge proposed as an alternative that a reference to either Rule 4 or Rule 5 should be added wherever the

word “service” appears throughout the rules. The members did not resolve how to address the dual meaning of “service,” but if the workgroup proposes definitions or explanations, Mr. Klain reminded the workgroup to assure that they are accurate.

The Rule 7 series. Workgroup 1 proposed new Rules 7.3 [“forms of documents”] and 7.4 [“orders to show cause.”]

Staff suggested that Rule 7.3 should precede Rule 7.1 because Rule 7.3 is a general rule applicable to all filings, but Mr. Jacobs believes that Rule 7.1 concerning motions is widely known by that number and he recommended that it keep its current number.

Although it did not appear in the materials, Mr. Jacobs said that he did not intend to delete the existing comment from the draft of Rule 7.2 [“motions in limine”], and he is open to including that comment in future versions.

Mr. Pollock observed that local federal rules require counsel to certify that he or she had a good faith conversation with an adversary as a prerequisite for filing a motion in limine. He suggested that the Arizona rule include a similar requirement.

Mr. Klain noted that the original intent of Rule 7.2 was to allow judges to enter early rulings on evidentiary issues, which would expedite proceedings and also preserve the issue for purposes of appeal. Mr. Rosenbaum stated that preserving the issue on appeal requires a definitive denial of a motion in limine; however, judges frequently deny the motion without prejudice to re-urge it at trial, which is equivocal. A judge concurred. He said that a denial based on a desire to hear subsequent evidence is not an unequivocal denial, and suggested that the rule not dictate when a judge will rule on the motion. Another member noted that motions in limine are sometimes abused and can be untimely motions for summary judgment disguised as evidentiary motions. On the other hand, a *Daubert* motion could be the proper subject of a motion in limine. One member suggested removing elements of Rule 7.2 that were not essential. Another member did not see a practical approach to setting limits on motions in limine. The workgroup will consider these comments and continue with its revisions to Rule 7.2.

The members generally favored adoption of new Rules 7.3 and 7.4, subject to additions regarding electronic filing that were discussed previously.

Rule 4(f) [“acceptance or waiver of service of process”]. Unlike the federal rule, which only provides for “waiving service,” Mr. Jacobs’ proposed rule includes separate provisions for “waiver of service” and “acceptance of service.” Mr. Rosenbaum noted that the draft rule should include language concerning the “force and effect” of acceptance or waiver. Ms. Feuerhelm would also add language concerning the duty to mitigate the expense of service. Otherwise, the members supported the workgroup’s approach to this revision.

Rule 5(i) [“proposed orders; proposed judgments”]. One member asked if the rule should require parties to submit proposed forms of judgment. Judges rarely sign “minute entry judgments,” and the parties should have a duty to submit a form of judgment.

Judges and clerk members of the Task Force will solicit input on the workgroup's proposed language for this rule.

Rule 8(c) ["affirmative defenses"]. The draft rule includes a defense of "injury to fellow servant." The sole reason for adding this defense is to mirror the federal rule. A member inquired whether the defense could be waived like any other affirmative defense. If the defense could not be waived, that is, if worker's compensation is an exclusive remedy as a matter of law, then the defense should not be included in Rule 8(c). The workgroup will revisit this matter.

Rule 1 [scope and purpose]. One member asked if Rule 85 ["title"] should be merged into Rule 1. Mr. Jacobs suggested deleting Rule 85. The members will look at this later.

**3. Workgroup #2: Rules 21-37.** Mr. Pollock advised that his workgroup met twice after the January 23 meeting.

Rule 21 ["misjoinder and non-joinder of parties"]. Mr. Pollock stated that a provision of the previous draft was problematic because it concerned noncompliance with a rule that was permissive on its face. The workgroup accordingly revised the rule, and the members had no further suggestions about the updated draft.

Rule 22 ["interpleader"]. Mr. Pollock noted that there were no changes to the prior draft of this rule. The draft includes a definition that Mr. Pollock said was consistent with case law, and that should help avoid misuse of the rule. Mr. Rosenbaum thought the definition would not be meaningful for self-represented litigants, and he would probably not include it, but the Task Force will reconsider the issue of definitions and explanations at a future time.

Rule 23 ["class actions"]. Mr. Pollock consulted with Brian Cabianca and Rob Carey, who represent parties in this practice area. The proposed draft is similar to the federal rule. However, and unlike the federal rule, the Arizona Rule 23(c) requires a hearing because a hearing is a requirement of an Arizona statute. The Arizona statute also requires the judge's certification order to describe "all the evidence" in support of a class action determination, and this phrase is included in the draft rule; the federal rule by comparison requires a description of "the evidence," and eliminates the word "all." Mr. Pollock preferred the federal version, but he used the word "all" in his draft for compatibility with the Arizona statute. Mr. Pollock is aware of a pending rule petition (R-15-0007) that will be on the Court's August rules agenda, and a ruling on the petition may require revisions to the proposed rule.

Rules 23.1 ["derivative actions by shareholders"] and 23.2 ["actions relating to unincorporated associations"]. Mr. Pollock's proposed draft of Rule 23.1 pertains to derivative actions on behalf of corporations and unincorporated associations, and it merges current Rules 23.1 and 23.2. His draft also includes a new Rule 23.2 regarding derivative actions on behalf of limited liability companies. He explained that this was

done because of different statutory requirements for derivative actions involving corporations and LLCs.

The members had a discussion about the extent to which court rules should include statutory requirements. Some members favor this because it informs practitioners of the requirements of maintaining an action, and avoids the necessity of practitioners referring to both statutes and rules when preparing a pleading. On the other hand, rules often require amendments because of statutory changes. Although the Administrative Office of the Courts customarily monitors legislative activity for any impacts of new legislation on court rules, some members believe that rules should be generic, for example, state that an action only may be maintained “as allowed by law.” Mr. Pollock distinguished pleading requirements, customarily established by rules, from prerequisites for bringing an action, which may be statutory. Another member noted an omission in the draft rules for limited partnerships. Mr. Pollock proposed that the Task Force consider two alternatives. One alternative is to keep the detailed pleading requirements in proposed Rules 23.1 and 23.2; the other is to have a single rule for all derivative actions, and use general language that requires a party to plead “as required by law.” A straw poll indicated that a majority of members (with one dissent) favored having a single, general rule that applied to all derivative actions.

Rule 25(e) [“public officers; death or separation from office,” now renumbered as Rule 25(d)]. Mr. Pollock confirmed his conversation with Mr. Jacobs regarding this rule, and their concurrence to move a portion of the rule regarding public officials to the “parties” provisions of Rule 17. The members agreed with this change. The members further discussed whether substitution of a new public officer should be “automatic” – as provided in current Rule 25(e) – or whether it should occur only upon motion or by stipulation. One member stated that the substitution should be automatic because the action is against an office rather than an official. Another member believes that automatic substitution is disadvantageous to new public officials, who cannot first consider their position in the lawsuit; that there should be an orderly substitution process; and that judges would benefit from input from the parties on issues of substitution. Mr. Nash advised that the clerk adds or substitutes a party only upon entry of a court order. This raises issues regarding the process to amend a case caption, which the members will discuss at a later time. Ms. Herbst will also consult with her colleagues regarding substitution of public officials.

**4. Workgroup #3: Rules 38-57.** Ms. Feuerhelm noted that her workgroup’s materials include several additional revised rules.

Rule 38 [“right to a jury trial; demand; waiver”]. Judge Moran introduced this draft rule.

Mr. Klain noted that Rule 38(b) contains vestiges of the former trial setting process, and the State Bar’s civil rules committee is contemplating modifications to this provision. The recent revisions to the trial setting process no longer provide for motions to set cases

for trial, except in medical malpractice actions. Under the current rule, if a judge sets a medical malpractice case for a non-jury trial on the court's initiative, a party who had not previously requested a jury could be preempted from having one. One option under consideration involves a presumption that parties would have jury trials in medical malpractice cases, which parties could thereafter waive by stipulation.

Mr. Pollock proposed that in all cases, not just medical malpractice cases, a party should be required to file an early request for a jury. This proposal is a departure from current Arizona practice and it is similar to the federal model, which requires a party to demand a jury during the pleading stage. It would, in cases that were subsequently removed to federal court, avoid the trap of a party not having made a timely request for jury in state court. Although it's not currently required in superior court, many attorneys now file early jury requests as a matter of course. One judge suggested that if the Task Force adopts the federal model, a jury request should be a separate filing, rather than including a jury demand in the body of a pleading where the court could overlook it. Some members favored the federal approach suggested by Mr. Pollock, where any party who wants a jury would be required to make an early demand or the right would be waived. Other members noted this would be a significant change to current Arizona practice, and of constitutional magnitude, and they were hesitant to include it as part of this project. But the members generally agreed with the federal model, and if it is adopted, they suggest it be heavily advertised in the legal community, and perhaps have a delayed effective date.

Rule 43 ["witnesses; evidence" renamed "taking testimony"]. Section (e) of the proposed rule would permit testimony in open court "by contemporaneous transmission from a different location." The proposal included two alternate standards for permitting this: "good cause" and "compelling circumstances." The members agreed that "compelling circumstances," which a new federal rule will likely adopt, is a preferable standard for allowing testimony from a remote location.

The members also discussed proposed section (f), which concerns the court relying on "facts outside the record." The members believe this phrase is unclear, and they were confused by the manner in which the court could consider something that was not "of record." One member expressed concern that deleting the rule might preclude the use of affidavits. Another member suggested that the rule should instead focus on the allowable use of affidavits. The workgroup will review and revise the draft in light of these comments.

Rule 44 ["proof records [sic]; determination of foreign law" renamed "proving an official record"]. Mr. Klain noted that certain rules that are evidentiary in nature are contained within the civil rules, such as Rule 44. He said that the Advisory Committee on Rules of Evidence is working to harmonize those civil rules with Arizona's rules of evidence. Ms. Feuerhelm explained that the proposed draft of section (a) ["authenticating an official record"] is modeled on the corresponding federal rule. Although there is still some overlap with the rules of evidence, she suggested that the civil rule sometimes provides

additional procedural utility when foreign records are at issue. A member asked whether the phrase “official publication of the record” in the provisions of proposed Rule 44 added any clarity, and if not, whether it should be deleted. Another member questioned the rationale for proving a record if the record is “official.” Ms. Feuerhelm will revisit the rule in light of these comments, and she will also discuss this rule with the chair of the Advisory Committee.

Ms. Feuerhelm discussed proposed Rule 44(b) [“method of proving appointment of a guardian, etc.”] with a probate practitioner. She updated the provision with terms used in the probate code. She noted that there is no federal counterpart to this section. In Rule 44(c) [“lack of a record”], she changed the word “proof” to “authenticate,” but otherwise this section follows the federal rule. There is no constitutional issue of confrontation in Rule 44 (c), as there would be in proving the lack of a record in a criminal case. The members had no suggested changes to these sections.

Rule 45 [“subpoena”]. Ms. Feuerhelm added details on electronically stored information within Rule 45(c)(2), and these details are parallel to language in Rule 26. The proposed revisions, if adopted, would require corresponding changes to Form 9 [“form of subpoena”], and Ms. Feuerhelm included a revised form in her workgroup materials. The members suggested no changes.

Rule 45.1 [“interstate depositions and discovery”]. The workgroup made substantive as well as stylistic changes to this rule. The substantive changes were intended to relieve Arizona citizens from out-of-state rules that might result in their being harassed or burdened. But members asked what would happen, for example, if the adjudicating out-of-state jurisdiction requires a “speaking objection” during a deposition, which could harass an Arizona witness but which would not be permitted under Arizona’s rules? Some members expressed that the rights of litigants in sister states should not be prejudiced by application of an Arizona rule, and the rule of the adjudicating state should apply. There are principles of comity, and this requires Arizona to respect that justice is done under the law of the adjudicating state. Protection of an Arizona witness is not the only consideration in these situations. Other members would apply the law of the host state on matters of procedure, and the law of the adjudicating state on substantive matters. Ms. Feuerhelm is attempting to draft a rule that would give some protection to an Arizona witness, yet also generally apply the law of the adjudicating state, although the draft may depart from the uniform act in certain respects.

The co-chairs took straw polls on specific issues that might arise when taking depositions under this rule. If a deposition of an Arizona witness in an out-of-state case occurred in Arizona, would the members:

Apply a four-hour limit? About half would.

Require a stipulation or court order to depose a witness in Arizona? None would.

Limit objections only to the form of the question? None would.

Ms. Feuerhelm will take these responses and the members' comments into further consideration, and she will continue her revisions to this rule.

Ms. Feuerhelm noted that she had a draft of Rule 56 ready, but the discussion on this draft rule will abide the next Task Force meeting.

**5. Workgroup #4: Rules 57.1-86.** Mr. Hathaway did not believe his assigned rules involved complex issues. Individual workgroup members prepared drafts of specific rules, and Mr. Rogers has been reviewing those drafts. Mr. Hathaway made brief general remarks on the following rules, which were generally agreed to by the members except as noted.

Rules 57.1 [*"declaration of factual innocence"*] and 57.2 [*"declaration of factual improper party status"*] are based on statutes. The word "shall" was changed to "must" or "should." The workgroup made other stylistic revisions to these rules.

Rules 61 [*"harmless error"*] and 63 [*"disability of a judge"*] were modeled on the federal rules, and drafts of these rules have no substantive changes.

Rule 64 [*"seizure of person or property"*] varies from the federal rule by excluding references to federal and other state statutes. The draft also avoids the federal rule's use of bullet points.

Rule 65.1 [*"security; proceedings against sureties"*] draft revisions generally follow the federal rule, but they do not use some words found in the federal rule (for examples, "maritime" and "admiralty.")

Rule 65.2 [*"action pursuant to A.R.S. §§ 23-212 or 23-212.01"*] was drafted by another committee. Mr. Hathaway is therefore reluctant to make changes to this rule. He will discuss this rule with a local county attorney who is familiar with it.

Rule 67 [*"deposit in court; security for costs"*] as revised also omits federal statutory references, but it is otherwise modeled on the federal rule. Mr. Nash and Mr. Jeanes will review the revised rule to assure that it conforms to actual practices of the clerk.

Rule 68 [*"offer of judgment"*] is generally restyled, but Mr. Hathaway proposed a substantive change, by removing the word "amount" from the phrase in the last sentence of section (h) that currently refers to "the amount or the extent of the liability." The members discussed whether this rule could allow conditional offers (for example, whether an offer could require payment by the offeree of Medicare or other liens.) Some members took the view that such conditions are not contemplated by the rule, others took the position that the offeror could impose limits or conditions on the offer of judgment. The language of the current rule does not address this, and the members will need to further discuss this issue.

Rule 69 [*"execution"*] removes references to federal statutes, but the structure of the draft is similar to the federal rule. The draft includes general references to statutory remedies and other applicable law.

**6. Roadmap and additional workgroup assignments.** The workgroups will continue to review and revise their assigned rules. The next Task Force meeting is scheduled for Friday March 20, 2015, at 10:30 a.m. At that meeting, workgroup #4 will make the first presentation, followed by, in order, workgroups #3, #2, and #1.

**7. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:05 p.m.

DRAFT

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: March 20, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes personally and by his proxy Aaron Nash, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall, Dev Sethi, Hon. Peter Swann, Hon. Randall Warner

**Absent:** None

**Guests:** None

**Staff:** Mark Meltzer, John W. Rogers, Sabrina Nash, Nick Olm

**1. Call to order, approval of meeting minutes.** The co-chairs called the meeting to order at 10:32 a.m. The chairs requested the members to review draft minutes of the February 20, 2015 Task Force meeting. There were no corrections to the draft.

**Motion:** A member moved to approve the February 20, 2015 minutes, which was followed by a second and unanimously passed by the members. **TF.ARCP: 2015-04**

**2. Verifications.** The members then engaged in a discussion, led by Mr. Rosenbaum, concerning verification requirements under various civil rules. The discussion was prompted by Rule 66(a), which states that an application for the appointment of a receiver "may be included in a verified complaint or may be made by separate and independent verified application after a complaint has been filed." Rule 65(d) regarding temporary restraining orders has similar language that also requires a supporting affidavit or a verified complaint. Mr. Rosenbaum asked whether a verified complaint and an affidavit, or a verified complaint and a verified application, are equivalent in weight, or if there were significant differences or redundancies in these requirements. Additional rules, such as Rules 9(i), 11(b), and 11(c), have specific verification requirements, which are omitted from corresponding federal rules. Should Arizona's rules continue to require verifications?

One member observed that the verification requirements of some Arizona rules may have predated the adoption of Rule 11(a), which provides that a signature constitutes a certification that a document is well-grounded in fact and law. Sometimes verifications are required by statutes, and the members discussed reasons for and against including those statutory requirements in court rules. Another member noted that when an attorney prepares a pleading, a verification subsequently signed by a client adds little to the trustworthiness of the document. A member suggested abrogating verifications under Rules 9(i) and 11(c), but he supported keeping rules that require affidavits for

evidentiary purposes. One member expressed caution before abrogating Rule 11(c), but other members thought that this rule and others containing verification requirements had minimal benefit and were traps for the unwary.

The discussion concluded with Mr. Rosenbaum's request that the workgroups be alert for verification requirements, determine whether there is an independent statutory basis for each requirement, and consider recommendations for removing a verification requirement from any particular rule.

**3. Workgroup #4: Rules 57.1-86.** Mr. Hathaway reported that with the exception of the arbitration rules, his workgroup had completed its assigned rules.

Rule 60 [“Relief from judgment or order”]. Mr. Hathaway noted that unlike the corresponding federal provision that provides a one-year time for filing certain motions under Rule 60(c), his proposed rule retains Arizona's existing six-month limit. His workgroup also proposed renumbering certain provisions of Rule 60 to align with the federal rules. Mr. Klain believed that Rule 60(c) was widely known by that number, and he asked if renumbering this section as Rule 60(b) might complicate research of Arizona law. Mr. Rosenbaum observed that law students learn civil procedure under the federal rules, and if Arizona deviated from federal rule numbering, that might be a source of confusion. One member noted that if Arizona is going to deviate from the federal rules, it should be for matters of substance rather than merely rule numbering. Another member observed that there will be other Arizona rule numbers that differ from corresponding federal rules, and she suggested that the Task Force include a cross-reference table to aid future users.

A straw poll of members concerning whether Arizona should retain its distinctive rule numbers, such as 56(f) or 60(c), or whether Arizona should align its numbers with the federal rules, indicated that twice as many favored alignment with federal rule numbering. Although differences in rule numbers may cause some users to pause, descriptive rule titles should assist them in locating a renumbered rule. Mr. Rogers added that the Task Force's rule petition must include an appendix of changes that are required in other sets of Arizona rules to assure that those rule numbers conform to any numbering changes in the civil rules.

The members also discussed Rule 60(b), and in particular a phrase in paragraph 2 of that rule that allows judgments to be “safely corrected” in the event of “a mistake, miscalculation or misrecital.” Some members thought that the rule should require a more formal correction process, such as a motion to correct a judgment. One member thought a revised rule should allow corrections of any mistakes in a judgment, rather than the limited types of clerical mistakes described in the current rule. Another member responded that removing the qualifiers in the current rule would open the door for parties to raise under Rule 60(b) mistakes of fact and law, or allow parties to raise situations of shared but mistaken beliefs. The members ultimately recommended that

the rule allow for correction of mistakes that “don’t reflect the intent of the court.” Mr. Hathaway’s workgroup will further revise the rule in light of this recommendation.

Rule 62 [“Stay of proceeding to enforce a judgment”]. The workgroup added to Rule 62(a) a reference to Rule 7 of the Arizona Rules of Civil Appellate Procedure. Rule 62(b) continues to include the phrase “when justice so requires,” although this phrase is not contained in the corresponding federal rule. The workgroup also removed sections from its proposed draft that are currently shown as “deleted” (sections d, e, and h), and this resulted in re-designating the rule’s alphabetic sections.

Rule 65.2 [“Action pursuant to A.R.S. §§ 23-212 or 23-212.01”]. The workgroup restyled the rule, but made no substantive changes. The original rule was promulgated by a committee, and Mr. Hathaway will send the restyled rule to the chair of that former committee for further comment.

Rule 66 [“Receivers”]. Mr. Hathaway noted that while the federal rule on receivers is only three sentences, Arizona’s rule is comparatively lengthy. The workgroup added sub-headings to the Arizona rule, and restyled it. The proposed rule would eliminate the option, as permitted by current section (a), of filing a verified complaint for appointment of a receiver. The proposed rule instead would require an application for a receiver to have a supporting affidavit. The members discussed this proposed provision, and whether a request for a receiver should require a complaint and an application, or only one or the other. The members’ preference was to require both. Rule 3 requires a complaint to commence an action. An application is not a “pleading” and could not by itself initiate an action. The members agreed to add the words “in a civil action” (i.e., “A party seeking the appointment of a receiver in a civil action must file an application for the receiver’s appointment...”) to clarify that the action must be initiated by a complaint. Although a request to appoint a receiver could be included within a complaint, a receivership application buried in a complaint might not be brought to the timely attention of the clerk or a judge. A separate application would better serve the interests of the parties, the judge, and the court.

The “powers” provisions of the rule may warrant further consideration. A judge member noted it is not the rule, but rather it is the trial court’s order, that actually specifies the powers of the receiver. He suggested that if the rule enumerates powers, it might be appropriate to add language such as, “the receiver’s powers include but are not limited to the following....” He also noted that because a receiver’s authority derives from the court, the court’s order should not simply “grant” the request for a receiver, but should identify the powers of the receiver with particularity. (See *Mashni v. Foster ex rel. County of Maricopa*, 234 Ariz. 522, 323 P.3d 1173 [2014].)

Rule 70.1 [“Application to transfer structured settlement rights”]. The workgroup considered creation of a form to replace the detailed language of this rule. However, Mr. Hathaway consulted with practitioners in this area, who advised that the rule functioned

well, and that they were satisfied using forms they had already drafted. Accordingly, the workgroup did minor restyling of the rule, but otherwise left it intact.

Rules 80 [“General provisions”] and 81.1 [“Juvenile emancipation”]. The workgroup proposed minor, non-substantive changes to these two rules. One member suggested that portions of Rule 80, especially those that relate to conduct at trial, be moved ahead to the trial rules. The workgroups will consider this suggestion. Another member asked if the requirement that agreements be “in writing” could be satisfied by email. Although the rule does not specify that it can, case law appears to allow it.

Rules 72-77 [“Compulsory arbitration”]. The workgroup has not yet drafted revisions for the arbitration rules, but Mr. Hathaway advised that the workgroup has concerns with time sequences in the current rules. For example, Rule 74 requires an arbitration hearing not less than 60 nor more than 120 days after appointment of the arbitrator. In many cases, this time may be too short, and only the assigned judge can extend the time for hearing. Mr. Klain asked whether it would be efficient if the arbitrator was allowed to extend the time for hearing. A judge responded that judges are usually agreeable to extending the time, the time of a hearing is not a disputed issue in most cases, and arbitration cases “mainly run themselves.” Mr. Hathaway also noted that the time currently specified for identifying witnesses on appeal may be too short. Mr. Hathaway would like to obtain input from practitioners on the arbitration rules. A judge member cautioned against making significant revisions to the arbitration rules because practitioners may have strong and opposing views about what revisions are desirable, and the Task Force could become bogged down in those revisions.

**4. Workgroup #3: Rules 38-57.** Ms. Feuerhelm began her review with Rule 11, which was assigned to workgroup #3 because Ms. Feuerhelm had previously studied this rule.

Rule 11 [“Signing of pleadings”]. Mr. Feuerhelm had prepared a rule petition proposing revisions to Rule 11 that was filed recently by the State Bar, and this petition is pending in the Court’s 2015 rule petition cycle (R-15-0004). The Task Force should learn of the Court’s disposition of this petition in September 2015. She used this petition’s version of Rule 11 as a starting point for further revisions to Rule 11 that she is now proposing to the Task Force. Those additional revisions would better align the Arizona rule with its federal counterpart. The revisions also would change the word “paper” to “document” throughout the rule, and add an in-person consultation as an alternative to a telephonic consultation in the proposed section regarding sanctions.

The members discussed the proposed revisions to section (e) regarding “verified pleadings.” Several members believe this section should correlate with Rule 80(i), which concerns unsworn declarations under penalty of perjury. The members considered where an integrated rule should be located. Another member suggested that any comprehensive provision should also include the substance of Rule 56(e) concerning “form of affidavits.” The members further discussed the distinctions between affidavits,

verifications, and declarations. Current Rule 11(e) confounds the meaning of these terms by using the phrase “verified by affidavit.” If a rule requires an affidavit, the requirement may be satisfied simply by a declaration under penalty of perjury pursuant to Rule 80(i). A judge member noted that the point of these requirements is to have a document signed by a person, not necessarily a party to the action, who is well-acquainted with the facts. The members also considered the implications of a person who provides a verification based on information the person acquired from other sources. The judge member suggested that in these situations, the rule should require the person to state the basis of the knowledge the person is verifying. A verification is significant because it requires the person to consider the penalty of perjury, and accordingly the signer needs to assure that the document is truthful. The members agreed that while an attorney who verifies a document is not automatically disqualified from further representation in a case, it is nevertheless not a good practice.

Some statutes require verifications, and the members concurred on moving the phrase “unless a rule or statute specifically states otherwise” from section (a) of Rule 11 to section (e). Ms. Feuerhelm will discuss the interaction between Rule 11 and Rule 80(i) with Mr. Hathaway, and with members of her workgroup.

The members also discussed the consultation provision of Rule 11(c). They compared the proposed language of this rule to the consultation provision of Rule 26(g), which concerns discovery motions. Ms. Feuerhelm noted that in the pending Rule 11 petition, the requirement of a telephonic consultation was intended to preclude attorneys from satisfying the requirement solely by email exchanges. She noted that Rule 26(g), which refers to “personal consultation” without specifying mechanisms, became effective before the advent of email. The members were split on whether email exchanges sufficed for a personal consultation, but they agreed that in many instances, making the effort to confer is more significant for judges than reporting to the court the actual substance of the consultation. In some circumstances, an attorney may not succeed in having a personal consultation with an adversary who is unavailable or who is avoiding contact, but the attorney still must have made a good faith effort to do so. The members therefore agreed that the language of Rule 37(a), which requires certification of both “personal consultation and good faith efforts,” should be changed to mirror revisions to Rule 11(c), that is, these requirements should be stated in the disjunctive rather than the conjunctive.

The members also distinguished a provision in federal Rule 11(c), which allows sanctions against an attorney’s law firm, from the corresponding Arizona rule that allows sanctions against the lawyer but not the firm. A member noted that in Arizona, and notwithstanding omission of the federal language, a law firm will typically be responsible for the actions of its attorneys in the ordinary course of business. Therefore, law firms don’t need to be included in Arizona’s rule to enhance the collectability of a sanction against a law firm’s attorneys. Another member also noted that an Arizona attorney may be disciplined by the State Bar for ethics violations that might arise under this rule, but

because the federal process does not have a parallel mechanism, its Rule 11 includes law firms to provide the rule with greater clout.

Rule 39 [“Trial by jury or by the court”]. The workgroup reorganized and restyled this rule, but it made no substantive changes. Ms. Feuerhelm advised that the counterpart federal rule does not include the “order of trial by jury” provisions of Arizona’s Rule 39(b), but the order of trial section is useful and the workgroup recommends retaining it. Although the workgroup recommended removing Rule 39(q) concerning memoranda, the Task Force agreed to keep this provision. The consensus of the Task Force was to remove language in Rule 39(b) that permits the parties to read pleadings to the jury.

Rule 42 [“Consolidation; separate trials; change of judge”]. The workgroup restructured the current rule into three separate rules. New Rule 42.1 would contain provisions for change of judge as a matter of right, and new Rule 42.2 would provide for a change of judge for cause. Ms. Feuerhelm commented that to harmonize with the federal rules, some members suggested elimination of the rule regarding change of judge as a matter of right, but the workgroup declined to do so because it would be beyond the scope of this Task Force.

The proposed rule for change of judge as a matter of right would, like the current rule, allow a change of one judge and of one court commissioner. During the ensuing discussion, the members observed that Maricopa treats all of its commissioners as judges pro tem, Pima does not assign commissioners to civil cases, and Coconino has no commissioners. A.R.S. § 12-411 provides in part, “Not more than...one change of judge may be granted in any action...” A member accordingly suggested that “one judge and one court commissioner” in the proposed rule be changed to “one judicial officer.” This would not include a special master, who is not a judicial officer. The members concurred with this suggestion.

The members further discussed the timeliness for exercising a change of judge as a matter of right, and the interplay between proposed Rule 42.1 section (c) concerning time limitations, and section (d) regarding waiver of the right. There may be ambiguity about when a case is “permanently assigned” to a judge. There are also situations where a motion is submitted on briefs without an actual appearance before a judge, and whether the submission would constitute a waiver. One member proposed that the right should be waived if it is not exercised with a specified number of days after assignment of a case. While the members were generally receptive to this approach, there would need to be exceptions if the judge ruled on a contested motion within that time limit. Moreover, and particularly with judicial rotations, the parties don’t always have notice of when a case has been reassigned to a different judge. There are also issues concerning whether the right can be exercised orally, and the rights of defendants who may be served, and who may appear, after the proposed time limit for noticing a judge has run. The workgroup will review these issues.

Concerning a change of judge for cause, a member inquired whether, when an adversary raises such a challenge, another party could file a responsive brief. Some members had not seen responses in these situations, but another member had actually filed a response in this scenario. The members agreed that, like a motion for reconsideration, the court should not grant a change of judge for cause until other parties have had an opportunity to file a response. The members also agreed that inasmuch as the statute does not require a hearing on a motion for change of judge for cause, the rule should not add a hearing requirement.

Rule 56 [“Summary judgment”]. The members first considered whether a summary judgment motion “may” or “shall” be filed no later than 60 days before the specified deadline. They agreed that the language of Rule 56(b) should be revised so that motions “may not be filed” less than 60 days before the deadline.

The members next considered proposed Rule 56(c) regarding a request for hearing. The revision proposed that the court must hold a hearing “unless it summarily denies the motion,” which the members found misleading. The members instead agreed to language providing that the court must hold a hearing, when requested by a party, if the court intended to grant the motion.

The members also considered whether Rule 56(e)(3) should provide, if a party did not properly respond to a motion, that the court “must” or “shall” grant the motion. The members agreed that the court has discretion to grant the motion under these circumstances, and that use of the word “must” is inappropriate.

Rule 56(f) does not contain the criteria enumerated in *Simon v. Safeway, Inc.* 217 Ariz. 330, 173 P.3d 1031 (2007). The workgroup will consider whether it would be feasible to add these case law criteria to the body of the rule. The members also discussed the expedited hearing requirement of Rule 56(f)(4), and specifically the provision that if the court does not set a hearing within seven days, “a later date may be set.” One member suggested this phrase was too indefinite, and that the rule would be more instructive if it instead said the hearing must be held “as soon as the court’s calendar allows.” The members felt that this also was too vague, and ultimately agreed that the rule should require “extraordinary circumstances” to set a hearing date beyond the seven-day window.

Rule 45 [“Subpoena”]. Ms. Feuerhelm noted that the workgroup had added language concerning electronically stored information and objections by non-parties. The members expressed no objections to these additions.

Rule 47 [“Jury selection,” et. cetera]. The workgroup’s revisions clarified the provisions regarding an alternate juror and challenging a juror for cause, and restyled the language concerning a juror’s qualifications. The members expressed a preference for “rule on” in lieu of “determine” in section (d)(2). The members also believed that paragraph (d)(1)(D) concerning an “unqualified” opinion was adequately covered by paragraph (d)(1)(E) [“bias or prejudice”], and therefore the former provision could be

eliminated. The members also discussed whether the “bias or prejudice” language in paragraph (d)(1)(E) would cover other miscellaneous circumstances, such as a disruptive or disabled juror, or one who would experience hardship if required to serve as a juror. A member suggested addressing this by adding to that paragraph words like, “...or for some other reason indicating the juror’s unfitness to serve...” and the members concurred with this suggestion.

Rule 49 [“Special and general verdicts and interrogatories”]. The workgroup restyled this rule and reorganized its sections to more closely align with the federal rule. The members discussed a provision in current Rule 49(c) that permits a defective verdict to be “reformed at the bar.” The members agreed that this language was archaic. They inferred that “reformed at the bar” meant that a defective verdict could be modified to express the true intent of the jury if the modification was completed before the jury was discharged, and if the jurors consented to the modification. The members agreed with this interpretation and agreed to retain the rule, albeit with clearer phrasing, because without the rule, correction of such things as simple math errors in a verdict might require post-trial motions. Although Rule 49 requires a verdict to be signed and read aloud in the courtroom, the members also discussed the use of informal verdicts. The workgroup will research whether informal verdicts should be allowed.

**5. Roadmap.** At the next meeting, Ms. Feuerhelm will continue to present her workgroup’s rules, and Mr. Pollock will present on behalf of his workgroup.

The next meeting is set for Friday, April 17, 2015. The anticipated May 15 meeting date was vacated because of staff’s calendar. Staff will send the members inquiries regarding their availability for meetings on May 6 and June 12, at the customary times. Mr. Rosenbaum commended the workgroups for the quality of their work, and for their time and commitment.

**6. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:10 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: April 17, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes personally and by his proxy Aaron Nash, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall, Dev Sethi (by telephone)

**Absent:** Hon. Douglas Metcalf, Hon. Peter Swann, Hon. Randall Warner

**Guests:** None

**Staff:** Mark Meltzer, John W. Rogers, Sabrina Nash, Nick Olm

**1. Call to order, approval of meeting minutes.** The co-chairs called the meeting to order at 10:33 a.m. They noted that this was the fifth meeting of the Task Force, and there have been twenty-two workgroup meetings. The chairs then asked the members to review draft minutes of the March 20, 2015 Task Force meeting. There were no corrections.

**Motion:** A member moved to approve the March 20, 2015 minutes, the motion was followed by a second, and it passed unanimously. **TF.ARCP: 2015-05**

**2. Workgroup #2: Rules 21 through 37.** The chairs indicated that today's meeting would be devoted to workgroup 2, and more specifically, to Rules 26 and 26.1. The meeting materials included a seven-page summary prepared by the leader of workgroup 2, Brian Pollock, which detailed more than a dozen issues that arise under these two rules. The chairs invited Mr. Pollock to discuss those issues, with the exception of the *Issue 1, Proportionality of Discovery*, which the members will consider at a subsequent meeting.

*Issue 2. Other Pending Federal Rule Changes to Scope of Discovery.* Mr. Pollock noted that there are several pending changes to the federal rules that will likely become effective on December 1, 2015. One of the changes concerns federal Rule 26(b)(1) and the scope of discovery. That rule currently provides that information is discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence." This is the same scope allowed under the current, corresponding Arizona rule. The pending federal amendment would substitute language that information within the scope of discovery "need not be admissible in evidence to be discoverable." Another federal amendment would allow discovery of matters "relevant to any party's claim or defense." Arizona's rule allows discovery on matters "relevant to the subject matter" of the action.

Mr. Pollock's workgroup discussed changing the Arizona provisions to align them with the federal amendments, but it decided that the current language works and these changes are unnecessary. He acknowledged that the differences between the Arizona and federal rules would be substantive, not merely stylistic. However, Task Force

members did not believe, as a practical matter, that altering the Arizona rule would affect the scope of discovery. Mr. Klain suggested that Arizona's language is more informative than the federal rule, which should assist Arizona judges and attorneys. Mr. Rosenbaum also commented that changes in the language of these important provisions might be controversial. A straw poll of the members indicated near-unanimity in maintaining the current Arizona language, notwithstanding that it may differ from the pending federal amendments.

*Issue 3. Insurance, Indemnity, and Suretyship Agreements.* Arizona's rules currently have two provisions regarding insurance agreements. Rule 26(b)(2) allows discovery of the "existence and contents" of insurance agreements under which "any person carrying on an insurance business may be liable to satisfy part or all of a judgment...." Rule 26.1(a)(8) requires disclosure of "relevant insurance agreements." Mr. Pollock's workgroup proposed consolidating these rules into a single new disclosure provision appearing as Rule 26.1(a)(10). The workgroup also proposed adding to this provision a requirement for disclosure of indemnity and surety agreements, because, like insurance agreements, disclosing funds from which to collect judgments might encourage settlements. The draft rule would also require disclosure of coverage denials, reservations of rights, and remaining limits under "wasting" policies. The proposed provision adds that disclosure of this information does not make it admissible as evidence.

Individual members raised several issues. One member asked about confidentiality and work product of certain insurance information, such as a reservation of rights letter, but the members generally felt this would not become problematic. Another inquired if available limits for a wasting policy, which might erode on a daily basis, would need to be continuously disclosed. The members agreed that the rule should address this issue by requiring disclosure only at defined times, such as at the time of initial disclosure, at the time of settlement, and at the time of trial. It should also be updated on the request of an opposing party. Mr. Pollock will draft specific language.

The members also discussed the wisdom of deleting the portion of current Rule 26 that allows discovery of insurance agreements. Although Rule 26.1 would require disclosure, discovery could capture what should have been disclosed, but was not. One member believes the remedy in that circumstance is not discovery, but rather a motion to compel disclosure. Another member responded that foreclosing discovery of insurance agreements would be an unwarranted and substantive change in the law; some attorneys might contend that removal of the discovery provision implies that insurance agreements were no longer discoverable. Mr. Pollock will take this issue back to the workgroup.

One member believed that while disclosure of indemnity agreements might be material in certain situations, a requirement of disclosing indemnity provisions that are included in documents such as corporate articles or by-laws might be excessive. The members also noted that the federal rules do not specifically require disclosure of indemnity or surety agreements. Mr. Pollock will work on language that would focus

the proposed rule's requirement on types of agreements that might be applied to satisfy a judgment.

*Issue 4. Number of experts per issue.* Arizona Rule 26(b)(4)(D) currently allows each side "one independent expert on an issue, except upon a showing of good cause." The workgroup proposes to change "independent expert" to "retained or specially employed expert" in light of *Felipe v Theme Tech Corp*, 235 Ariz. 520 (Div. One, 2014). A "specially employed" expert would include, for example, an "in house" expert. The workgroup further proposes qualifying "good cause" by the phrase, "unless the experts' testimony would not be cumulative [or other good cause is shown.]" This latter change, which was not unanimously agreed to by the workgroup, is designed to preclude repetitive evidence.

A member asked if the workgroup intended to require an evidentiary showing to establish good cause; Mr. Pollock said that it did. One member believes that the current rule concerning cumulative expert testimony is already understood by judges and counsel, and that it works well. A judge member added that the bench can usually determine under the current rule when experts are "piling on." Another member suggested that the rule would require parties to take depositions of potentially cumulative experts to establish that fact, and it therefore will be counterproductive. Mr. Pollock responded that the change does little more than encapsulate comments and case law. A straw poll indicated that twice as many Task Force members opposed inclusion of the "cumulative" and modified good cause language in the rule than supported it. (Four members favored these inclusions, eight members were opposed.)

*Issue 5. Notice of Non-party at Fault ("NPAF").* The workgroup recommended amending Rule 26(b)(5) to require that notices of NPAF be filed with the court, in addition to being served on the parties. Mr. Pollock noted that the time when a NPAF notice was prepared may be an issue in a case, and the issue can be readily resolved if the notice is filed. He acknowledged that this is a practice change and practitioners would need to be educated about it. One member suggested that the change should not be to this rule, but rather in Rule 5 concerning "service and filing." Another member thought that a notice of service could be filed in lieu of the actual notice of NPAF. Both of these alternatives received little support. However, because the consequence of not filing a notice of NPAF can be severe, the members agreed that Rule 26(b)(5) instead provide that practitioners "should" file, rather than "must" file, the notice. This would make the filing of the notice a prudent practice, but there would be no requirement to file it. One member suggested that a similar change would also be of benefit to Rule 68 and offers of judgment, but the members took no action on that suggestion.

*Issue 6. Burden of Proof Regarding Confidentiality Orders.* Although Rule 26(c)(2) places the burden of showing good cause for a confidentiality order on the party seeking confidentiality, the rule also contains language that the opposing party or intervener has a burden to show why the court should not enter the order. Mr. Pollock's workgroup

believes this dual burden unnecessarily complicates the rule; the proposed revision therefore deletes the opposing party's burden.

Mr. Rosenbaum agreed that the rule was unartfully written, and contradictory, but he believes that the rule resulted from a compromise between plaintiff and defense counsel in personal injury cases, where the issue of confidentiality orders routinely arises. He accordingly recommended no change. He added that in the majority of cases, the parties stipulate to entry of an order. Mr. Pollock did not believe that the workgroup's proposed revisions made any substantive changes to the rule, but in light of these comments, he will leave the rule intact.

*Issue 7. Disclosure of Expected Witnesses.* Current Rule 26.1(a)(3) requires disclosure of witnesses, and "a fair description of the substance of each witness' expected testimony." The workgroup believes that this language too frequently results in overly general disclosures, and it therefore proposes amendments to the rule that require more specific disclosure. The proposed language is, "...a description of the substance - and not merely the subject matter - of each witness' expected testimony sufficient to fairly inform the other parties of the information known by that person." Mr. Pollock added that this proposed language was drawn from the rule's comments and from case law, and that this amendment would be particularly informative for out-of-state counsel, most of whom have no corresponding provision in the rules of their home states.

Some members saw no need for this change. One said that he had not seen gross misuse of the current rule. Another said that the proposed language may require an unwarranted level of detail. And another thought that whether to disclose the subject matter versus the substance might depend on whether it is a low or high value case. Others agreed that the disclosure should include a fair summary, but that it should not require disclosure of all the information known by the witness. On the other side, some members thought that the change would discourage "drive-by" disclosures, and that it would fairly and equally apply to plaintiffs and defendants. One member commented that "a few sentences" concerning a witness' testimony would be very useful for opposing counsel. Mr. Klain added that the provision is intended to assist inexperienced counsel and self-represented litigants, who may not read the comments to the rule when preparing a disclosure statement.

Mr. Rosenbaum had concerns that practitioners would interpret the proposed language as a requirement for "scripting" a witness' testimony. He suggested a change in the text to a "fair summary," but Mr. Pollock believed that because this phrase did not appear in the comments, it would constitute a substantive change to the rule. Mr. Pollock countered that the workgroup's proposed language be retained, but that it terminate beginning with the word "sufficient." Another member recommended moving the word "fair" so that it appeared before the word "description."

The chairs then took a straw poll. Six members favored retaining the current language of this rule, and six supported changing the requirement to "a fair description

of the substance and not merely the subject matter of each witness' expected testimony." Mr. Pollock noted that the latter choice was not really a change, because an amendment to the rule in 1996 already advised that disclosure merely of subject matter was insufficient.

The discussion of this issue concluded with these suggestions. First, it would be helpful, if possible, to get further guidance from the Court regarding its views of the issue. Second, the Task Force could propose bracketed alternatives rather than propose a single text version of this provision. Third, could the Task Force get a better sense of the legal community's position prior to filing a rule petition? This would help avoid a multitude of competing post-filing comments that would require subsequent resolution by the Task Force. Finally, the Task Force would benefit from reconsideration of this issue and the input of the three judges who were not present for today's discussion. The members agreed to the latter suggestion, and this issue will therefore be revisited.

*Issue 8. Definition of Statements to be disclosed under Rule 26.1(a).* The workgroup noted that Rule 26.1(a)(5) requires parties to disclose "statements," but it does not define the term. The second paragraph of current Rule 26(b)(3), however, does contain a description of statements. The workgroup accordingly proposed adding to Rule 26.1(a)(5) the words "as defined in Rule 26(b)(3)(C)(i) and (ii), relevant to the subject matter of the action." Task Force members had no disagreement with this proposed revision.

*Issue 9. Disclosure of Expert Witnesses.* Mr. Pollock discussed differences between the federal and Arizona rules concerning disclosure of experts. The workgroup declined to adopt the federal rule, on the basis that doing so could generate additional costs for Arizona parties. However, and while not unanimous, the workgroup recommended changing the current provision regarding expert disclosure (that requires disclosure of "the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion") to the following: "a complete statement of all opinions the witness will express and the basis and reasons for them."

Some members opposed this change. One member said that the proposed language requires parties to provide the substance of a report without mentioning a report, yet it would have equivalent expense. She suggested that expert disclosure only needs to be at a high level. She believes this rule change would double expenses by requiring the expert's report and the expert's deposition. Another member added that counsel don't learn the details of an expert's opinion without taking a deposition.

One of the co-chairs inquired if anything in the current rule wasn't working reasonably well? A member said that it's not the rule that needs improvement as much as litigants who don't adhere to the spirit of the current rule. He believes that requiring reports is "a dramatic substantive change" that will increase cost and decrease access to experts. A few members stated that they customarily request reports from experts, but

this is not a universal practice. One member advised that a report helps to reduce the necessity to take depositions, so the report “front loads” the expense, although another member indicated that the cost of a report might be prohibitive in lower value cases. The co-chair also asked if the proposed rule change would apply only to “independent” experts. The consensus of the members was that it would have this limitation, and that it would not include, for example, the party/owner of a business who offers expert opinions.

The chairs again took a straw poll. Seven members favored retaining the rule’s current language. Four members supported adding to the rule a requirement that independent experts prepare a report. (One member abstained.) The chairs proposed reconsideration of this issue at a subsequent meeting, and the members proceeded to issue #11.

*Issue 11. Addition of Provision to Rule 26.1 Regarding Purpose of Disclosure.* The workgroup proposed the addition of a new Rule 26.1(c) entitled “purpose; scope.” Mr. Pollock explained that the content of the new rule comes from comments and case law, including *Bryan v Riddell*, 178 Ariz. 472 (1994). The workgroup believes that this rule will provide additional guidance to the court and litigants when disputes arise concerning disclosure. It believes that this rule will be particularly useful to judges who are asked to decide during trial whether evidence should be excluded that was allegedly not disclosed. Mr. Pollock added that a number of other states lack disclosure rules similar to Arizona’s, and this provision will provide an informative overview of disclosure for out-of-state counsel. One member thought the provision was so helpful that it should be Rule 26.1(a) rather than 26.1(c), but the Task Force declined to change the numbering because practitioners have well-established awareness of the disclosure categories of Rule 26.1(a). The members agreed to one change to draft Rule 26.1(c), specifically, the deletion of the word “all” in the phrase, “a party must include in its disclosures all information and data in its possession, custody, and control....” Otherwise, the rule might inappropriately suggest the need to disclosed privileged and other confidential information.

*Issue 12. Timing of Initial Disclosures.* The workgroup proposed changes to what is now Rule 26.1(b)(1), and that would become Rule 26.1(d)(1), affecting the time for initial disclosures in multi-party and multi-claim cases. It proposes that for a party seeking affirmative relief, the initial disclosure is due forty days after the filing of the first responsive pleading (e.g., the first answer to a complaint). A party who files that responsive pleading must serve an initial disclosure within forty days after filing the pleading. The parties can stipulate to an alternative schedule for disclosures. Task Force members agreed that these proposed changes were improvements to the current rule.

*Issue 13. Disclosure through Written Discovery or Depositions.* The issue is whether a party must provide information in a formal disclosure statement, or whether it can be disclosed within a response to an interrogatory, a deposition, a request for production or admissions, or another informal process, as long as the parties are reasonably informed

of the information. This alternative manner of disclosure was discussed in a 1996 State Bar Committee Note to Rule 37(c). The workgroup proposed that this concept be codified by an amendment to Rule 26.1. Members opposed to the amendment believe that it would encourage a practice of not formally supplementing disclosure statements. The discussion concluded with a decision to revisit this issue when the Task Force considers Rule 37.

*Issue 10. Disclosure of Electronically Stored Information.* The workgroup believes that a number of changes are needed to modernize provisions concerning disclosure of electronically stored information ("ESI"), and to make the ESI disclosure process more efficient. The workgroup's proposed changes are included in a new Rule 26.1(b), which goes into greater detail than corresponding federal provisions. The workgroup's proposed rule would:

- Distinguish disclosure of "hard copy" documents from disclosure of ESI;
- Require a party to disclose in its initial disclosure statement, among other things, the existence and location of pertinent ESI, proposed methods for searching for relevant data, proposed forms of production, and metadata fields that the disclosing party proposes to produce;
- Provide a process for other parties to object to the proposed production of ESI, as identified in the initial disclosure, and a resolution of these disputes;
- Provide a time for production of ESI thereafter, and confirm that absent good cause, a party need not produce ESI in more than one form; and
- Provide a presumptive form of production (i.e., in the form requested by the receiving party, or otherwise, in native form or in another reasonably usable form.)

Members made the following comments:

- Is this proposed rule consistent with the procedures in the ESI checklist, which was recently recommended by the Business Court Advisory Committee for the pending pilot commercial court in Maricopa County?
- One member believes that the commercial court's ESI process should not apply beyond Maricopa County's commercial court. Another member responded that if that process proved to be effective, it might be adopted on a statewide basis.
- Rather than disclosing considerable information in an initial disclosure statement, as proposed by the workgroup, would it be more effective if the

parties first conferred (as is required in the pilot commercial court) about the ESI that the parties actually need? That is, does mandatory disclosure of ESI that the opposing party doesn't seek improve or inhibit the disclosure process? Might it be more productive for parties to discuss the five subjects specified in the workgroup's draft, prior to formalizing these items in their initial disclosure statements?

- The current forty day deadline for the initial disclosure of ESI is unrealistic. But do the ESI disclosure time limits proposed by the workgroup integrate with the time frame for the Rule 16 joint report, as well as with the timing of other, non-ESI initial disclosures?
- Are there special considerations with medical records, which may be maintained by medical providers in electronic form yet produced in paper? Are there different considerations regarding electronic records in medical malpractice actions versus other types of personal injury cases?
- The members also discussed the preservation obligation. Mr. Rogers noted that this obligation is contained in comments to the federal rule. He is in the process of drafting a proposed Arizona rule concerning preservation, which would be based on principles from the Sedona Conference.

Mr. Pollock will consider these comments when the workgroup convenes again.

**3. Roadmap.** The next meeting of the Task Force is set for Wednesday, May 6, 2015. Because of the unavailability of a room in the State Courts Building, Mr. Rosenbaum has agreed to host the next meeting at Osborn Maledon, 2929 North Central Avenue, Suite 2100, Phoenix. The meeting will be open to attendance by members of the public. The May 6 meeting will include consideration of a plan for vetting the proposed rules prior to filing a rule petition in January 2016. The following meeting will be on Friday, June 12, 2015 at the State Courts Building. Thereafter, work will commence on melding the workgroup drafts into a single document. This process will enhance the uniformity of style, format, and other aspects of the proposed rules. The chairs also requested Task Force members to note any instances where case law precedent could impede constructive changes to the rules, and other potential obstacles to innovations and improvements of the rules.

**4. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:00 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**Osborn Maledon PA, Phoenix**

**Meeting Minutes: May 6, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Andrew Jacobs, Hon. Michael Jeanes personally and by his proxy Aaron Nash, Hon. Mark Moran, Prof. Catherine O'Grady by her proxy Sara Agne, Brian Pollock, Greg Sakall, Dev Sethi (by telephone), Hon. Peter Swann

**Absent:** Rebecca Herbst, Hon. Douglas Metcalf, Hon. Randall Warner

**Guests:** Pam Griffin, James Cool, Leslie Foldy

**Staff:** Mark Meltzer, John W. Rogers, Sabrina Nash, Nick Olm

**1. Call to order, approval of meeting minutes.** The co-chairs called the meeting to order at 10:33 a.m. This is the sixth meeting of the Task Force, and there have been twenty-seven workgroup meetings. The chairs then asked the members to review draft minutes of the April 17, 2015 Task Force meeting. There were no comments or corrections to the draft minutes.

**Motion:** A member moved to approve the March 20, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-06**

**2. Workgroup #3: Rules 38 through 57.** The chairs advised that today's workgroup reports would begin with presentations by Ms. Feuerhelm and members of workgroup 3.

*Rule 40 ("Trial procedures").* Current Rule 40 is entitled "assignment of cases for trial." The Task Force previously agreed to abrogate that rule because it describes a process that courts no longer utilize. Workgroup 3 proposed a new Rule 40. The new rule combines the provisions of current Rule 39.1 ("trial of cases assigned to the complex civil litigation program") and most of the provisions in current Rule 39 ("trial by jury or by the court.") A small portion of current Rule 39, concerning a demand for jury trial, is retained as Rule 39. Creation of new Rule 40 presents no conflict with federal Rule 40 ("scheduling cases for trial") because the federal rule does not pertain to Arizona's distinct trial setting process.

Rule 40(b) is derived from current Rule 39.1. Ms. Feuerhelm noted that the workgroup omitted from Rule 40(b) a provision that the court consider bifurcation of issues or claims. Litigants understand that the court has authority to do this, and including it in this rule would place undue emphasis on bifurcation. Regardless, the last item listed in Rule 40(b) is "other means of managing or expediting trial," and this encompasses bifurcation. The workgroup also omitted in Rule 40(c) concerning opening statements a reference found in the current rule to "reading the pleadings."

Members had questions about the phrasing of Rule 40(a), which concerns the applicability of Rule 40 to jury trials and trials to the court. Some of the proposed provisions don't apply in bench trials, and the members discussed drafting solutions, including breaking section (a) into two sentences. Ms. Feuerhelm will incorporate a change in her next set of revisions. The members also discussed the most appropriate place for a provision in current Rule 47(b) that allows the parties to present "brief opening statements" to the entire jury panel. The members considered placing this provision in the "order of trial" described in Rule 40(c), but the consensus was to keep the provision where it currently is. The members also agreed that there is no need for new nomenclature to distinguish these brief Rule 47(b) "mini" opening statements from customary opening statements parties make to the jury pursuant to Rule 40(c)(2).

*Rule 50 ("Judgment as a matter of law in a jury trial; related motion for a new trial; conditional rulings")*. Ms. Bridge noted that the workgroup recommended maintaining the current 15 day time limit in Rule 50(d), rather than adopting the federal time limit of 28 days. The workgroup's draft of Rule 50(b) - renewing the motion after trial - included two alternative phrases in brackets. The alternatives were [or if the motion addresses a jury issue not decided by a verdict] and [or if the trial ends without a verdict or with a verdict that does not decide a jury issue raised by the motion]. Initially, Task Force members were evenly divided over which was the better alternative. But after further discussion, they selected neither and instead agreed to "without a verdict or with an incomplete verdict," and this phrase will be incorporated in the next draft.

*Rule 56 ("summary judgment")*. Ms. Feuerhelm advised that an initial round of suggested Task Force revisions to this rule are incorporated in today's draft. Because the rule was amended in 2013, most of the proposed changes concern style rather than substance. In addition, sections of the rule have been reorganized and restyled so they align with the federal rule. For example, section (d) ("failing to grant all the requested relief") now appears as section (g). The factors identified in *Simon v Safeway Inc.*, which are currently cited in a comment to the rule, are now incorporated in new Rule 56(d).

The members corrected an error in Rule 56(d) that required the opposing party's counsel to file a good faith statement, because it is the party requesting relief who needs to file it. The members agreed to delete the word "satisfactorily" from the draft phrase "satisfactorily resolve." The members also rephrased the language of the "good faith" provision to clarify that good faith includes not only having a personal consultation, but also making reasonable efforts to contact opposing counsel.

This led to a discussion on the meaning of "personal consultation," and whether it had a different meaning when used in different rules, such as Rules 11, 26, or 56. One member proposed that a new rule should specify requirements for a personal consultation. Does consultation require telephonic or an in-person conference? Does the requirement apply to self-represented litigants as well as to attorneys? What should the outcome be when one party is unavailable or avoids contact? Although the members discussed a Rule 11.1 as a potential placeholder, their consensus was to place this

proposed rule in the "7.point" series of rules. Mr. Hathaway agreed to prepare an initial draft.

*Rule 65 ("Injunctions and Restraining Orders").* Judge Moran introduced the draft of this rule. He began with a discussion of Rule 65(c) and additional new language that codifies Arizona procedures for security under Rule 65. The new language fills a void because the federal counterpart to Rule 65(c) lacks detail (much of which is supplanted by local federal rules), and there is scarce Arizona case law under Rule 65(c). One of the chairs raised a question about the language in paragraph 2 of Rule 65(c), which concerns an injunction or restraining order involving the collection of money, and which might have application when someone claims that payments are about to be made to an improper party. Although the language of this paragraph might be improved for greater clarity, the members agreed to leave it as-is because of its limited and specialized application.

The members also discussed Rule 65(f) and the procedures for obtaining sanctions and an order to show cause. Workgroup 1 had prepared a new rule that deals specifically with orders to show cause, and the members considered whether the provisions of that rule should be consolidated or cross-referenced with Rule 65(f). In Workgroup 1's new rule, a party is seeking an order in the first instance, whereas in Rule 65(f), a party already has an order and is seeking a remedy because the order was not obeyed. The members agreed to keep these provisions separate because they apply in different contexts.

The title of the current draft of Rule 65(b) is "temporary restraining order." However, one of the members noted that the entire section applies specifically to TROs without notice. There is no corresponding section for TROs with notice, which constitute the majority of these orders. Following a discussion of drafting alternatives, Workgroup 3 agreed to consider ways of modifying this rule so that it includes distinct provisions for TROs with and without notice. A member reminded the workgroup to adhere to statutory requirements for injunctive relief.

Mr. Rogers observed that the provisions of draft Rule 65(f) require service "under" Rules 4, 4.1, and 4.2, but those rules specifically apply to service of pleadings, and Rule 65 orders are not pleadings. He suggested, and the members agreed, that Rule 65(f) be revised to state that service be made "in the manner provided" under Rules 4, 4.1, and 4.2.

**3. Workgroup #2: Rules 21 through 37.** Mr. Pollock's workgroup met after the April 17 Task Force meeting to follow up on several unresolved issues. With regard to his April 17 memo, Mr. Pollock noted that the Task Force still needs to address the issue of proportionality, and added that his workgroup is continuing its work on spoliation under Rule 37. Mr. Pollock then presented the following update on particular issues identified in his April 17 memo.

*Issue 3. Insurance, Indemnity, and Suretyship Agreements.* At the previous meeting, Task Force members agreed that Rule 26.1(a)(10) should require disclosure of “wasting” policies only at defined times, such as at the time of initial disclosure, at the time of settlement, and at the time of trial. The workgroup’s most recent draft of this rule incorporates these changes. It allows a party to request supplementation regarding these policies within thirty days before a settlement conference or trial, and requires a responsive supplement within ten days thereafter.

The members further discussed adding to new Rule 26.1(a)(10), which requires disclosure of insurance agreements, a requirement that parties also disclose indemnity and surety agreements. The members recognized that there are a number of different scenarios that involve indemnity. They do not intend to include in this rule a requirement of disclosing possible indemnity under common law or statute, or under corporate articles or bylaws. The intent is that parties disclose an indemnity agreement that may by its terms expressly apply to a party. The workgroup will further revise this rule. The chairs noted that the Task Force should consider removing the new provision regarding indemnity if the legal community generally opposes it.

*Issue 7. Disclosure of Expected Witnesses.* Current Rule 26.1(a)(3) requires disclosure of witnesses, and “a fair description of the substance of each witness’ expected testimony.” The workgroup proposed different phrasing for this rule at the April 17 meeting, and members discussed variations of that phrasing. The April 17 discussion concluded with equal numbers of members favoring retention of this rule’s current text, and others who supported a change to “a fair description of the substance and not merely the subject matter of each witness’ expected testimony.” The members agreed to reconsider the language following further revisions by the workgroup.

At today’s meeting, the workgroup proposed that a party must disclose for each witness the party intends to call at trial “a description of the substance – and not merely the subject matter – sufficient to fairly inform the other parties of each witness’ expected testimony.” Mr. Pollock noted that the proposed rule maintains the current rule’s use of the word “substance.” He acknowledged that the workgroup did not have unanimity on this proposed language. But Mr. Klain, who attends the workgroup’s meetings, advised that this language attempts to strike a balance between “drive-by” disclosures (or a disclosure that the witness will testify about “everything” in a disclosure statement) and “scripting” the witness’ anticipated testimony. The objective is to make the disclosure meaningful.

The members discussed whether the provision should require disclosure of unfavorable information known by the disclosing party, for example, that the witness has a felony conviction. One difficulty in adding such a provision is that the disclosing party would not be eliciting unfavorable information as part of “the witness’ expected testimony.” The members also discussed the possibility of adding this requirement to Rule 26.1(a)(4), but that rule seemed unsuitable for this amendment.

Mr. Pollock prefers that the Task Force agree on proposed language for Rule 26.1(a)(3) to avoid submitting alternative text in brackets. A few members of the Task Force opposed the language proposed at today's meeting, although even these members agreed to the phrase "the substance - and not merely the subject matter." But the great majority of members attending the meeting supported the workgroup's most recent version, as shown above.

*Issue 9. Disclosure of Expert Witnesses.* At the April 17 meeting, the workgroup recommended changing the current provision regarding expert disclosure (that requires disclosure of "the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion") to the following: "a complete statement of all opinions the witness will express and the basis and reasons for them." Although a majority of members favored this new language, there were a sufficient number opposing it that the chairs requested that the workgroup study the rule further.

The workgroup's proposed language under consideration at today's meeting is that the disclosing party provide "the subject matter on which the witness is expected to testify, a complete statement of all opinions the witness will express, the basis and reasons for the opinions, the witness' qualifications, and the name and address of the custodian of copies of any reports prepared by the witness." Again, Mr. Pollock advised that this language did not represent a unanimous recommendation by the workgroup, but it was supported by a majority, who believed that a report should not be required.

A judge member of the workgroup observed that the federal rule on expert disclosure is probably superior to both the Arizona rule and what is proposed by the workgroup, but he had reservations about whether the Task Force would adopt substantial changes and conform its rule to the federal rule. However, he believes that a number of court proceedings could be avoided if there was more adequate disclosure concerning expert witnesses prior to trial.

One of the features of the workgroup's proposed rule, unlike the federal rule, is that an expert report is not required. An attorney can prepare the expert witness disclosure, with assistance from the expert, and this should mitigate costs. One member expressed concern that if an attorney prepares the expert's opinion in the disclosure statement, the attorney's communications with the expert could become a fertile ground for discovery. Another felt that the absence of a report could be used to impeach the expert.

Another member supported a requirement for reports because it "front-loaded" the expense, rather than "back-loading" the cost of discerning the expert's opinions to the time of deposition, and shifting that cost to the opposing side. And another member believed that because the proposed rule would require detailed information not within the knowledge of the attorney, disclosure of this information would lead to substantial additional expense. Some members felt that requiring more disclosure concerning an

expert witness, with the resulting expense, could adversely affect access to justice for some litigants.

But the judge-member noted that litigants in high-value cases should be prepared to anticipate these expenditures. Cases with lesser value, including cases in which parties are self-represented, often have no experts, or don't have multiple experts that may be required, for example, in a medical malpractice case. He noted that the current expert disclosure rule was written in the *Logerquist* era, but that case is no longer the standard. The standard under current case law for Evidence Rule 702 requires adequate disclosure of expert information, and the civil disclosure rules should be amended to reflect this change. He added that the timing of expert disclosure can be addressed in the joint report and proposed scheduling order; it does not need to be included in the initial disclosure statement.

The latter comment prompted a discussion concerning the Rule 16 joint report. The members agreed to add a provision in Rule 16 that the parties discuss exchanging expert reports. Such a provision would not mandate expert reports, but it would give parties the options of exchanging them upon agreement or seeking a court order that they do so.

At this point, the chairs took a straw poll of three alternatives. Four members favored keeping the current rule on expert disclosure. Seven members preferred keeping the current rule, but adding a provision to Rule 16 regarding a discussion of expert reports. Two members supported Workgroup 2's most recent proposal regarding expert disclosures, with the condition that it apply only to specially retained, not employed, experts. Mr. Pollock's workgroup will do additional drafting based on the outcome of this straw poll.

*Issue 10. Disclosure of Electronically Stored Information ("ESI").* Based on discussions at the April 17 meeting, and to more fully harmonize with ESI requirements in the new pilot commercial court, the workgroup is proposing a new version of Rule 26.1(b)(2). It requires the parties, "when the existence of electronic stored information is disclosed or discovered," to "confer promptly and attempt to agree on matters relating to its disclosure and production." Subsequent provisions of this rule specify the subjects of the parties' discussion, a process for the resolution of disputes, and the manner of production and presumptive form of production of ESI. Mr. Pollock advised that Rule 26.1(a)(8) still requires disclosure of ESI a party intends to use at trial, as well as the information required under Rule 26.1(b)(2). The parties' conversation regarding ESI would accordingly follow their initial disclosures, and the conversation may be renewed as additional ESI is discovered. Task Force members had no objections to this revised provision. The chairs noted that the provision integrates well with the commercial court's ESI process, and that it is practical and flexible.

*Rule 26 ("General provisions governing discovery").* Although this rule had been discussed previously, Mr. Jacobs noted that a provision in Rule 26(e) concerning

supplementation had conflicting verb tenses. He suggested substituting the phrase “that the response was or has become” to resolve that conflict, which was generally acceptable.

*Rule 28 (“persons before whom depositions may be taken”) and Rule 30 (“depositions upon oral examination”).* Mr. Pollock preceded to these rules, which had not been previously presented to the Task Force. However, the chairs first made a call to the public and invited comments from James Cool, the attorney for the Arizona Court Reporters Association.

Mr. Cool noted that court reporters are licensed by the Arizona Supreme Court and they are governed by Section 7-206 of the Arizona Code of Judicial Administration. The code section refers to licensed individuals as “certified reporters.” These individuals have a dual function, one of which is stenographic. The other function is ethical, and requires certified reporters to be keepers of the record of proceedings. Because reporters meet licensing standards, the court can rely on their records and certifications. It is improper under the code for someone other than a certified reporter to record a proceeding. Mr. Cool requested that the Task Force take note of these provisions when drafting these two rules.

Mr. Pollock advised that Rule 30 currently allows the parties to agree to recording a deposition only by audio or audio-visual means, and this alternative is carried into revised Rule 30(b)(3) under the heading “additional method.” (A member requested, and Mr. Pollock agreed, to change “any party” in that paragraph to “any other party.”) Mr. Cool responded that he had no objections at this time regarding the draft that Workgroup 2 had recently prepared. The chairs explained the Task Force timeline to Mr. Cool, and they requested his further input as well as that of other stakeholders as this project progresses.

The members continued their discussion with comments regarding Rule 32(d)(E)’s provision that provides, in part, that “continuous and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited.” The members believed that the “or at any time during the deposition” portion of this provision was inappropriate and unnecessary. Mr. Pollock advised that the workgroup has not yet completed its revisions to this rule.

*Rule 27 (“Discovery before an action, etc.”)* Mr. Pollock also requested Task Force comments on this rule, which appears to be rarely used. Mr. Pollock noted that the current rule contains a provision for court-appointment of counsel, but there are few details about how this is done, or the source of payment for counsel. (One member also questioned the propriety under this rule of counsel representing someone they have never met.) The current rule also permits discovery pursuant to Rules 34 and 35, but the process for obtaining court orders for those proceedings is not specified. The workgroup proposed that Rule 27 incorporate various protections afforded under Rule 45. The members agreed that inclusion of a Rule 45 process works well with depositions and

document production under Rule 34, but it is not compatible with a Rule 35 medical examination. They therefore suggested that these subjects be given separate treatment in Rule 27.

**4. Workgroup #4: Rules 57.1 through 86.** Mr. Hathaway offered brief comments concerning the arbitration rules (Rules 72 through 77), which are in the meeting packet. He advised that the workgroup considered making substantive changes to these rules, but they did not. He anticipates that stakeholders may file comments requesting those types of changes. The workgroup improved upon the syntax and style of these rules to make them easier to read, it added captions and titles, and it reorganized a few provisions. The workgroup may have additional changes for consideration at a subsequent Task Force meeting.

**5. Roadmap.** The chairs announced that the next Task Force meeting will be on June 12, 2015, in the State Courts Building. The meeting agenda will include further discussion about vetting a complete draft of the proposed rules. The Civil Practice and Procedure session at the State Bar convention in June will include a discussion of this project. The Civil Practice and Procedure Committee is establishing four sub-groups to review the Task Force work product. The CPPC groups correspond to the four Task Force workgroups, and each will include a judicial officer. The Task Force needs to reach out to a wider spectrum of practitioners, including plaintiff and defense trial attorney associations, legal aid groups, and other constituencies. Independent reviews would also be helpful. The target date for distributing a draft of these rules is late summer.

The chairs noted the desirability of including a prefatory comment with the rule amendments. A prefatory comment was incorporated in other recent Arizona rules restyling projects, and it is helpful in summarizing the scope and purpose of amendments. A prefatory comment should be included in the draft that the Task Force circulates for pre-filing comments.

An additional item that the Task Force needs to address before distributing the draft is the manner it will deal with published comments to the rules.

**6. Call to the public, adjourn.** There was no response to a second call to the public. The meeting adjourned at 2:10 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: June 12, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge by her proxy Jeff Katz, Jodi Feuerhelm, Milton Hathaway, Andrew Jacobs, Hon. Michael Jeanes personally and by his proxy Aaron Nash, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall, Hon. Peter Swann, Hon. Randall Warner by his proxy Hon. Patricia Starr

**Absent:** Rebecca Herbst, Dev Sethi

**Guests:** John Gray, Kendra Kisling

**Staff:** Mark Meltzer, John W. Rogers, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** The co-chairs called the meeting to order at 10:32 a.m. This is the seventh meeting of the Task Force, and the workgroups have met thirty-two times. With the exception of Rules 38.1 and 64.1, the workgroups have prepared initial draft revisions of all 108 civil rules.

The chairs reported that they recently presented an update on this Task Force to Arizona Supreme Court justices. If any proposed rule revisions will require conforming legislative changes, the justices requested that the Task Force advise the A.O.C.'s legislative group to allow for inclusion of these changes in the upcoming legislative package. The justices would also like the Task Force to coordinate its proposed rule revisions with the State Bar's Civil Practice and Procedure Committee to avoid duplicate or conflicting provisions. Other topics presented to the justices are contained in the PowerPoint presentation that is included in the meeting materials.

The next Task Force meeting will be in July, and the chairs aspire to have a complete set of rule revisions that are suitable for circulation following the conclusion of that meeting. The chairs noted that each workgroup has approached its revisions in a unique way, and the Task Force will need to integrate the products of all four workgroups into a single comprehensive set of draft rules. For vetting purposes, although not necessarily for the published rules, it would be helpful to have a comment for each rule explaining proposed changes, for example, that Rule 56(f) has become Rule 56(d). The workgroups have touched on existing rule comments, but not in detail, and the Task Force needs to determine dispositions of those comments.

The chairs acknowledged Mr. Rogers' assistance with regard to styling the draft rules. However, there are a variety of stylistic matters that still need to be resolved, for example, is the most appropriate term for an accord between parties a "stipulation" or an "agreement?" The comprehensive draft will also need to include cross-references and a common and consistent format. These matters may be best addressed by a small working

group rather than by the full Task Force. The justices advised that a computer-generated comparison would be adequate for the “redline” version that will be included with the rule petition, which would eliminate the need for meticulous underlining and strikethrough. The entire “comparison” version should be created by the same software to assure that redlines in the comprehensive document have a uniform appearance. However, alternative approaches might be necessary if the computer generated comparison version appears to be messy or confusing.

Finally, the chairs noted that Task Force members will need to consider an implementation order. They specifically noted potential issues with cases that “straddle” the effective date of the rules, and the need for an implementation order that clarifies how the rules apply in that circumstance.

The chairs then asked the members to review draft minutes of the May 6, 2015 Task Force meeting. There were no comments or corrections to the draft minutes.

**Motion:** A member moved to approve the May 6, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-07**

**2. Workgroup #3: Rules 38 through 57.** Today’s presentations continued with workgroup 3 and a discussion led by Ms. Feuerhelm. Ms. Feuerhelm noted that redline versions of rules in the materials shows changes from previous versions, rather than changes from the current rules. She added that the Civil Practice and Procedure Committee recently approved changes to Rules 54 and 58 that she would like to incorporate into her drafts before presenting those rules to the Task Force.

*Rule 43 (“Taking testimony”).* Ms. Feuerhelm discussed the phrase “outside the record” in draft Rule 43(f), which typically, and paradoxically, actually involves matters that are in the record. This phrase is used in the federal rule, although the corresponding phrase in the current Arizona rule is “facts not appearing of record.” Because there is a substantial amount of case law concerning the phrase, and because there is no good reason to depart from the federal language, workgroup 3 recommends adoption of the federal wording, and Task Force members agreed.

The other issue under Rule 43 concerns section (e), and a requirement that allows the court to permit testimony from a location outside the courtroom. The proposed revision provides that the trial court may allow this “for good cause shown in compelling circumstances.” The workgroup added “in compelling circumstances” to mirror the federal language, and the draft rule therefore requires a “double hurdle” of good cause and compelling circumstances. Does the Task Force want to set the bar that high, especially in light of modern technology that facilitates remote testimony?

One member thought that the double hurdle could make access to justice more difficult, or more costly. The member noted that in a civil case, there is no constitutional right to confront a witness. Another member added that the allowance of remote testimony might avoid the need to continue a trial due to the unavailability of a witness.

In addition, a state court case might have a lower amount at issue than a federal case, and this might be a good reason to have a different state standard. The judge members of the Task Force believed that “good cause” alone was a sufficient standard, and the other members of the Task Force agreed.

*Rule 44 (“Proving an official record”).* Ms. Feuerhelm inquired about a need to clarify a new phrase in this proposed rule, “official publication of the record,” which also is used in the federal rule. Her concerns included the admissibility under this rule of documents that are available on the internet. In light of similar language in the federal rule, a body of federal case law, and construing this phrase as a “term of art,” Ms. Feuerhelm recommended following the federal model without additional verbiage. Mr. Klain thought that it might be useful to have input on this rule from the Advisory Committee on Rules of Evidence, because this rule is evidentiary in nature.

The members also discussed the meaning of “under seal” in Rule 44. One member thought the draft language was appropriate because “under seal” is a challenging concept to rephrase. Mr. Jeanes noted that his office uses an electronic certification, which is the equivalent of a seal. Mr. Klain accordingly proposed adding to “under seal” the words “or other mark of authenticity as recognized by the issuing body.” Some members supported this language. One judge member noted that the rule should provide judges greater guidance because in the real world, official documents offered for admission frequently have a custodian’s authentication but no seal. Mr. Jeanes advised that his office also uses an attestation, either by a judge or the clerk, when requested by another jurisdiction. Mr. Pollock suggested that regardless of what words might be added, the rule should retain the word “seal” because that word is used in other rules, such as Evidence Rule 902, which refers to a “seal or its equivalent.” The Task Force agreed to use this latter phrase in Rule 44, subject to any comments from the Evidence Committee.

*Rule 51 (“Instructions to the jury; objections; preserving a claim of error”).* The Task Force discussed two issues arising under revisions to this rule.

First, the language in current Arizona Rule 51(a) requires a party to object to an instruction “before the jury retires to consider its verdict.” The language of the proposed revision, which follows the federal rule, requires objections at an earlier time, specifically, “before the instructions and arguments are delivered.” Ms. Feuerhelm noted that the current Arizona civil and criminal rules have comparable provisions, and she asked whether the Task Force supports this change to the civil rule. The members do. The change is appropriate because judges frequently instruct before argument, and jurors typically have a paper copy of the instructions while the judge reads them, so the instructions should be settled by then, and not thereafter. A member added that if something objectionable occurs during argument that requires a further instruction, or there is a need for an impasse instruction during deliberations, those are supplemental instructions and are not subject to the same time considerations as concluding instructions. The members agreed that parties should be required to object to instructions prior to the judge charging the jury and final arguments, as proposed by the workgroup.

The second issue arises under proposed Rule 51(d)(2), which has a provision concerning “fundamental error.” This differs from the “plain error” provision under a corresponding federal rule. The concept of fundamental error is grounded in criminal law. It implies prejudice that affects a substantial right, and it is not waived by the absence of an objection. A judge member noted that what constitutes “fundamental error” in civil cases is debatable; the current Arizona rule leaves this open. It should be revised to clarify its application to civil cases. Mr. Rogers agreed that fundamental error was an elusive concept in civil cases, and he suggested that “clear and prejudicial error” would provide more guidance than “fundamental.” The chair offered the alternative of “plain error that affects a substantial right,” which is closer to the federal rule; but he also acknowledged that this might be perceived as “fundamental” error. The members of the Task Force, with only one dissent, agreed to utilize the phrase “clear and prejudicial.”

*Rule 53 (“Masters”).* Ms. Feuerhelm advised that the draft rule preserves aspects of the current rule that are unique to Arizona, and the draft incorporates other changes resulting from recent Arizona amendments. Mr. Klain provided background regarding those recent amendments. The draft rule accordingly differs from the corresponding federal rule, particularly regarding objections and conflict affidavits. After discussion, the members concurred that the draft reasonably and appropriately integrates Arizona’s recent amendments, and the members had no further changes to the draft.

*Rule 55 (“Default; default judgment”).* Ms. Feuerhelm noted that the workgroup’s draft incorporates amendments to this rule that became effective in January 2015. The draft also incorporates (a) an amendment to Rule 55 that is proposed in the current Arizona rules cycle, and (b) a proposed amendment to the federal rule.

Paragraph (a)(2) of the draft contains a list of items that need to be included in an application for default. The members discussed proposed language that requires that the application “identify any attorney known to represent the party claimed to be in default as provided in Rule 55(a)(3)(B)....” One member commented that this presents a difficult standard. Does it apply, for example, to an attorney who formerly represented a client? What is the attorney’s responsibility where the attorney no longer has an ability to communicate with the client? Another member suggested changing the language in this paragraph so that it tracks the language in Rule 55(a)(3)(B), or to simply include a cross-reference to this subsequent provision. Members agreed with this suggestion.

The members also discussed the notice provisions of Rule 55(a)(3). The rule requires the party requesting default to give notice of the application to the party in default, as well as to the attorney for the party in default. Rule 5 provides that service of a party who is represented by counsel is made by serving counsel, not the party, and the provisions of Rules 5 and 55 appear to conflict. Another concern is that service on a party represented by counsel may be construed as communication with a represented party, and might be an ethical violation. The members nonetheless agreed that service on a party in default, as well as service on the party’s counsel, is sensible. This is a critical stage of the proceeding, and there may be a good explanation why the attorney did not respond

to the summons. One member added that current rule also requires service on both the party and counsel. Another member noted that the requirement is to mail the application; the rule does not require proof that the application was received. Ms. Feuerhelm will add language that addresses the concerns raised by the members during this discussion.

Another issue involved Rule 55(b)(1)(A), and the entry of a default judgment by motion and without a hearing. If the motion is supported by affidavit, “must” the court - or “should” the court - enter judgment? After discussion, the members concluded that the most appropriate word to use in this provision is “may.” This permissive language allows the court discretion to set the matter for a default hearing if the court does not grant the motion.

The members further considered whether the list of items in draft section (a)(2) - the items that must be included in the application for default - was a complete list. For example, it did not include a reference to the Servicemembers Civil Relief Act [50 U.S.C. App. §§ 501, et. seq.], although compliance with the act is a requisite for obtaining a valid default judgment. Maricopa County Superior Court commissioners use a checklist to assure that the requesting party has met the requirements for entry of a default. Are there elements in the checklist that should be included in the rule? One way of dealing with this is to specify all of the checklist requirements in the rule. Another way is to add one or more new forms to Rule 84 that incorporate those requirements. None of the members had a copy of the commissioners’ checklist, but Ms. Feuerhelm will attempt to obtain a copy, and she will report back at the next meeting.

*Rule 59 (“New trial; altering or amending a judgment”).* Ms. Feuerhelm’s introduction to this rule noted that the proposed changes were primarily organizational and stylistic, and that there are areas where the proposed rule is different than the federal rule.

Ms. Feuerhelm requested guidance from the members about the interplay between section (e), the scope of a new trial, and section (f), the conditional grant of a new trial, and whether the most appropriate qualifier in section (e) is “must,” “may,” or “should.” Judge Moran’s research revealed case law supporting the proposition that a new trial should be on damages only, if that is the basis for the new trial, unless the issues of liability and damages are intertwined. One member believes the rule implies that issues concerning liability and damages are separable as a matter of law; another member believes these issues are rarely separable. In any event, these provisions apply only when a new trial is ordered solely on damages. After discussion, the members responded to Ms. Feuerhelm’s request by concluding that the following underlined words are appropriate:

(e) Scope of new trial. A new trial, if granted, must be limited to the questions found to be in error, if separable. If a new trial is ordered solely because the damages are excessive or inadequate, the verdict may be set aside only on damages, and must stand in all other respects.

A judge member also raised an issue concerning Rule 59(f)(2)(B), which provides that perfection of a cross-appeal “is deemed to revoke that party’s consent to the decrease or increase in damages.” The member suggested that the rule should allow revocation of the consent, but it should not require revocation as a matter of law. He believes that a party should not be committed to a revocation at the inception of the appeal, that appeals don’t always follow a prescribed course, that unanticipated events occur, and that some outcomes – such as the appeal not being decided on the merits –might make a premature revocation of consent a precipitous act. Ms. Feuerhelm will ask the workgroup to consider changing this provision so that a party “may” revoke consent when perfecting a cross-appeal.

**3. Workgroup #2: Rules 21 through 37.** Mr. Pollock continued the prior discussion concerning discovery rules.

*Objections at depositions.* Current Rule 32(d)(3)(D) provides in part:

Objections to the form of the question or responsiveness of the answer shall be concise, and shall not suggest answers to the witness. No specification of the defect in the form of the question or the answer shall be stated unless requested by the party propounding the question.

By comparison, Rule 30(c)(2), as proposed by the workgroup, provides in part:

An objection to a question must be stated concisely, in a non-argumentative manner, and without suggesting an answer to the deponent. An objection may be made only if necessary to preserve the objection under Rule 32(d)(3). Unless requested by the party who asked the question, an objecting person may not specify the defect in the form of a question or answer, but instead may only state “objection, form” or “objection, foundation.”

The corresponding federal Rule 32(d)(3)(B)(i) provides in part:

An objection to an error or irregularity at an oral examination is waived if it relates to the...form of a question or answer...or other matters that might have been corrected at that time....

The proposed Arizona rule would accordingly differ from its federal counterpart. One member believes that the second sentence of proposed Rule 30(d)(2) is unnecessary because Arizona’s rules sufficiently deter obstreperous conduct. Regarding foundation, some members believe it can be waived by failing to object, others believe that it cannot be waived by the absence of an objection. Some believe that the draft rule would encourage “lying in wait.” That is, counsel could be aware of a foundational defect yet remain silent, foreclosing any opportunity for cure by opposing counsel, and then later object to admission of the deposition testimony on lack of foundation grounds. One member believes the draft would precipitate disputes about objection protocols, and characterized the draft as “neutering” the role of receiving counsel at a deposition.

A co-chair proposed removing the second sentence of the proposed draft quoted above, or making it aspirational (“...an objection should be made...”) The other co-chair also proposed removing the words, “or objection, form” in the third sentence because of his concerns that a foundation objection might be waived if it was not made during the deposition. But another member noted that even if the objection is not waived, a receiving party should still object if, during the deposition, a lack of foundation can be cured. At this point, a co-chair moved as follows:

**MOTION:** The second sentence of proposed Rule 30(d)(2) as quoted above should be removed. The motion received a second and it passed unanimously. **TF.ARCP: 2015-08**

The members took no position on whether to permit motions to strike during a deposition. While the members agreed that some counsel make these motions to preserve objections, they also agreed that there is no judge present at the deposition to rule on the motion, and it has no greater effect than an objection.

*Other deposition issues.* Draft Rule 30(a)(3) allows the deposition of an incarcerated person “only by leave of court.” One member advised that inmate depositions are often taken with the cooperation and consent of the prisoner’s custodian, and without a court order. Mr. Pollock advised that the workgroup would consider a revision that would alternatively allow taking the deposition upon agreement of the custodian. Another issue concerned draft Rule 32(d)(3)(E), and what constituted “unwarranted” conferences between the deponent and counsel “during the deposition.” During the discussion one member proposed adding the word “disruptive” to this provision, but the members concluded this was unnecessary, and what is “unwarranted” is fairly well-defined by custom and practice.

*Sanctions (Rules 30 and 37).* A “must” or “may” issue was presented again in draft Rule 30(d)(2), which provides in part, “the court must/may impose an appropriate sanction...against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with a deposition.” Some members believed that once inappropriate conduct had been satisfactorily proven, the court is required to impose a sanction because it is the most effective method of deterring such conduct. Discretionary sanctions would be “toothless.” Others believed that imposition of a sanction should be discretionary, and the court should not be bound to impose sanctions in situations where counsel was simply wrong or mistaken on an issue. One judge member commented that even if the rule says “must,” judges will still exercise discretion. The consensus of the members was to use the word “may” in the provision quoted above.

This led to a discussion of a sanctions provision in Rule 37(a)(5). This rule provides in part that if the court grants a motion to compel disclosure or discovery, the court “must/may” require the person whose conduct necessitated the motion to pay expenses. The rule further provides, “but the court must not order payment if...etc.” Similar

choices of “must” versus “may” are presented in the sanctions provisions of Rule 37(b), with regard to failure to comply with a court order, and in Rule 37(c), concerning inaccurate or incomplete disclosure. After discussion, a judge member made the following motion:

**MOTION:** These sanction provisions should allow for judicial discretion; they accordingly should use the word “may” rather than “must.” The motion received a second and it passed, ten in favor and two opposed. **TF.ARCP: 2015-09**

*Proportionality.* The meeting continued with a discussion of proportionality. The concept of proportionality is embedded in current Rules 16(a) [objectives of pretrial conferences] and 26(b)(1)(C) [discovery scope and limits]. Mr. Pollock discussed pending federal rule amendments, which will likely become effective in December 2015. In particular, a federal discovery rule will include the phrase “proportional to the needs of the case,” which is a standard that is now frequently cited in federal case law. The foregoing Arizona rules incorporate a different and broader standard. Mr. Pollock and members of his workgroup believes the Arizona standard works well, and they recommend retaining it and diverging from the federal rule.

The members’ resistance to the word “proportional” was premised on its emphasis on the dollar value of the case, although the federal proportionality rule does include other factors that the court must consider. By comparison, proposed Arizona Rule 16(a)(3) requires “discovery [that] is appropriate to the needs of the case,” rather than “proportional.” Proposed Arizona Rule 26(b)(1)(C) concerning limits on discovery also includes a list of factors the court should consider, such as the importance of discovery in resolving the issues and the amount in controversy, but the Arizona factors do not utilize the word “proportionality.”

A judge member commented that civil cases in federal court either exceed a substantial monetary floor, or they pose a federal question that does not involve money, and that this subset of cases may be suitable for a proportionality approach. But he noted that civil cases in Arizona are markedly different from those in federal court. Many of the state cases are of lesser dollar amounts. These cases are more effectively managed by prudent judicial oversight rather than by a proportionality analysis, which might have the undesirable effect of precluding most discovery in those cases. Whether an Arizona judge should allow more depositions in a routine auto accident case is a matter of sound judicial discretion rather than adopting federal interpretations of its discovery rules. Arizona should have rules that meet the needs of ordinary Arizona cases, which revolves around local court culture.

One of the chairs expressed concern that if Arizona adopted a “proportionality” test, it would lead to rigid limits on discovery, such as those recently adopted by Utah, and which could be exceeded only upon a showing of “extraordinary” circumstances. The other co-chair agreed that the Utah discovery limits appeared arbitrary and dollar

driven, but he noted that the motions to exceed the presumptive discovery limits under the Utah rules also require the court to consider factors other than dollar value. He also noted that failing to use the word “proportional” in Arizona would be a departure from the federal model, and he recommended that Arizona be aligned with the national trend towards adopting “proportionality” in discovery rules. Moreover, Maricopa County’s pending pilot commercial court protocol requires consideration of proportionality, although business cases by their nature are more suited for an economic analysis. This co-chair believes that “appropriate” may be replaced by “proportional” in the Arizona rule with little practical effect.

Mr. Pollock’s workgroup had previously proposed a comment to Rule 26 that was included in the April 17 meeting materials, and which provided in part as follows:

Federal Rule of Civil Procedure 26(b)(1) was amended effective December 1, 2015, to expressly use the word “proportional” in describing the scope of discovery. The amendments to Arizona Rules of Civil Procedure 16(a) and 26(b)(1)(C) have not been amended to incorporate use of the word “proportional,” but instead Rule 16(a)(3) uses the word “appropriate.” This was done to avoid any possible misreading of the rules that might place undue emphasis on any one factor (e.g., the amount in controversy). No single factor is intended to be dispositive in all cases, but rather the factors should be considered together in determining the appropriateness of given discovery in a case. While the language of “proportional” versus “appropriate” differs, the factors under Federal Rule of Civil Procedure 26(b)(1) for reaching that determination are similar to those under amended Arizona Rules of Civil Procedure 16(a)(3) and 26(b)(1)(C).

The members discussed including this new comment with its proposed draft of Rule 26. A co-chair suggested that the rule petition explain the Task Force’s support of the word “appropriate,” but at the same recommend an explanatory comment to clarify that whatever terminology the Court ultimately adopts should not overemphasize the dollar value of the case. Mr. Rogers noted the Court’s reluctance to add comments to rules, and he proposed that the rule petition provide the two alternatives (appropriate or proportional) in the body of the draft rule. Judges on the Task Force favor “appropriate” over “proportional.” At this point, Mr. Klain moved as follows:

**MOTION:** The Task Force approves the comment to Rule 26 prepared by workgroup 2, as shown in the April 17 meeting materials. The motion received a second and passed, eleven in favor, one opposed. **TF.ARCP: 2015-10**

*Limits on discovery (Rule 26).* Mr. Pollock also requested Task Force guidance regarding an issue arising under Rule 26(b)(1)(C), the limits of discovery. The draft rule provides in part that a court “should/may/shall/must” limit discovery that would otherwise be permissible after considering specified factors. Workgroup 2 was divided on the appropriate operative word. Mr. Pollock noted that the proposed federal amendment utilizes “must.” A member concurred with “must” because when the court

limits discovery, it has made a predicate finding that discovery would be cumulative or burdensome. A judge member again observed that judges may apply discretion even if the rule says “must.” Another member contended that “should” was most applicable. After further discussion, the chairs took an informal poll, with these results: seven members favored “must,” four favored “should,” two favored “may,” and none favored “shall.” The workgroup will take these results into consideration for its next draft.

*Miscellaneous.* Based on member consensus on issues previously discussed, workgroup 2 will use the word “may” rather than “must” in the sanctions provision of Rule 26(f). The workgroup will continue its discussions on reducing the discovery response time from forty days to thirty days, and it will report on this issue at the next meeting. It will also consider whether a telephone conference with the court should be a mandatory or permissive prerequisite to a party filing a motion to compel.

**4. Roadmap.** Based on member input, the chairs announced that the next Task Force meeting will be on Friday, July 24, beginning at 10:30 a.m. They reminded the members that Maricopa County’s pilot commercial court will begin operating on July 1, 2015. They further noted they will begin discussions with the workgroup chairs about blending the workgroup drafts into a comprehensive Task Force document.

The Task Force also needs to discuss how it will treat existing comments and notes in the rules. One member suggested deleting comments prior to 1992 but preserving comments after that date; this would retain comments, for example, regarding amendments to the “Zlaket” and case management rules. He added that the Task Force does not need to endorse the existing comments, but the comments will provide users a history that some might find helpful. The chairs added that the Task Force needs to prepare a prefatory comment for its proposed civil rule amendments. Prefatory comments have been utilized with recent, comprehensive amendments to other sets of Arizona rules, and the Court finds these prefatory comments to have value.

Prior to filing a rule petition, and as noted in the introductory remarks to this meeting, the Task Force needs to determine which rule changes will require statutory amendments. That analysis should be completed by the end of this summer. In addition, the draft rules should be distributed for comment as far in advance of filing a rule petition as is possible. The distribution list should include the State Bar (with the possibility of an email “blast” to bar members that contains a link to the draft rules), the Committee on Superior Court, the Attorney General, county attorneys, local bar associations, and plaintiff and defense bars. The Task Force should include a broad range of stakeholders in the distribution, and should not marginalize anyone.

**5. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:13 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: July 24, 2015**

**Members attending:** William Klain (co-chair) and David Rosenbaum (co-chair, by telephone), Pamela Bridge by her proxy Jeff Katz, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall (by telephone), Hon. Peter Swann, Hon. Randall Warner

**Absent:** None

**Guests:** Jacob Metcalf, Mark Lassiter, Theresa Barrett, Stewart Bruner

**Staff:** Mark Meltzer, John W. Rogers, Sabrina Nash

**1. Call to order.** The co-chairs called the meeting to order at 10:05 a.m. Mr. Klain then introduced Mark Lassiter, chair of the State Bar of Arizona's Committee on Technology, who was invited to address the Task Force.

**2. Presentation by Mr. Lassiter.** Mr. Lassiter advised that the State Bar's Committee on Technology ("SBA.COT") considers technology issues affecting the practice of law. It was formed in 2009, following promulgation of the American Bar Association's "20/20" ethics report and directions for the legal profession in the twenty-first century. SBA.COT works through four sub-committees: Cloud Computing and Law Practice Management; Electronic Evidence Discovery of Electronically Stored Information; Data and Privacy Security; and Court Technology Applications. Mr. Lassiter suggested the Task Force consider SBA.COT's goals as a complement to its objectives.

Mr. Lassiter noted in particular a recent amendment to the Arizona comment to Ethics Rule 1.1, which requires attorneys to "keep abreast of...the benefits and risks associated with relevant technology." He relayed the views of a local federal judge, who believes that only a small fraction of attorneys have a good grasp of issues regarding electronically stored information ("ESI"). This judge believes that ESI issues often are ignored until late stages of pretrial proceedings, and this becomes problematic. SBA.COT is attempting to address this circumstance by drafting a set of uniform interrogatories to promote early discovery of electronic evidence. Given the variety of preservation letters, the committee is also looking at a standard form "legal hold" notice that the court clerk would issue when an action is filed, and that would be served with the summons.

Mr. Lassiter commended the recent work in the area of ESI by the Arizona Supreme Court's Business Court Advisory Committee ("BCAC"). He would like to build

on that work by creating additional forms. He mentioned two helpful forms now used in California courts. One form is an “advance notice to appear.” This requires an opposing party to appear at a trial or hearing, and to bring documents, without the need for a subpoena. The other form is an “agreement to appear at trial,” which allows a court-approved on-call appearance for trial testimony and avoids the need for a witness to appear on the first day of trial. Mr. Lassiter is inviting industry experts to SBA.COT meetings to assist with the development of a set of best practices for discovery of ESI, including downloadable forms. He echoed the BCAC and this Task Force, which believe that litigation should focus on the merits of a case in lieu of time-consuming attention to belated and contentious electronic discovery issues.

Mr. Rosenbaum, who chaired the BCAC, noted that Michael Arkfeld, a leading expert on law and technology, was a member of the BCAC and provided valuable knowledge and assistance to that committee. Mr. Rosenbaum added that this Task Force is trying to integrate the Business Committee’s ESI concepts into its drafts of Rule 26 and Rule 26.1. Mr. Lassiter suggested that Rule 26.1 disclosure of “persons with knowledge” include information concerning ESI custodians.

Mr. Klain thanked Mr. Lassiter for addressing the Task Force, and encouraged the SBA.COT to visit the Task Force webpage and review upcoming drafts of the civil rules.

**3. General comments, approval of meeting minutes.** This is the eighth meeting of the Task Force. Mr. Klain noted that the Task Force is near completion of its initial draft of the revised rules, but there is still considerable work remaining. The objective of today’s meeting is to discuss outstanding workgroup issues and to move towards a comprehensive draft of the civil rules. Although this draft will still be subject to revision and editing, this version will become the “vetting draft” that the Task Force will circulate to the legal community for pre-petition review. Mr. Klain added that Ms. Feuerhelm and Perkins Coie’s support staff have offered word processing assistance for preparing this draft, and they will meet with Task Force staff on August 5 to discuss the project.

Mr. Klain stated that when Ms. Herbst assumed her current employment, it left the Task Force without a representative from the Arizona Attorney General’s office. He would like to discuss with the Chief Justice the appointment of a new Task Force member to fill this void. While this individual might miss most of the initial rule drafting, he or she could still provide useful input during the future course of the Task Force.

Mr. Klain then asked the members to review draft minutes of the June 12, 2015 Task Force meeting. He noted that staff had already corrected a few typographical errors that appear in that draft. Members had no other corrections to the draft minutes.

**Motion:** A member moved to approve the June 12, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-08**

The chairs then turned to reports from the workgroups, beginning with workgroup 4.

**4. Workgroup #4: Rules 57.1 through 86.** Mr. Hathaway reminded the members that the arbitration rules had been briefly discussed at a previous meeting. He thereafter approached plaintiff and defense bars about proposed substantive changes to these rules, but the two sides were unable to reach consensus on those changes. He accordingly limited workgroup 4's revisions of the arbitration rules to such things as placing provisions in a more chronological order, arranging provisions within a rule, and clarifying titles and headings. The Task Force members then discussed the following issues in the arbitration rules.

*Rule 72 ("Suitability for arbitration").* For purposes of determining the amount at issue, Rule 72(b) provides that the amount includes punitive damages, but does not include interest, attorney's fees, or costs. Mr. Klain was concerned about the inclusion of punitive damages because they are not liquidated, and the amount of those damages cannot even be specified in a pleading under Rule 8(g). Mr. Hathaway noted that similar concerns exist regarding damages for pain and suffering. But members opined that judges can readily determine whether cases are eligible for arbitration, and issues about eligibility and the amount in controversy generally are not problematic. The chair took a straw poll on whether "punitive damages" should remain in the draft; eight agreed that it should, five thought not.

Members also discussed whether the legal community ever utilized Rule 72(c), "arbitration by agreement of reference." Two members advised that they use this provision, particularly in uninsured and underinsured motorist claims when an insurance policy requires court arbitration. Moreover, A.R.S. § 12-133 expressly allows arbitration by agreement of reference. Mr. Jeanes added that the Clerk assigns a case number to these matters.

Members agreed that the first word of Rule 72(c), "irrespective," be changed to "whether or not." They also agreed that the word "substantially" should be added in Rule 72(e)(1) to the phrase "in [substantially] the following form...."

*Rule 73 ("Appointment of an arbitrator").* Members questioned whether the time for the court's appointment of an arbitrator (120 days after an answer is filed), should be shortened. Mr. Jeanes was open to this change, but he needs to get input from the

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Maricopa County judges. One of the judge members observed that this time limit, although long, rarely slows the arbitration process.

The members also discussed the provision for excusing an arbitrator. Should an arbitrator be excused from serving on any cases, or must the arbitrator be excused on a case-by-case basis? If the arbitrator seeks to be excused from a single case, the request should go to the assigned judge, but a request to be excused from any case should be considered by the presiding judge. Draft language concerning an arbitrator's area of concentration, speciality, or expertise was discussed but was not changed.

*Rule 74 ("Powers of arbitrator, etc.").* Rule 74 does not permit an arbitrator to rule on a Rule 68 motion for sanctions. Accordingly, proposed Rule 76(b) removed language about leaving a blank space in the award for fees and costs arising from these sanctions.

Rule 76(b) requires the arbitrator to file an award within 145 days after appointment. But Rule 74(b) allows the arbitrator to extend the time for an arbitration hearing. If the arbitrator extends time under Rule 74(b), the members agreed that Rule 76(b) should allow for a commensurately longer time to file the award.

*Rule 75 ("Hearing procedures").* Current Rule 75(b) includes a reference to Rule 26.1 disclosures, but the revised rule contains no such reference. Rule 26.1 applies in cases subject to arbitration, and a reference to Rule 26.1 should be added back to the rule. Also, the workgroup should consider harmonizing the time for Rule 26.1 disclosures, and the time for preparing a prehearing statement under Rule 75(b). The members discussed moving the requirement for a prehearing statement to Rule 74, because it is prepared before the hearing, but after discussion they agreed to keep it in Rule 75.

Draft Rule 75(d), concerning documentary evidence, has a proviso in paragraph 8 that doctors' medical reports "be given the weight to which the arbitrator deems them entitled." If this proviso is retained, the members agreed it should apply to every paragraph in section (d), and not just paragraph 8.

*Rule 76 ("Post-hearing procedures").* The rule requires a three-step process to conclude an arbitration: entry of a notice of decision, followed by an arbitration award, and then entry of a judgment. The members discussed this process in light of *Phillips v. Garcia* (1-CA-CIV 14-239, June 9, 2015.) Mr. Hathaway acknowledged a common misperception of treating the award as a judgment, and prior to 2007, that was actually the procedure. But a 2007 rule amendment, as further explained in *Phillips v. Garcia*, added the third step of reducing the award to a judgment. Some members felt this third step was redundant and unnecessary, and they supported the current draft of Rule 76(d), which allows an award to constitute a judgment. But a judge member persuaded those

members of the desirability of entering a judgment. A judgment, unlike an arbitration award, is entered as a matter of record, by a judge. It has the “dignity” of a judgment, and it can be recorded and domesticated. In light of the number of self-represented litigants in arbitration proceedings, one member suggested that Rule 76 require either a notice of decision or an arbitration award to contain advisory language that the document must be reduced to a judgment, but the members declined this suggestion. Mr. Hathaway otherwise will revise this rule to make it consistent with today’s discussion.

*Rule 77 (“Appeal”).* Mr. Hathaway noted a new proposed Rule 77(i). It would allow the court to contact an arbitrator regarding an award or other matters concerning the arbitration. This is not dissimilar from a judge contacting a colleague who was formerly assigned to a matter, and who might expediently provide useful information about a case. The members supported this provision.

Mr. Hathaway will assure that the time for appeal under Rule 77 is consistent with the time provided in revised Rule 76 for reducing an award to judgment. One member suggested that the Task Force not use the word “appeal,” because as used in the arbitration rules, it is not a true appeal, that is, a review based on a record. Rather, it is a “do-over,” or a trial de novo. While the members were receptive to this suggestion, A.R.S. § 12-133 nonetheless refers to an “appeal,” and therefore this nomenclature will be used in the revised rule. However, Mr. Hathaway’s workgroup will consider adding explanatory language that the “appeal” is actually another trial.

*Rule 69 (“Execution”).* Mr. Hathaway stated that he consulted with Ms. Feuerhelm, regarding the transfer of current Rule 58(c) [“enforcement of judgment; special writ”] to Rule 69. The members had no objection to relocating this provision in Rule 69, where it more logically belongs.

**5. Workgroup #1: Rules 1 through 20.** Mr. Jacobs began by discussing Rule 4.

*Rule 4 (Was “process,” is now “summons”).* A provision in section (g), which concerns service outside the U.S.A., states that “failure to make proof of service does not affect the validity of service.” Mr. Rogers noted that this concept applies not just to service in another country, but to service anywhere. The members agreed, and Mr. Jacobs will create a new paragraph in section (g) to clarify the application of the provision.

Rule 4(a) deals with issuance of a summons upon the filing of a complaint. One member suggested clarifying this provision, possibly by a definition of “complaint” for purposes of this section, because a summons might be required in other situations where new parties are added, such as a counterclaim or a third party complaint. Other members agreed with this suggestion.

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Revised Rule 4(f) distinguishes “waiver” and “acceptance” of service. Rule 4(f) also has a paragraph for a “voluntary appearance” in open court, or by filing a responsive pleading. However, the draft does not specify that the filing of a notice of appearance is a “voluntary appearance.” The members concluded that it was not necessary to include this in the rule. A subsequent sentence in this section further provides that waiver, acceptance, and voluntary appearance “have the same force and effect as if a summons had been issued and served.”

A member asked why section (g)(1) [“return of service should be made no later than when the person served must respond to process”] was phrased as aspirational. Mr. Jacobs responded that the provision encourages the filing of a proof of service, but the failure to file a proof does not vitiate service. The requirements for proof of service in a default setting are addressed by Rule 55.

Rule 4(i) provides a 120 day limit for service of the summons. The corresponding limit under the federal rules is 90 days. The members discussed adoption of the federal limit, but concluded that the longer period provided by Arizona’s rule is more appropriate in light of the difficulty of serving some state court defendants.

*Rule 4.1 (“Service of process within Arizona) and Rule 4.2 (“Service of process outside Arizona”).* Mr. Jacobs advised that there were no substantive changes to these two rules.

*Rule 5.1 (“Duties of counsel”).* The substance of Rule 5.2 of the current rules (“limited scope representation in vulnerable adult exploration actions”) has been relocated and merged into Rule 5.1. Therefore, there is no longer a Rule 5.2. Mr. Jacobs consulted Debbie Weecks, a practitioner in this area, and she agreed with this approach. One member was concerned that Rule 5.1(c)(4) [“application to vulnerable adult exploitation actions”] may create a misleading impression that the limited appearance provisions of Rule 5.1(c) apply only to vulnerable adult actions. Following a discussion about whether to delete paragraph (c)(4), the members agreed instead to add a new provision in section (c) about its scope and application; Mr. Jacobs will prepare clarifying language.

*Rule 10 (“Form of pleadings”).* Rule 10 was considerably shortened by relocating many of its current provisions into the new “seven-point” rules. However, the members discussed the provisions of Rule 10(a), which concern the caption, and the interplay of those provisions with Rule 10(d) regarding fictitiously named defendants. When service is made on a fictitiously named defendant, some members believe the serving party must move under Rule 15 to amend the caption. Other members believe a Rule 15 motion is unnecessary complex for these circumstances. (The Clerk’s case management system, rather than the caption on a pleading, officially identifies party names, and party

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information in this system is updated when the Clerk receives a proof of service.) The members agreed that an efficient solution is to include in Rule 10 a provision that a party who serves a fictitiously named defendant must file a notice with the Clerk, which must be served on other parties, stating that a “Doe” defendant is now a named defendant, and specify the name. By filing this notice, it will become part of the record.

*Rule 17 (“Plaintiff and defendant; capacity public officers”).* A new section (d) of this rule includes the substance of current Rule 25(c). The substance logically belongs in Rule 17, and this is consistent with how it is treated under the federal rules.

Although Rule 17(d) does not require a pleading to identify a public officer by name, one member thinks that it should. The identity of a public officer is commonly known and should be easy to ascertain. Moreover, generic descriptions (for example, “supervisor” or “councilman”) are vague when there is more than one person holding that office. Mr. Jacobs agreed to add language to the effect that the identity of the individual officer is unnecessary only in situations when naming the office is sufficient to identify the individual officer.

New Rule 17(f) incorporates the substance of current Rules 17(g) and 17(h). A member questioned the necessity of using the phrase “next friend” in this new rule; “guardian ad litem” seems more appropriate. Another member noted that the federal rule, as well as rules in other jurisdictions, utilize “next friend.” After further discussion, the members recommended leaving the phrase “next friend” in paragraph 17(f)(2)(A), but striking it elsewhere in 17(f)(2).

*Rule 64.1 (“Civil arrest warrant”).* Mr. Jacobs advised that this rule is unique because a comment appears before the text of the rule. Consistent with Task Force philosophy of including current substantive comments within the rule, Mr. Jacobs drafted a new Rule 64.1(a) that is based on the current comment. Mr. Klain suggested changing the word “contemnor” in new section (a) to “person found in contempt,” and this suggestion was adopted.

A judge member suggested that Rule 64.1 clarify that the rule is not an independent basis of authority for issuing a civil arrest warrant, but rather only provides the procedure. Some misread the rule and conclude that it provides a substantive basis for a civil arrest warrant, but the warrant must be based on other legal authority. The members found this point well-taken, and Mr. Jacobs will revise the rule to reflect this principle. The members also agreed that new Rule 64.1(a) does not provide a comprehensive list of situations where the rule may be used, only examples; but they made no further revisions in this regard.

**6. Workgroup #2: Rules 21 through 37.** Mr. Rogers compiled and presented revisions to these rules.

*Rule 16 (“Scheduling and management of cases”).* Mr. Rogers noted a new provision, based on previous discussions, in section (c) concerning the scheduling order. It provides that the scheduling order “also may direct that a party must request a conference with the court before moving for an order relating to discovery.” This provision gives a judge authority to implement this practice, but the rule does not require it. The members supported this new provision.

*Rule 30 (“Depositions by oral examination”).* Mr. Rogers revised Rule 30(a)(3), as discussed at the last meeting, by allowing the deposition of an incarcerated person by agreement of the custodian, as well as by court order. One member believes adding this alternative is unnecessary because if the custodian agrees, there is no need for the rule. Other members took the contrary view; they believe the rule provides a helpful starting point for the infrequent situations when inmates are deposed. A straw poll showed strong support for retaining the revision.

*Rule 32 (“Using depositions in court proceedings”).* A new provision in section (c) provides that the court may require a single presenter to read deposition testimony. Although one member felt that judges already have discretion to require a single reader, the rule makes this explicit. The members further suggested that Rule 32(a)(3) clarify that the provision is subject to Rule 32(a)(1) and (2).

*Rule 33 (“Interrogatories to parties”).* The revised rule consolidates current Rules 33 and 33.1 into a single rule. Rule 33(a) is new and provides a definition of “interrogatories,” which should be helpful for self-represented litigants. Rule 33(b) reduces the time for responding to interrogatories, compatibly with the federal rule, from 40 days to 30 days. The members believe this shortened time is adequate and appropriate. Similar reductions in response times are included in Rules 34 and 36 regarding requests for production and admissions.

Rule 33(b)(3) requires a party who objects to an interrogatory to still provide an answer “to the extent [the interrogatory] is not objectionable.” The members agreed to retain this language. However, several members offered practice pointers of including in the answer the phrase “subject to the objection” or similar words to indicate that an answer is not a waiver of the objection.

Members also discussed a requirement of Rule 33(b)(2) that answers be under oath, and in particular that an entity “must furnish all responsive information available to it...” The corresponding federal rule does not include the word “all,” and one of the

co-chairs felt “all” was unnecessary in Arizona’s rule. He believed that if there is an issue with entities not furnishing “all” of the information, it should be addressed in other ways, and the members agreed with the removal of “all” in this provision.

The members further discussed the oath and signature requirements of Rule 33(b)(4). The objective of new language in this paragraph is to avoid “designated” or perfunctory signers who have no knowledge of the facts contained in the interrogatory answers. The members agreed that the oath binds the entity as well as the signer to the answers, and that the oath facilitates admissibility of the answers and their use for impeachment. One member suggested that with regard to an entity, the rule should allow for multiple signers. Other members believe multiple signers would be problematic, and that taking Rule 30(b)(6) depositions would be a superior remedy. Another member thought these concerns could also be addressed by sending an interrogatory that inquired about the information gathering process used by the signer.

After further discussion, some members believed this rule should require the signer to acknowledge that information in the answers was gathered through an appropriate process. The members reviewed the corresponding federal provision, and a straw poll indicated that equal numbers of members supported (1) the federal version, and (2) a proposed version that requires the signer to attest to personal knowledge or information supplied by others. In light of this impasse, Mr. Klain suggested that the signer specify, if he or she does not have personal knowledge, the basis or the extent of their knowledge. Following additional discussion, a majority of members agreed to the following language: that the signer “is an authorized representative of the entity, with knowledge of the information contained in the answers, obtained after reasonable inquiry.” The members agreed that “reasonable inquiry” can include conversations with knowledgeable individuals, and a review of pertinent documents.

*Rule 34 (“Production of documents, etc.”)* The rule was restyled and restructured in the same manner as the corresponding federal rule. The Arizona version specifies a limit of 10 items or distinct categories. The time period for responding to a request was shortened from 40 days to 30 days. A new paragraph (b)(3)(C) deals with objections. It requires that an objection state whether any responsive materials are being withheld; that it specify the objectionable parts of the request; and that it permit the requesting party to inspect other, non-objectionable parts. Paragraph 3(E) provides for production of electronically stored information similar to the manner provided by Rule 26.1. Like the federal rule, a party need not produce ESI in more than one form “absent good cause.”

*Rule 35 (“Physical and mental examinations”)*. Mr. Rogers noted that the rule deletes a reference to “physician or psychologist” and substitutes the phrase “suitably licensed

or certified examiner.” This would permit, for example, examination of a party by a vocational expert. The remainder of the rule was restyled.

*Rule 36 (“Requests for admission”).* The edits are primarily stylistic. A lengthy section (a) in the current rule was reorganized into seven separate paragraphs to enhance comprehensibility.

*Rule 37 (“Failure to make disclosures or to cooperate in discovery; sanctions”).* Mr. Rogers noted that this rule now includes “must/may” decisions made at the last Task Force meeting. He is awaiting completion of a “meet and confer” rule, which he will cross-reference in a future version of Rule 37. Otherwise, the discussion of Rule 37 focused on section (g), and the failure to preserve electronically stored information. Mr. Rogers’ materials included an annotated version of draft Rule 37(g), which contained extensive footnotes and references to Sedona Conference materials, case law, federal rules, and other authorities. One member noted the desirability of harmonizing state and federal preservation requirements to assure comparable duties in both jurisdictions.

Mr. Rogers proposed revisions to Rule 37(g) address the routine operation of an electronic information system (a party nonetheless must take reasonable steps to prevent the destruction of information that should be preserved). The revisions also provide remedies and sanctions for failing to take reasonable steps to preserve ESI, either before or after commencement of an action. If a party acted with intent to deprive another party of the use of ESI, and upon a finding of prejudice to the other party, the proposed rule would allow the court to dismiss an action or enter a default judgment.

A judge member was concerned with imposing legal duties on someone before they become a party to a lawsuit. Although there is a definitional issue about when a party knows a suit is on the horizon, Mr. Rogers’ draft of “reasonable anticipation” seems to fairly address this. Mr. Rogers also noted a trend in jurisprudence about imposing a prelitigation duty to preserve evidence. Notwithstanding, the members agreed to delete from paragraph (g)(1)(B)(ii) one of the criteria for “reasonable anticipation,” specifically, that a person receives a written request from a potentially opposing party asking the person to preserve specific information for future litigation. Also, the members concurred in adding the word “reasonably” in paragraph (g)(1)(B)(i) before the phrase “should know that it is likely to be a defendant in a specific action.” Regarding “reasonable steps to preserve” in section (g)(1)(C), a member recommended also including paragraph (i) factors in the body of section (ii); another member suggested reversing the order of paragraphs (i) and (ii), and this seemed to be the preferred alternative.

One member asked what the preservation obligation of a large corporation might be, when half of terminated employees threaten to file suit when they walk out the door. Although there was not unanimity, most members felt that the duty to preserve in those circumstances involves a limited and well-defined subset of ESI. Other circumstances are more challenging. Among other things, preservation letters under section (g)(1)(B) can become problematic if overbroad or overused. Mr. Rogers noted the Sedona Conference's reference to a "credible probability" of litigation, but he also suggested that trying to be too specific about the meaning of "reasonable anticipation" of litigation might be as knotty as being too general.

Mr. Rosenbaum commended Mr. Rogers' codification of Sedona principles and the current state of the case law. But he questioned why substantive preservation duties should be included in our procedural rules. He believes that those duties are established by case law, by the Sedona principles, and, to a lesser extent, by statutes; that the boundaries of those duties are still evolving; and that the Task Force should be concerned about "freezing" in the rules of procedure preservation duties that will continue to develop under the law. But Mr. Klain believes that the proposed rule could offer guidance to attorneys with regard to advising their clients about preservation, that it summarizes where the law is at the current time, and that because a failure to preserve ESI can have significant impacts with commensurate consequences, it should be addressed in a rule. He added that the Court can reject or modify Rule 37(g) if the Court believes it's not appropriate as proposed. A straw poll indicated that a majority (11 members) of the Task Force supported Mr. Roger's proposed draft of Rule 37(g), with the modifications discussed during the meeting.

**7. Workgroup #3: Rules 38 through 57.** There was insufficient time remaining to review workgroup 3's drafts, with the exception of Rule 65.

*Rule 65 ("Injunctions and restraining orders")*. Judge Moran summarized revisions to the most recent draft of Rule 65. Those revisions included suggestions from attorney Russ Piccoli, a subject matter expert. The title of Rule 65(a) now includes reference to a temporary restraining order. Consideration of discovery was added to a provision about consolidating a hearing with a trial on the merits. In section (b), the word "likely" was inserted in the phrase, "loss or damage will likely result to the movant." Section (c) provides that "the State of Arizona, its officers, and its agencies" are not required to give security. A member believes this should apply to all political subdivisions in Arizona. Judge Moran will revise this as appropriate.

Workgroup 1 proposed a new provision in Rule 7.4, which provides that Rule 65(f) governs orders to show cause for violations of injunctions. Judge Moran reviewed the

recent revisions to Rule 65(f) concerning orders to show cause (“OSC”) for sanctions. These revisions add references to civil and criminal contempt; make a change that a party “may” – not “must” – file an application for an OSC if an injunction was violated; and provide that the court “may” set a date for a written response (compare Rule 7.4, which uses “must” in this circumstance), but “must” require a party to appear before imposing Rule 65 sanctions. Under proposed Rule 65(f), the court need not hold an evidentiary hearing on an OSC unless there is a “genuine dispute of material fact.” A new revision provides that the court may impose a sanction of a fine, as well as jail. A member suggested, and Judge Moran agreed, to clarify in section (f) the distinction between civil and criminal contempt when imposing a sanction. Another member recommended that Rule 65(f)(7) require the arresting jurisdiction to notify the issuing court when a warrant is executed.

**8. Roadmap.** Particularly because there was insufficient time today to review the remaining workgroup 3 rules, Mr. Klain suggested that the Task Force meet again in August. The members agreed on Friday, August 21 as the next meeting date, although a co-chair and a member will be unavailable. The August 21 meeting agenda might also include discussion of comments to the current rules, a prefatory comment for the new rules, any necessary statutory changes, collateral rule changes (for example, to the ARFLP, JCRCP or the ARCAP), and the implementation order.

**9. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 3:30 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: August 21, 2015**

**Members attending:** William Klain (co-chair), Pamela Bridge by her proxy Ellen Katz, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady by her proxy Sara Agne, Brian Pollock, Greg Sakall, Dev Sethi (by telephone), Hon. Peter Swann, Hon. Randall Warner

**Absent:** David Rosenbaum, Michael Gottfried

**Guests:** Aaron Nash

**Staff:** Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** Mr. Klain called the meeting to order at 10:05 a.m. He advised that Mr. Rosenbaum is in trial and is unable to attend today's meeting. This is the ninth meeting of the Task Force, and the workgroups have met thirty-five times. Mr. Klain noted that today's meeting packet includes Administrative Order number 2015-72, which concerns the appointment of a new member to the Task Force, Michael Gottfried of the Attorney General's office.

Mr. Klain then asked the members to review draft minutes of the July 24, 2015 Task Force meeting. Ms. Agne noted that "unnecessary" at page 6 of the draft should be "unnecessarily." There were no other comments or corrections to the draft minutes.

**Motion:** A member moved to approve the July 24, 2015 minutes with the correction noted above, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-09**

**2. Workgroup #3: Rules 38 through 57.** Today's presentations continued with workgroup 3 and a discussion led by Ms. Feuerhelm. Ms. Feuerhelm noted that redline versions of rules in the materials shows changes from previous versions, rather than changes from the current rules.

*Rule 11 ("Signing pleadings, etc.").* Workgroup 3's assigned rules include Rule 11. Ms. Feuerhelm noted that a blank space in the draft of Rule 11(c)(2)(A) will be filled by "Rule 7.2(h)," a new rule that was prepared by Mr. Rogers and that is included in the meeting materials.

The members discussed the workgroup's proposed deletion of Rule 11(e) concerning verified pleadings. Ms. Feuerhelm advised that Rule 11(e)(1) has no counterpart in the federal rules; if the members decide Rule 11(e)(1) should be retained, she proposed moving its substance to Rule 80(i). If Rule 11(e)(2) is retained, she suggested that its content be moved to Rule 9.

Some members believe that Rule 11(e)(1) is unnecessary because its provisions are self-evident. One member observed that the purpose of this provision is to require a party rather than an attorney for the party to provide verifications; it would be redundant for the attorney to verify a pleading because the attorney's signature on the pleading already includes the representations required by Rule 11. On the other hand, there are occasions, such as fee applications, where an attorney's signature on an affidavit is necessary and appropriate.

Another member suggested that verification requirements should be expanded rather than eliminated, especially in situations where a party sought equitable relief. The member believes that equitable actions often request interim and early relief that might have a substantial impact on a person's life or business, and the additional solemnity of a verification by someone well-acquainted with the factual basis of the claim is well-warranted.

Mr. Klain questioned language in Rule 11(e)(2) that permits the allegations of a verified complaint to be "deemed admitted" unless the answer is verified. The result seems harsh, especially if the answer denies the allegations of the complaint. Moreover, if plaintiff moved to have the allegations of the complaint "deemed admitted" based on a failure to verify the answer, a judge would probably allow the defendant to file an amended answer containing a verification. Another member commented that a served party often has less time to prepare a responsive pleading than the plaintiff had to prepare the complaint, and a defendant may not have sufficient time to verify an answer. One member characterized Rule 11(e)'s requirement for verifying a responsive pleading as a "trap for the unwary."

The members by an informal 8 to 5 vote favored eliminating Rule 11(e). Mr. Klain thereafter noted that other rules and statutes govern specific remedies (such as injunctions, receivers, or provisional remedies), which may require a party's supporting affidavit. A judge member concurred and observed that a client may not be familiar with the legal theories alleged in a complaint, but would have knowledge of the facts supporting the requested relief. He suggested, and the members then agreed, to reframe Rule 11(e)(1) as an affidavit requirement, rather than as a requirement to verify a pleading, and to move the requirements of (e)(1), with this modification, to Rule 80(i). The members further agreed to delete the requirements of Rule 11(e)(2).

*Rule 54 ("Judgment; costs; attorney's fees").* Ms. Feuerhelm advised that many of the substantive changes in workgroup 3's draft, particularly the attorney's fees provisions of Rule 54(g), were proposed by the State Bar's Civil Practice and Procedure Committee ("CPPC"). The changes to sections (a), (b), and (d) of Rule 54 are primarily stylistic, and generally track the language of corresponding federal provisions. There is no federal counterpart to Rule 54(c). The workgroup modified Rule 54(c) to require a recitation in the judgment that states, in essence, there is nothing left to decide in the case. (*See Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, 223-24, 338 P.3d 328, Div. 1, 2014.)

The members then discussed Rule 54(f) concerning costs. Mr. Klain advised that staff had prepared a legislative proposal for the Arizona Judicial Council's consideration, which is included in the meeting materials. The proposal contemplates a repeal of A.R.S. § 12-346; this statute allows submission of a statement of costs up to ten days after entry of judgment. The members would prefer a rule that requires a determination of costs prior to entry of judgment. A judge member advised that he occasionally signs judgments before considering costs in cases involving self-represented litigants, but he agreed that the time to determine costs should be addressed by court rule rather than by statute.

The members also discussed Rule 54(g) provisions regarding fees. Revised paragraph (g)(1) allows a claim for fees to be made in a Rule 12 motion, as well as in a pleading. Revised paragraph (g)(2) distinguishes judgments by three scenarios of entry: first, under Rule 54(c); second, under Rule 54(b), by adjudicating all claims or rights pertaining to a party or parties; and third, under Rule 54(b) under other circumstances. With regard to the second scenario, a member suggested removing the words "but fewer than all of the parties" because those words appear superfluous. A judge member suggested, and the members discussed, an alternative sequence in which the judge would always resolve fee issues before entering a Rule 54(b) judgment. Ms. Feuerhelm will consider this alternative within the parameters of the CPPC's previous work on this issue.

Ms. Feuerhelm explained that the revised "motion" language of Rule 54(g)(3) includes some verbiage from the federal rule. The members agreed that the word "may" in the phrase "may be supported by affidavit" should be changed to "must." They also agreed that "exhibits" was unnecessary in the phrase "supported by affidavits and exhibits...." The members agreed with the language of proposed Rule 54(g)(3)(B), which says that the motion "must disclose the terms" of a fee agreement if the court so orders; this would not compromise an attorney-client privilege. Several members urged adoption of a federal rules' provision that requires parties to confer and attempt to resolve differences in the claimed amount of fees prior to a court hearing on the claim. The members did not agree on whether this would ultimately save time and expense, and Ms. Feuerhelm suggested that this is properly an issue that the CPPC should consider.

Proposed Rule 54(g)(4) allows for referring contested fee claims to a special master. Several members believe that determining fees is a judicial responsibility, and utilizing a master to determine fees only serves to increase the cost of litigation. A straw poll indicated that almost all members shared those views, and Ms. Feuerhelm will remove this provision. The members also agreed to remove from Rule 54(g)(4), if the motion is contested, a phrase that "opposing parties may respond to the motion," because this is superfluous. Another provision in this paragraph that states "the court may hold a hearing" duplicates language in Rule 54(g)(3), and that provision also will be removed. A separate provision, which Ms. Feuerhelm adapted from a federal rule, would allow the court to "decide issues of liability for fees before receiving submissions about the value of services." But the members felt that the court has this inherent authority without codifying it. Ms. Feuerhelm will conform the numbering of Rule 54(g)(5) to today's

discussion, and she will combine the provisions of Rule 54(g)(3) and 54(g)(4) as agreed to today.

*Rule 58 (“Entering judgment”).* The members discussed revisions in the current draft. The members agreed to delete the second sentence of Rule 54(a), which would generally require inclusion of a blank space in a form of judgment for entry of the amount of a fee award. Instead, Ms. Feuerhelm proposed, and the members agreed, that Rule 58(b)(3)(A) provide, except as permitted by Rule 54(g)(2), that a judgment may not be entered until claims for attorney’s fee have been resolved and are addressed in the judgment; and that a form of judgment must include a blank to allow the court to include an award of fees. (The timing of entering costs in Rule 58(b)(3)(B) is noted in the discussion regarding Rule 54 above.) The members also concurred with proposed language regarding objections to the form of judgment, except they requested that the word “respond” in Rule 58(a)(2)(B)(i) be changed to “reply.” They further agreed with the manner and timing of entering habeas corpus and other civil judgments, as specified in proposed Rules 58(b)(1) and (b)(2).

Regarding notice of the entry of judgment, as provided in Rule 58(c), a judge member requested restating the phrase “notice of entry of judgment must be provided by...” in the active voice to identify who provides the notice (e.g., “the court provides notice...etc.”) Ms. Feuerhelm proposed reversing the order of paragraphs (c)(1) [“form of notice”] and (c)(2) [“manner of notice”] to provide clarification on this point. The members agreed that the clerk must give notice regardless of whether a party also provides notice, and this is confirmed by language in Rule 58(c)(2)(B) which allows a party to give notice “in addition to notice under Rule 58(c)(2)(A)” [notice by the clerk.] After discussion, the members agreed to retain the first sentence of current Rule 58(e) as a stand-alone section of Rule 58.

*Rule 42.1 (“Change of judge as of right”).* Proposed Rule 42.1(a) provides, “The term ‘judge’ as later used in this rule refers to any judge, judge pro tem or court commissioner.” Does this allow for a change of a judge and a court commissioner, as provided in current Rule 42(f)(1)(A), or only one or the other? Typically, a commissioner who hears a case does so in the capacity of a judge pro tem. However, a commissioner usually hears post-judgment proceedings in the capacity of a commissioner. Ms. Feuerhelm will revise the draft to further clarify that it intends only one change of judge as of right, and not a change of one judge and one commissioner.

The members also discussed the time limitation provisions of Rule 42.1(c). Ms. Feuerhelm recommended that the most effective limitation would be based on a party’s first appearance in a case; this more than any other limitation best provides a “bright line” date. This limitation also avoids pitfalls that occur when a limitation is based on the date a case is set for trial, which varies among venues. The date-of-appearance limitation does have the drawback that a later-appearing defendant may discover that a co-defendant has already exercised that side’s right; but this anomaly also occurs under the current rule. The proposed rule further provides a time limit for exercising the right, ten days,

after an assignment first identifies a judge. One member suggested changing this to fifteen days, but the majority of members favored ten days, as provided by the current rule. Some counties (Pima, for example) don't send notices in individual cases when a judge rotates on to a calendar, so the rule requires that the party has ten days to exercise the right after receiving notice of the assignment.

Rule 42.1(d) specifies circumstances where the right may be waived. The word "or" will be deleted after the first four of six specified circumstances. A member referred to a Division One memorandum decision that appears to preserve a right notwithstanding that a judicial officer had previous involvement in an evidentiary matter. See 1-CA-SA 13-0180, which says: "To be sure, a 'new' judge heard the application -- most likely because of a general administrative policy designed to ensure speedy relief for protective-order applicants. But because the 'new' judge neither presided over a trial nor was permanently assigned to the case, there was no waiver under Rule 42(f)(1)(D)." Judges who have a waiver issue under the proposed rule might need to consider this decision.

The members also discussed Rule 42.1(e), which provides a process for an informal request, that is, when a party is unable to file a written notice of change of judge. Members agreed that this circumstance typically arises in open court. Rule 7.1 does not require a motion made in open court to be in writing. In recognition of that rule, the members agreed to delete Rule 42.1(e). However, a reference to an informal request is retained in Rule 42.1(d)(2).

The members also discussed Rule 42.1(f), and the right to a change of judge upon an appellate court remand. Members initially asked to substitute the word "decision" for "opinion," and the words "further proceedings" for "new trial." But after further discussion, members considered more extensive revisions that would cover situations when a case is remanded only on a minor issue, or only in part; in these situations, the members believe there should be no right to change of judge. Whether the right exists on appellate remand of a special action also should be addressed in the rule. Ms. Feuerhelm will prepare another draft of this section.

*Rule 42.2 ("Change of judge for cause").* Rule 42.2(e) adds a hearing procedure. On suggestion of a member, Ms. Feuerhelm will change the three day time provision in this rule to five days. Mr. Rogers suggested that the rule clarify, when "presiding judge" is first used in the rule, that the term refers to the presiding superior court judge "of that county." He also suggested that Rule 42.1 contain a similar clarification, and that these two rules allow for the presiding judge's "designee" to act upon a change of judge request. The members agreed that Rule 42.2 is not intended to cover circumstances when a judge recuses himself or herself.

During a short lunch break, the Chief Justice entered the room, thanked the members for their work on this project, and reminded them of its importance. Mr. Klain confirmed that the Task Force was on track to file its rule petition by January 2016.

*Rule 45.1 ("Interstate depositions and discovery").* At a previous meeting, the members discussed which Arizona rules should apply when seeking interstate discovery under this rule. Ms. Feuerhelm memorialized that discussion in the current draft of Rule 45.1(d). The draft reflects that Rules 30(a)(1), 30(a)(2), and 30(a)(3) [now 30(a)(4)] (respectively concerning depositions permitted, depositions less than thirty days after service of the summons, and compelling the deponent's attendance), do not apply; Rule 30(c)(2) regarding objections applies, with the caveat that counsel in the foreign action may object in the manner required to preserve objections in the forum state; and Rule 30(d)(1) concerning duration does not apply.

Mr. Klain disagreed with the determination regarding the inapplicability of Rule 30(d)(1). He believes that if an Arizona resident is deposed as a witness in a case pending in another state, the Arizona resident should have the protection afforded by Arizona's rule. He added that Arizona's rule allows extensions of a deposition's time limit for good cause. Another member took the contrary view; because the deposition will probably be used at trial, and because there is no time limit on the length of a witness' testimony at trial, the member believes there should not be a limit on the length of the deposition. A straw poll indicated that a majority of members shared Mr. Klain's view. Ms. Feuerhelm will revise the rule accordingly.

*Rule 48 ("Stipulations on jury size and verdict").* When this rule was discussed at a previous meeting, the workgroup was asked to consider whether the rule should allow parties to stipulate to a jury of more than eight; and whether the rule should specify how many jurors must decide on a verdict if the jury is less than eight. The workgroup thereafter concluded that further modifications to the rule were unwarranted. Ms. Feuerhelm noted A.R.S. § 21-102, which provides that a jury "shall consist of eight persons," but allows the parties to stipulate to a "lesser number." A statutory amendment would be required to allow a jury of more than eight members. The workgroup also saw no need to impose restrictions on the parties' ability to stipulate to the number of jurors who must agree on a verdict. The only change to Rule 48 agreed to at today's meeting was adding the words "exclusive of alternates who deliberate" in Rule 48(a) concerning the size of the jury.

*Rule 49 ("Special verdict; general verdict and questions; etc.").* Rule 49(f) concerning the "form of verdict" contains a reference to an "informal verdict." Workgroup 3 discussed whether there might be a term that is more appropriate than "informal verdict," or whether that phrase should be deleted from this rule. The workgroup concluded that "informal verdict" appears to be a term of art, which is "not broken," and there is no need to change it. In Rule 49(a) regarding a special verdict, the members agreed to strike the words "categorical or other" in the phrase, "submitting written questions susceptible of a ~~categorical or other~~ brief answer."

*Rule 51 ("Instructions to the jury; etc.").* Today's discussion of this rule focused on section (d), and in particular paragraph (2) concerning fundamental error. This provision provides in part that "a court may consider fundamental error in the instructions...." A

judge member noted that fundamental error may involve structural errors that occurred during the trial in matters other than instructions; he believes that the rule should not be limited to error in the instructions. He added that the concept of fundamental error is clearly defined; it simply does not come up as often in civil actions as it does in criminal cases. The members accordingly agreed to modify the draft rule as follows: "A court may consider a fundamental error ~~in the instructions~~ as allowed by law, even if the error was not preserved as required by Rule 51(d)(1)."

*Rule 55 ("Default; default judgment").* Ms. Feuerhelm recommended an addition to Rule 55(a)(2)(E) concerning an application for default. The addition requires the party seeking entry of default to attach to the application a copy of the Rule 4(g) proof of service. This item is mentioned on the "default checklist" used by Maricopa County superior court commissioners. That default checklist was included in the meeting materials, but the workgroup did not recommend adding this or any other default checklist to the civil forms. Instead, the workgroup suggested that the court use whatever checklist it finds useful, as long as it assures due process. Task Force members agreed with these recommendations.

*Rule 59 ("New trial; altering or amending a judgment").* The primary change in the current draft of this rule concerned the impact of a cross-appeal on a party who has accepted a remittitur. Revised Rule 59(f)(2) allows a cross-appeal without deeming it a revocation of acceptance of the remittitur. If the trial court's ruling on damages is affirmed, the acceptance remains in effect; and if it is not affirmed, the damages will be determined pursuant to the appellate court's disposition.

A judge member had a general comment on Rule 59. He suggested that "new trial" is a misnomer, because the rule has a broader scope than trials. For example, a Rule 59 motion might be directed to a summary judgment. The judge and other members suggested adding explanatory language to the rule to the effect that the rule applies "when a party seeks to vacate a judgment and secure further proceedings." He cautioned, however, about adding this provision as a new section of the rule, because the Arizona Rules of Civil Appellate Procedure include multiple references to various sections of Rule 59. He recommended that the provision be located within existing Rule 59(a). Ms. Feuerhelm will include this suggestion in her next draft.

**3. Workgroup #2: Rules 21 through 37.** Mr. Rogers presented two new rules on behalf of the workgroup, Rule 38.1 and Rule 7.2(h).

*Rule 38.1 ("Setting of civil actions for trial, etc.").* Mr. Rogers prepared a draft of Rule 38.1 that had been inadvertently omitted from prior materials. Rule 38.1 was included in the 2013 revisions to the rules on case management, and Mr. Rogers' proposed revisions therefore were primarily stylistic. However, he asked the members to consider the provisions of Rule 38.1(b)(4), which allows an adverse party to demand as a condition of postponement that witnesses' testimony be presented at trial by deposition. Members noted that postponements may be granted on the basis of a real hardship or for compelling reasons, and this requirement seemed unduly harsh, and possibly

unconstitutional. In light of the members' agreement on this point, Mr. Rogers will delete that provision.

The members also suggested an additional phrase for Rule 38.1(b)(1). It currently allows a postponement for three specified reasons, one of which is "the parties consent." The members recommended adding to this phrase the words "and the court approves." Some members also recommended adding a provision that the court could impose conditions on a postponement; other members disagreed because they felt this was inherent, and after further discussion, the members agreed that such a provision was unnecessary.

The members also discussed how the dismissal calendar in Rule 38.1(d) operates in medical malpractice cases, and how those cases are set for a jury trial. Previously, the "trigger" for dismissal of civil cases generally was the failure to file a motion to set. With the new case management rules, the trigger became the filing of a joint report and proposed scheduling order. But malpractice cases don't require the filing of a joint report. Instead, they require the setting of a Rule 16(c) comprehensive pretrial conference. However, some judges don't schedule these conferences, often because the parties themselves have agreed to case management deadlines. Therefore, tying the dismissal of a medical malpractice case to a conference that might not occur is impractical.

On the issue of jury trial, one member suggested that Rule 38(b) should include a presumption that a medical malpractice case will be set for a jury trial unless the parties stipulate to a bench trial; the member may propose specific language for consideration at the next meeting. Another member felt this presumption might have constitutional infirmities. A judge member recommended there be no differences in the manner that medical malpractice and other civil cases are set for trial. While this suggestion seemed meritorious, the members agreed that the Task Force was too far along in the process to consider such a substantial change at this time. Instead, the members agreed that the trigger for the dismissal calendar in medical malpractice cases would be the failure to submit a joint report/proposed scheduling order, and the failure to schedule a comprehensive pretrial conference. This will require parallel revisions to Rule 38(d)(1) ("placing an action on the dismissal calendar") and Rule 38(d)(2) ("dismissal").

*Rule 7.2(h) ("Good faith consultation certificate").* This rule has no correlate in the current rules. Mr. Rogers offered two alternatives in his draft of this new rule. One alternative would apply to counsel only, and the other would apply to any moving party, including a self-represented litigant. (Some of the current meet-and-confer requirements apply only to counsel; see, for example, Rules 11 and 37.) A few members preferred the alternative that applied only to counsel; they believe self-represented litigants will have difficulty complying with the meet-and-confer requirement. One member suggested it might exacerbate rather than resolve discovery issues in a case with a self-represented litigant. Other members had a contrary view. They believed that even if a self-represented litigant failed to adhere to the requirement, the pro se's motion would be denied without prejudice to resubmit it after complying with the requirement. A judge member agreed,

and stated that any discovery dispute brought to a judge, include one involving a self-represented litigant, should be preceded by a meet-and-confer attempt to resolve the issue. The majority of members favored the version applying the requirement to all parties.

The members also agreed to delete from the draft the words “~~discovery or sanctions~~ motion,” because it should apply to any motion with a meet-and-confer requirement. The members also agreed that the rule should include details regarding specific contacts or attempts to contact an opposing party. The rule accordingly will include a phrase about “certifying and demonstrating” those attempts.

**4. Workgroup #4: Rules 57.1 through 86.** Mr. Hathaway presented one new rule on behalf of workgroup 4.

*Rule 7.5 (“Joint filings”).* This new rule details the responsibilities of parties who must jointly file a document. Mr. Hathaway noted that those documents include a joint report, a proposed scheduling order, and a joint pretrial statement. Members agreed with the need for such a rule, and they supported the draft, with two exceptions. First, draft section (a) is superfluous in light of similar language in section (b). The members therefore agreed to delete section (a). Members also agreed with Mr. Rogers’ suggestion that the items in section (b) appear in list form. The members discussed other possible changes, such as placing this provision in Rule 16, and adding more explicit language concerning sanctions, but they ultimately decided that nothing additional was necessary.

**5. Comments.** The members considered the inclusion of comments in the proposed rules.

*Prefatory comment.* Mr. Klain said the Chief Justice believes a prefatory comment is often helpful when an entire set of rules has been restyled. A prefatory comment was included in a restyling of the Arizona Rules of Evidence, as well as the recent restyling of the Arizona Rules of Civil Appellate Procedure. Today’s meeting materials included staff’s draft of a prefatory comment to the proposed civil rules.

Mr. Klain reviewed the one-page draft prefatory comment with the members, and members then discussed a few revisions. First, members agreed that attorney’s fees should be written with an apostrophe followed by an “s,” which is the format preferred by Division One of the Court of Appeals. Second, the word “former” should be substituted for “prior,” for example, “former” rather than “prior” case law. Third, the fourth paragraph of the draft enumerates several substantive changes to the rules. Several members believe it would not be possible to detail all of the proposed substantive changes in this paragraph, and that a partial list of those changes could be misleading. They suggested that the text of this paragraph should be truncated by noting that the rules include substantive changes, without specifying them. Other members believed that major substantive and thematic changes should be mentioned in the prefatory comment. This issue will abide further discussion and drafting.

*Comments generally.* The members proceeded with a general discussion concerning comments to the rules.

First, Mr. Klain suggested that workgroups 2 and 4 follow the approach taken by workgroups 1 and 3 by identifying, with regard to their assigned rules, existing comments that should be retained, modified, or deleted. Comments in the current rules have various titles, such as “Court Comments,” “State Bar Committee Notes,” or simply “Comments.” Members agreed that any new comments should not be denominated as “Task Force Comments.” New comments should be expressed and promulgated as the authoritative voice of the Court.

With regard to new comments, Mr. Rogers proposed two templates in the meeting materials. The first template simply notes that a rule was restyled, and that no substantive changes were intended. Although a similarly phrased comment was included after many of the evidence rules in conjunction with that 2012 restyling, some members stated that doing this in the civil rules would be superfluous. They believe that adding a comment stating there were no substantive changes would be contrary to the Court’s directive to minimize the number of comments. Furthermore, there may be disagreements about whether a rule change was substantive or stylistic. The majority of members therefore agreed that the first template added little benefit and was unnecessary.

On the other hand, a comment noting substantive changes to a rule, without elaboration, might be helpful. Comments of this nature should be editorially neutral, and not provide a rationalization or justification for the rule. Mr. Rogers’ second template could be useful to discuss substantive changes to a rule. The members agreed that a good next-step would be for each workgroup chair to prepare a list of substantive changes in their assigned rules, which may need to be flagged for attention in a comment. A derivation table showing where particular rules were moved might also be useful.

The members agreed that regardless of where comments are now located in a rule – at the beginning, the end, or in the middle of a rule – all of the comments in the Task Force’s rule petition should appear consistently at the end of a rule. Mr. Rogers noted that a proposed implementation order should probably abrogate all of the existing comments, as well as the existing rules, and promulgate a new, comprehensive set of rules and comments. However, the publisher may still include in the new rules any historical notes it deems appropriate. If the Court desires to abrogate the historical notes, in addition to the comments, that should be addressed in the implementation order.

**6. Legislative proposal.** The members reviewed staff’s legislative proposal, which proposed a repeal of A.R.S. § 12-346 concerning costs, and an amendment to A.R.S. § 12-1242 concerning receivers. The Task Force intends to propose changes to the rules on costs and receivers in its petition, and the contemplated legislative changes would make those rule amendments consistent with these statutes. The proposals, which will be discussed in September with the Committee on Superior Court and thereafter with the

Arizona Judicial Council, anticipate a January 1, 2017 effective date, concurrent with the probable effective date of the civil rules.

A judge member noted that A.R.S. § 12-332 concerning taxable costs in the superior court does not include filing fees, which is an anomaly. Mr. Klain suggested speaking with Mr. Landau, the Court's government affairs officer, about this issue.

**7. Roadmap.** Ms. Feuerhelm's office is preparing a clean "vetting" draft. She advised that the draft should be ready in about a week. With the goal of widely distributing the draft, members then suggested individuals, groups, and entities that should receive a copy. Suggestions included the following: county attorney offices in Maricopa and Pima counties; the Arizona Prosecuting Attorneys Advisory Council; the Attorney General's office; the Arizona Association of Defense Council; the Arizona Association for Justice (formerly AzTLA); the Committee on Superior Court; the presiding superior court judges statewide; the Arizona Association of Superior Court Clerks; the Arizona Court Administrators Association; the Chamber of Commerce and Industry; the Goldwater Institute; Arizona law school deans; District Court Judge David Campbell; the Supreme Court's Commission on Access to Justice; and Arizona legal aid organizations (CLS, DNA, and SALA.)

The members generically identified other groups, including local bar associations; specialty bar organizations; and the sole practitioners section of the State Bar, and possibly other State Bar sections. Alternatively, and to be all-inclusive and not overlook any attorneys, the members considered an "e-mail blast" to State Bar members throughout Arizona. (However, particular organizations identified in the preceding paragraph should be individually contacted, rather than being informed through the blast.) The State Bar also may publicize the draft, and notices in other legal publications, such as the *Maricopa Lawyer* and the *Record Reporter*, may be beneficial.

Administrative Order 2014-116 should accompany the vetting draft when it's distributed. The vetting draft won't include comments to the rules, but it should include the prefatory comment.

Mr. Klain suggested that the Court post the vetting draft on its website; and that the Court provide a mailbox on that website that includes an e-mail address for submitting comments. The members agreed that November 15, 2015 would be an approximate deadline for submitting comments so the Task Force can consider those comments prior to preparing the "petition version" of the rules that it intends to file in early January.

Staff will take the lead on drafting the rule petition. However, Mr. Klain requests that each workgroup chair summarize the changes to their respective rules - including any substantive changes in the rule or if it is simply a restyling - for inclusion as separate sections of the rule petition. The petition should also explain the Task Force's methodology. The petition will include a clean draft of the rules. The Task Force will determine later whether the petition should also include a redline version or other

comparison version, and if so, the form of that other version. The petition will also need to address cross-references to the civil rules in other sets of Arizona rules of procedure. Mr. Jacobs and his staff will assist in identifying those cross-references.

Mr. Jacobs described how the CPPC will review the vetting draft. The CPPC has established four workgroups, which will review the respective work products of the four Task Force workgroups. Each CCPC workgroup will include a judge member. The CPPC workgroups will not include Task Force members, so those workgroups will have a “fresh look” at the proposed rules. In addition to having the clean vetting draft, Mr. Jacobs requested that Task Force workgroup chairs send him redline versions of the proposed rule changes for the CPPC’s review. The CPPC has two meetings before November 15, 2015 to complete their review. Mr. Klain highlighted the importance of the CPPC’s comments on the vetting draft. He suggested that Task Force workgroup chairs contact Mr. Jacobs if any substantive changes warrant the CPPC’s heightened attention. Mr. Klain acknowledged that the vetting draft is a work-in-progress, and Task Force members should anticipate additional changes.

The members discussed October 1 or 2 as a possible meeting date, but several members have conflicts with those dates. Mr. Klain suggested Friday, September 18 as an alternative, provided that a meeting room is available in the State Courts Building or offsite.

**5. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:45 p.m.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: September 18, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge (by telephone), Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Hon. Douglas Metcalf, Prof. Catherine O'Grady by her proxy Sara Agne, Brian Pollock, Greg Sakall, Dev Sethi, Hon. Peter Swann, Hon. Randall Warner

**Absent:** Michael Gottfried, Hon. Mark Moran

**Staff:** Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** Mr. Rosenbaum called the meeting to order at 10:02 a.m. This is the tenth meeting of the Task Force. Mr. Rosenbaum confirmed that the vetting draft has been completed, and he congratulated Mr. Rogers, Ms. Feuerhelm, and Ms. Jana Ferguson at Perkins Coie for the fine work they had done preparing that draft. Staff distributed the vetting draft to about two dozen stakeholder organizations on September 15, and on September 16, the State Bar of Arizona distributed the draft to about 18,000 members of the bar. Both distributions included a cover letter from the chairs that invited comments. The deadline for comments on the vetting draft is November 16, 2015. Federal judges David Campbell, chair of the Advisory Committee on the Federal Rules of Civil Procedure, and Neil Wake, chair of the District Court of Arizona's Local Rules Committee, also received the draft. Mr. Klain advised that the Chief Justice was informed of, and supports, the Task Force efforts to widely vet the draft.

Mr. Rosenbaum then asked the members to review draft minutes of the August 21, 2015 Task Force meeting. Members had no comments or corrections to the draft minutes.

**Motion:** A member moved to approve the August 21, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-10**

**2. Additional issues.** Mr. Rosenbaum and Mr. Klain reminded the Task Force that over the Labor Day weekend, they had made minor, non-substantive changes to an earlier version of the draft. Staff circulated these changes to the members on September 8, and the members concurred with the proposed changes. The chairs noted that the vetting draft now included experimental Rule 8.1, which applies to cases in the pilot commercial court.

Several additional issues have been raised in the interim:

*a. Electronic filing.* Rule 7.1(b)(I) in part provides that "only originals may be filed...." Mr. Rogers suggested that the rule should expressly acknowledge electronic filing, and that the rule should state, "Unless filing electronically, only originals may be

filed.” He asked whether other rules in the vetting draft are primarily applicable to paper filing and fail to adequately accommodate electronic filing. Mr. Rogers noted that the Arizona Rules of Civil Appellate Procedure have two separate rules, Rule 4.1 and Rule 4.2, which respectively apply to paper and electronic filing. One member believes adding definitions of paper and electronic filing to the superior court rules might be useful. Another member thought a new provision should be added to Rule 7.1 that might say something like, “these rules apply equally to paper and electronic filings.” Mr. Rogers further noted that a superior court rule also should cover the topics of electronic signatures and the courts’ electronic transmission of records. Ms. Agne and Mr. Sethi mentioned A.R.S. § 41-132, which contains requirements for electronic signatures for documents filed with a state agency, board, or commission, and this statute might be helpful in drafting a corresponding court rule.

**ACTION:** After further discussion, Mr. Rogers and Mr. Jacobs agreed to collaborate on drafting new provisions that would address electronic filing. Rules 6 and 7 both were mentioned as possible placeholders for the new rule, but another member believes that a rule dealing with electronic signatures should be located in Rule 11. A judge member questioned whether the current practice of electronically signing a court filing with “/s/” has the same solemnity that a paper signature would customarily have. Another practical issue is that multiple individuals might have access to a single electronic filing account. An admonition in the registration process, which informs registrants that opening the account renders the registrant responsible for every filing under that account, might be inadequate, especially because the admonition does not appear in the filing screens of the e-filing portal. The federal electronic filing system requires that the name on a filing match the name on the registration, and a similar provision should also be considered for any new Arizona rule.

*b. Maricopa Local Rule 2.23 (“Certification of electronically transmitted court records”).* A newly proposed local rule in Maricopa County concerns certification of electronically transmitted court records, as more fully detailed in pending Rule Petition number R-15-0031. The chairs asked the members to consider whether the Court’s adoption of this local rule would affect Rule 44(a) [“authenticating an official record”] of the vetting draft.

Members are critical of electronically transmitted court records from another jurisdiction without some certification that the records are genuine. But Mr. Nash noted that this local rule would be promulgated under the authority of A.R.S. § 12-282(D), which allows the clerk to electronically transmit court records to an Arizona officer, board, or commission, provided that the records are certified as a “full, true, and correct copy of the original...” Mr. Nash added that the clerk routinely transmits court records to the Department of Corrections under authority of this statute. The members discussed adding a new provision to Rule 44(a) that would govern electronic transmission of records from one Arizona court to another Arizona court. However, by a straw vote of 7 to 3, a majority of the members believed there was no need to replicate the substance of the statute within the content of Rule 44(a).

*c. Rule 26.1, and disclosure of impeachment materials.* Mr. Jacobs proposed adding to the disclosure duties of Rule 26.1(a)(8) the words “including any material to be used for impeachment.” The State Bar’s Civil Practice and Procedure Committee, which Mr. Jacobs chairs, concluded that a significant number of counsel still have an erroneous belief that they have no duty to disclose impeachment materials. His proposed addition to Rule 26.1(a)(8) would dispel that misperception. The members considered adding the qualifying word “only” for impeachment, but agreed with Mr. Jacobs that this was a disingenuous distinction.

**MOTION:** A member moved to adopt Mr. Jacobs’ proposed amendment, the motion received a second, and it passed unanimously. **TF.ARCP: 2015-11**

*d. Rule 23(h) (“Class actions: Attorney’s fees and nontaxable costs”).* Rule 23(h) of the vetting draft contains a provision that allows the court to refer issues related to the amount of an attorney’s fee award to a special master. But at their last meeting, Task Force members agreed to delete a more general provision in proposed Rule 54(g) that would have allowed the court to refer issues concerning attorney’s fees to a special master. Ms. Feuerhelm therefore raised the question of whether the Task Force still wishes to retain a provision that would allow the court in a class action to refer attorney’s fee controversies to a special master.

One of the chairs noted that the corresponding federal rule included a similar provision, but said that in his experience federal judges rarely used it, and he did not see a need for a special master option in this section of Arizona’s class action rule. A judge member added that there are few class actions filed in the superior court of Arizona. Another judge member thought that attorney’s fees in class actions often involve issues of public policy, and judges, not special masters, should make findings and conclusions concerning fees. But before deleting the provision, Mr. Klain suggested obtaining input from practitioners in this area. **ACTION:** Ms. Feuerhelm will follow up on this suggestion.

*e. Rule 80(f) (“Lost or destroyed records”).* This section, although previously drafted, inadvertently had been omitted from a prior draft version of the rules. Mr. Hathaway explained that it now had been added to the vetting draft, with conforming stylistic changes. The members had no changes to this addition.

*f. Comments to the rules.* The workgroup chairs have obtained, or are in the process of obtaining, input from their respective workgroup members concerning comments to the rules. Mr. Klain recommended that the workgroups have a unified approach to the comments, rather than four different ones. Discussion ensued.

As a preliminary matter, Mr. Klain thought that no rules should include a comment to explain that changes to a rule were merely stylistic (also referred to as the “no comment-comment.”) This type of comment is repetitive and takes up space without adding significant value. But while the Court generally disfavors comments, some comments greatly assist practitioners. He mentioned in particular a comment to Rule

6(e) regarding calculating time, and a new comment proposed by the Task Force concerning Rule 16.

Yesterday, Mr. Rogers and Ms. Feuerhelm presented the vetting draft at a firm's lunch meeting. Mr. Rogers advised that the first inquiry at this presentation asked whether the final version would include comments describing substantive changes to the rules. Mr. Rogers suggested today that comments describing substantive changes would mitigate counsels' apprehension about missing an important change as they transition to the new rules. Mr. Rosenbaum believes that comments of this nature will only have temporary value. In several years, when counsel have been accustomed to the new rules, those comments won't be useful. A bar magazine article that outlines substantive changes might have more value to practitioners than dozens of these comments. But one member would include substantive comments in the rules, with a caveat that the Civil Practice and Procedure Committee file a rule petition a few years hence to remove them. Another member said that comments would assist counsel in doing research by demarcating when a rule changed relative to an appellate court decision.

Mr. Klain suggested that practitioners would find it helpful if the rules included a table that showed provisions that formerly had been in a different rule. This would save counsel the time of trying to locate the new rule, and inform them the provision had been moved but not deleted. The table should be sufficiently detailed to include sections of a rule that had moved. **ACTION:** The members unanimously agreed that the rules should include this table. Mr. Klain then took a straw poll on the question of whether the rules should include at least some comments, and on that question the members again concurred unanimously. The next issue was establishing the purpose of comments that might be included with the rules.

A judge member believed that a comment might be necessary to explain the practical meaning of a rule, but not the work or the reasoning of the Task Force in proposing the rule. But on reconsideration, neither the judge member nor the other members thought that explaining the "practical meaning" of a rule was the appropriate standard for including a comment. One member suggested that comments should alert users to a significant change in a rule (referred to as a "signpost comment.") Another judge member hypothesized that regardless of what distinctions the Task Force discusses at today's meeting, the workgroups will use their own individual standards for proposing comments.

Mr. Klain then took another straw poll. This poll, by a two-to-one margin, indicated that while the members generally did not support signpost comments, they did favor some, albeit limited, comments. Mr. Klain and Mr. Rosenbaum agreed that the value of the Task Force's prefatory comment could be enhanced if it noted, without detailing, a dozen or so major substantive changes, for example, new disclosure requirements in Rule 26.1 regarding electronically stored information. **ACTION:** They asked that workgroup members compile major substantive changes for possible inclusion as a bullet-point list in the prefatory comment. But regardless of the way the Task Force

chooses to flag major substantive changes in the new rules, the chairs emphasized that comments proposed by the workgroups should be limited in number, should have valuable content, and should be truly explanatory and useful. Mr. Rogers added that although comments might be limited in number, the justices will still expect to have a comprehensive explanation of rule changes in the Task Force's rule petition.

*g. Other comments concerning the vetting draft.* The chairs invited other remarks regarding the vetting draft, and members discussed the following two.

- Rule 5(f)(2)(B): This provision concerns "documents not to be filed." Subpart B, which is entitled "discovery documents," includes a reference to disclosure statements, but the title of subpart B is "discovery documents." Mr. Jacobs believes that disclosure statements are not discovery documents, and the title of the subpart should therefore be "disclosure and discovery documents." Although the members did not all agree with Mr. Jacobs' premise, they nonetheless unanimously agreed to change the title of subpart B as he suggested.
- Rule 7.2(f): This rule concerns "limitations on motions to strike." Mr. Klain suggested that while the rule is well-intentioned (it's designed to cut down the volume of motions to strike), the rule as phrased is not clear. A judge member suggested that motions to strike, except for motions to strike a pleading, should be altogether eliminated. Other members thought that motions to strike were useful in situations where something was included in a motion that was not authorized by a rule; or when sensitive data was included in a filing. Another judge added that some motions to strike are more accurately motions *in limine*, or motions to preclude evidence, but these motions would be filed even if Rule 7.2(f) was deleted. Because Rule 7.2(f) was recently adopted, the consensus of the Task Force was to leave it as is.

The members agreed the pending rule petition should identify changes made to the vetting draft so stakeholders will not have to reread the entirety of the draft rules when they are filed with the petition. **ACTION:** Staff will maintain a list of changes to the vetting draft, and Ms. Feuerhelm will track these changes in her master draft of the rules.

**3. Mailbox for comments.** The Administrative Office of the Courts has established an Outlook mailbox ([CivilRules@courts.az.gov](mailto:CivilRules@courts.az.gov)) as a repository for comments concerning the vetting draft. **ACTION:** Staff has access to the mailbox, and the chairs directed staff to send comments to the members as they accumulate. The workgroups should do the initial screening of the comments and report back to the Task Force on those that are significant. Staff's emails to the members will note the workgroup or workgroups that should pay particular attention to a comment.

**4. Draft rule petition.** The meeting materials included a draft rule petition, and Mr. Klain reviewed the draft petition with the members. He noted Part V of the draft, which is a reserved for text from the workgroup chairs. He explained that this is where content that might have gone into “signpost” comments should be located. Every rule should be included in Part V, and if the only change to a rule was restyling, that should be stated. He also noted that the concluding pages of the draft petition request a “staggered” comment period.

Although Part V of the petition would include the rules sequentially, the workgroups were not always assigned sequential rules. Mr. Klain advised that the final draft will integrate the workgroups’ work products so that the rules are presented in sequence. Mr. Klain also suggested that the title of Part V be changed from “substantive changes,” because not all of the changes discussed in this portion of the petition will be substantive. Mr. Rogers observed that the petition will have two distinct audiences (practitioners and justices) who have different interests. While practitioners will want to know what changed in a rule, the justices will also want to know why a change was proposed. Because staff anticipates that this part of the petition will be voluminous, he suggested moving the rule-by-rule details to an appendix, or to a table in the appendix. Members made other suggestions, including a section-by-section narrative, a list of rules with no substantive changes, or the uniform use of explanations such as “to follow the federal rule,” or “no substantive change.” The format for the next draft of the rule petition will abide preparation of content by the workgroup chairs.

**5. Roadmap.** The members agreed to set the next Task Force meeting on October 30. The workgroup chairs will have their materials for that meeting to staff by October 23. Stakeholder comments on the vetting draft are due November 16, so the November meeting is scheduled for November 20. The December meeting, while not yet set, will focus on “fine-tuning” the materials for the rule petition filing.

Mr. Jacobs advised that the Civil Practice and Procedure Committee has the vetting draft, and it is making progress on its review. He expects that Committee will provide partial, preliminary comments to the Task Force in early October.

Mr. Rogers noted that the Task Force needs to consider other sets of rules impacted by its proposed changes to the civil rules. The Civil Practice and Procedure Committee will look at this issue, but the Task Force should too, preferably by someone who is well-versed in technology and legal research. Mr. Jacobs volunteered to look for suitable individuals. The Task Force also needs to check internal cross references in the vetting draft.

**6. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 12:45 p.m.

**Task Force on the Arizona Rules of Civil Procedure**  
**State Bar of Arizona, 4201 North 24<sup>th</sup> Street, Phoenix**  
**Meeting Minutes: October 1, 2015**

**Members attending:** William Klain (co-chair), Pamela Bridge, Jodi Feuerhelm, Michael Gottfried, Andrew Jacobs, Hon. Michael Jeanes, Brian Pollock, Greg Sakall, Dev Sethi (by telephone), Hon. Peter Swann, Hon. Randall Warner

**Absent:** David Rosenbaum, Rebecca Herbst, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady

**Staff:** Mark Meltzer, John W. Rogers

**Also present:** Members of the State Bar's Civil Practice and Procedure Committee

**1. Call to order, call to the public.** Mr. Klain called the meeting to order at 4:28 p.m. He announced that this Task Force meeting will be held concurrently with a meeting of the State Bar's Civil Practice and Procedure Committee ("CPPC"), on which eleven Task Force members serve. Mr. Klain advised that the purpose of today's Task Force meeting is to consider CPPC comments on the vetting draft. He noted that the Task Force will not take action today on these CPPC comments, and any votes by Task Force members who are present today would be in their capacity as members of the CPPC.

Mr. Klain then made a call to the public, to which there was no response. Mr. Klain proceeded to turn the floor over to Mr. Jacobs, who serves as chair of the CPPC, and Mr. Jacobs called the CPPC meeting to order at 4:30 p.m.

Mr. Jacobs noted that the CPPC meeting agenda is in three parts: a consent agenda, a "short" agenda, and a "long" agenda. Each item on these agendas require the CPPC's consideration of a rule amendment proposed by the Task Force's vetting draft, or an issue arising from that draft. These three agendas cumulatively have dozens of items, and Mr. Jacobs indicated that he would like the CPPC to address as many of these items as possible during today's two-hour meeting.

**2. Consideration of the CPPC's consent agenda.** The consent agenda included the following items (the referenced "rules" are the Arizona Rules of Civil Procedure):

1. **Rule 11**, the Task Force's response to changes proposed by the State Bar's rule petition R-15-0004;

2. **Rule 26.1(a)(8)**, the Task Force's adoption of a CPPC recommendation that expressly requires disclosure of materials used for impeachment;

3. **Rules 33, 34, 36**, the Task Force's response to a CPPC recommendation that limits on certain discovery requests may not be exceeded "unless the parties agree or the court orders otherwise;" and

4. **Rule 38(b)**, concerning trial setting practices in medical malpractice cases.

By consent and agreement of its members, the CPPC approved its consent agenda.

**3. Consideration of the CPPC's "short" agenda.** The "short" agenda included the following items:

5. *Rule 4(f)*, distinguishing waiver and acceptance of service. Approved by the CPPC.

6. *Rule 5.2*, currently, as modified in proposed *Rule 5.1(c)*, dealing with limited scope representation. Approved by the CPPC.

7. *Rule 10(d)*, which is proposed *Rule 5.2* of the Task Force draft, regarding the form of documents filed with the court. Approved by the CPPC, subject to an alternative version included in the CPPC materials that had been proposed by a Task Force workgroup, but not yet considered by the full Task Force. The alternative version includes additional provisions regarding electronic filing. A CPPC member also requested the Task Force to specify a 13-point font size; see further Maricopa County Local Rule 2.16 ("size of print").

8. *Rule 7.2(h)*, a new provision concerning a certification of "good faith" when a good faith consultation is required by other rules. Approved by the CPPC.

9. *Rule 6(d)*, which is proposed Rule 7.4 of the Task Force draft, and which will become Rule 7.3 in the next Task Force draft, regarding orders to show cause. Approved by the CPPC.

10. *Rule 7.5*, a new rule proposed by the Task Force regarding the parties' obligations when preparing a joint filing. Approved by the CPPC.

11. *Rule 7.5*, and the issue of whether this rule should be moved to Rule 5.1 ("duties of counsel"). CPPC members agreed that moving the provision was unwarranted because it would apply to self-represented litigants as well as counsel.

12. *Rules 11(b) and (c)* regarding verifications, and moving language concerning verifications generally to Rule 80(g). Approved by the CPPC.

13. *Rule 17(d)*, which would include a provision moved from Rule 25(e)(2) concerning actions against public officers. Approved by the CPPC.

14. *Rule 23(1)(c)*, concerning certification of class actions. A member of the CPPC opposed the proposed language because it failed to include certain requirements specified in A.R.S. § 12-1871. Mr. Pollock explained why the Task Force omitted those requirements from the draft rule. The Task Force version was approved by the CPPC, but conditional on the Task Force's consideration of adding the statutory requirements into the content of the amended rule.

15. *Rules 26(b) and 26.1(a)(10)*, which deal with disclosure of insurance agreements and related documents, such as reservation of rights letters. The CPPC had a lengthy discussion of this item, which concluded with two recommendations to the Task Force. First, regarding Rule 26.1(a)(10), paragraph A, the CPPC by motion

recommended changing the words “the existence and contents of the insurance policy, [etc.]” to “the existence and a copy (or the substance if no copy is available) of the insurance policy, [etc.]” Second, regarding Rule 26.1(a)(1), paragraph B, the CPPC by motion recommended changing the words “the existence and contents of any disclaimer, [etc.]” to “the existence, basis, and a copy of any disclaimer, [etc.]”

16. *Rule 27*, concerning pre-litigation discovery. In response to questions concerning the appointment of counsel for pre-litigation discovery, Mr. Pollock advised that the current rule already provides for this; the Task Force draft simply adds a cost-shifting provision for appointed counsel. The CPPC then approved the proposed draft, but asked that the Task Force consider the following two recommendations. First, that section (a) should contain the words shown with underline: “A person who wants to perpetuate testimony, including his own...” Second, that section (a)(2) (“hearing required”) provide for an expedited hearing, including one without notice, based on exigent circumstances.

17. *Rule 30(c)(2)*, a provision concerning objections at depositions. Approved by the CPPC.

18. *Rule 33(b)(2-3)*, regarding answers and objections to interrogatories. Approved by the CPPC.

19. *Rule 34(b)(3)(C)*, concerning objections to requests for production. Approved by the CPPC.

20. *Rule 35(a)*, expanding those persons who may conduct independent medical examinations. CPPC members were split on the Task Force draft. Some supported the draft, which aligns the Arizona rule with its federal rule counterpart. Others were reluctant to broaden the categories of professional persons who could conduct these exams. A majority of CPPC members approved the Task Force draft, but only with the addition that the rule add a presumptive limit of one physical exam, one mental exam, and one vocational exam.

21. *Rules 39, 39.1, and 40*. Ms. Feuerhelm explained that the content of these three rules was folded into two rules, and Rule 39.1 was deleted. Approved by the CPPC.

22. *Rule 52*, where the Task Force diverged from the federal rule requirement that findings be made in all nonjury trials, and instead require that findings and conclusions only be made in those cases if requested before trial. Approved by the CPPC.

23. *Rule 56*, the summary judgment rule as restructured by the Task Force and which would include certain factors required by case law for relief under current Rule 56(f). Approved by the CPPC.

**4. Consideration of the CPPC’s “long” agenda.** The “long” agenda included the following items:

24. *Rule 16(d)(4)*, regarding judicial determinations of whether the parties should be required to provide reports from expert witnesses, and if so, the content of those reports. A judge member of the CPPC noted that there had been recent amendments to this rule, and requested that if the current amendment is adopted, that the rule be allowed a future period of stability. The proposed change was approved by the CPPC, but with a significant number of members (about one-fourth) opposed.

25. *Rules 26(b)(1)(C) and 16(a)(3)*, which deal with the subject of proportionality, but which use the alternate word “appropriate” rather than “proportional” (i.e., Rule 16(a)(3) says that discovery should be “appropriate to the needs of the action....”) The use of “appropriate” rather than “proportional” diverges from corresponding federal syntax. After considerable discussion, the language proposed by the Task Force was approved by CPPC, but there were a few votes opposed.

26. *Rule 26.1(b), 34(b)(3)(E), and 37(g)* concerning electronically stored information. Mr. Pollock advised that Rules 26.1(b) and 34(b)(3)(E) adopt an approach used in recent experimental Rule 8.1 for cases in the pilot commercial court. Mr. Rogers explained that Rule 37(b) provides clarity to practitioners about pre-litigation duties to preserve that are already established by case law. Further consideration of this item was deferred to the next meeting.

**5. Adjourn.** The Task Force meeting adjourned at 6:28 p.m., concurrently with adjournment of the CPPC meeting. The CPPC will reconvene on November 12, 2015 to discuss the remaining items on its October 1 agenda.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: October 30, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Hon. Douglas Metcalf by his proxy Chas Wirken, Hon. Mark Moran (by telephone), Prof. Catherine O’Grady by her proxy Sara Agne, Brian Pollock, Greg Sakall (by telephone), Dev Sethi, Hon. Peter Swann

**Absent:** Michael Gottfried, Rebecca Herbst, Hon. Randall Warner

**Staff:** Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** The Chairs called the meeting to order at 10:30 a.m. This is the twelfth meeting of the Task Force. The eleventh meeting was held concurrently with a meeting of the State Bar’s Civil Practice and Procedure Committee (“CPPC”) on October 1, 2015.

Mr. Rosenbaum then asked the members to review draft minutes of the September 18, 2015 and October 1, 2015 Task Force meetings. Mr. Nash corrected two sentences at page 2 of the September 18 minutes, as shown by the following strikethrough: “But Mr. Nash noted ~~that this local rule would be promulgated under the authority of A.R.S. § 12-282(D), which allows the clerk to electronically transmit court records to an Arizona officer, board, or commission, provided that the records are certified as a ‘full, true, and correct copy of the original....’~~ Mr. Nash added that the clerk routinely transmits court records to the Department of Corrections ~~under authority of this statute.~~” Mr. Nash also corrected a typographical error [“choses” should be “chooses”] at page 5 of the draft. Members had no other comments or corrections to either set of draft minutes.

**Motion:** A member moved to approve the September 18, 2015 and October 1, 2015 minutes, another member made a second, and the motion passed unanimously.

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**2. Rules concerning filing.** During the September 18 meeting, Mr. Rogers and Mr. Jacobs agreed to collaborate on drafting new provisions that would address electronic filing. Along with a few other Task Force and CPPC members, they prepared proposed amendments to Rules 5, 5.1, 5.2, 6, 7.1 to 7.5, 8, 11(a), 58, and 80, which are included in the meeting materials. (Redlines in today’s meeting materials are to recent Task Force versions, not to the current rules.) Mr. Rogers advised that these amendments accommodate the filing of court documents electronically as well as in paper form. Some of these amendments derive from Supreme Court administrative orders (e.g., 2015-32) concerning electronic filing, while other amendments are renumbered or reorganized provisions of the vetting draft.

The members discussed proposed Rule 5.1(a), which in part allows a judge to “permit a document to be filed with the judge, who must note the filing date on the

document and then transmit it to the clerk for inclusion in the clerk's record." Filing with a judge is problematic because, among other things, the judge does not keep the record, and one member suggested adding language to this rule that judge filing is "not preferred." Another member recognized that the rule would generally be applicable to documents filed in the courtroom, and proposed adding the words "in open court" to the rule. Mr. Nash noted that self-represented litigants may send copies of handwritten documents to a judge that are difficult to distinguish from originals; does the judge file those? Does the judge file emails he or she receives from counsel during trial concerning such matters as jury instructions? The draft requires the judge to note the filing date on the document, but will judges actually do this? A member suggested, and the other members agreed, that the rule should provide that "a judge may permit documents to be given to the judge for filing with the clerk." Accordingly, the judge will have a responsibility to transmit documents to the clerk, and the clerk will then be responsible for noting the time of filing; the filing will be deemed to occur when the document was received by the judge.

Mr. Rogers noted that proposed Rule 5.1(b) [*"effective date of filing"*] is analogous to new provisions in the Arizona Rules of Civil Appellate Procedure ("ARCAP"). A member commented that proposed Rule 5.1(d) [*"compulsory arbitration"*] was out-of-place in Rule 5.1, and the members agreed to move the provision to the end of Rule 8.

The members discussed the "*electronically filed documents*" provisions of Rule 5.2(c). Proposed Rule 5.2(c) included alternative text choices. One choice would permit the filing of text searchable documents in ".pdf, .odt, or .docx format or other format permitted by Administrative Order." The alternative was simply a "format permitted by Administrative Order." There were also similar alternatives for proposed orders, except that proposed orders could not be submitted in .pdf format. To avoid the need for parties to search administrative orders, the members favored the alternative that referred to specific formats. A judge member recommended that all court filings, other than proposed orders, be in .pdf format, because Word documents are modifiable, can conceal footnotes, and, he believes, are generally not as reliable as a .pdf. Based on a straw poll, the members agreed that the rule should express a preference for a .pdf format for all filings except proposed orders.

The members also discussed the "*document format*" provisions of proposed Rule 5.2(b). The current version of this rule requires documents to use "an easily readable 12-point font." Several members suggested that 13-point font was more easily readable, and it's also used in federal court filings. However, a 13-point font would require an increase in page limits that might be established by local Arizona rules. Task Force members believe that if a statewide rule specifies a font-size, it would prevail over any contrary local rule. Accordingly, the members agreed that the proposed amendments will specify a 13-point font. The page limits contained in Rules 7.1 and 56 will be modified to be consistent with page limits provided by the local federal district court rules.

Rule 5.2(c)(2)(B) concerns the attachment of “*official records*.” For consistency with other Task Force amendments, this rule will allow those records to contain an official stamp or seal of authenticity “or their equivalent.” One member suggested that the rule amendments include an analog to ARCAP 13(f) (“*references to case law*”). Although the majority of members believe the appellate rule is a “best practice” to follow in preparing superior court documents, they did not believe it was necessary to include such a provision. Mr. Rogers noted that some of the “5.point” rules were renumbered as a result of the recent revisions. He also stated that the words “and parties” have been added to the title of Rule 5.3, which is now “*duties of counsel and parties*.”

The members agreed to add the words “filed by the clerk” to the most recent version of Rule 6(d) (“*minute entries and other court-generated documents*”). Mr. Klain asked whether the second sentence of Rule 6(d) should clarify that the time period for taking action following entry of a court-generated document begins to run not on the date of filing by the clerk, but on the following day. Mr. Rogers will review the language and revise it for clarity, if necessary. Mr. Rogers further noted the renumbering of certain “7.point” rules, and other changes to Rules 8, 11, and 80. Although the members had previously considered the authentication of electronic signatures similar to the manner provided by A.R.S. § 41-132, Mr. Rogers did not believe the civil rule amendments required verbatim adoption of these statutory provisions. He added new provisions to Rule 80 that he extracted from former Supreme Court Rule 124. The members had no other comments concerning his revisions to these rules.

### **3. Workgroup changes to the vetting draft.**

**Workgroup #2.** Workgroup 2’s revisions were precipitated by comments made at the October 1 CPPC meeting, as well as the workgroup’s further review of its own work product. Mr. Pollock advised that he just recently received comments from the CPPC workgroup assigned to workgroup 2’s rules, and he anticipated workgroup 2 would be making additional changes.

In Rule 23(c) (“*certification order, etc.*”), the workgroup added two requirements for class certification provided by Arizona statute. Mr. Pollock noted that state court judges infrequently have class actions, and they would benefit from guidance in the rule concerning the required process. Mr. Rosenbaum asked whether the word “evidence” was necessary in the requirement that the order “describe the evidence,” because the court might not have received evidence at that stage of the proceeding. Mr. Pollock replied this language was included on recommendation of practitioners in this area. One member noted that to be consistent with the statute, the rule should state “all evidence.” Pursuant to discussions at previous meetings, the current version of Rule 23(h) deletes a reference to special masters for resolving attorneys’ fee issues.

Workgroup 2 recently changed Rule 26 (“*general provisions governing discovery*”) to improve the rule’s organization. The members discussed substantive revisions to provisions on payment of expert witness fees for responding to discovery and preparing for deposition. Mr. Pollock advised that these revisions derive from comments to the

existing rule. But one member thought the proposed language might facilitate experts charging “punitive rates” (i.e., a rate for depositions that’s higher than the expert’s customary rate), while depriving the court of tools to promote fair payment. One member suggested that the court should consider expert fee fairness issues at a Rule 16 conference. The consensus of the members was to retain the workgroup’s proposed language in subpart (ii), but to add a qualifier of “reasonableness.” The members had no consensus on adding text concerning the time when costs charged by a consulting expert should be paid.

The changes to Rule 26 also included two new sentences in the provisions regarding a non-party at fault (“NPAF”). The new language requires a party to supplement and correct discovery responses concerning a NPAF. Mr. Klain had concern that these sentences might allow the naming of a new NPAF after a statute of limitations had run. Other members took the view that a notice of NPAF is a discovery document rather than a pleading, and they did not share Mr. Klain’s specific concern. However, after further review of the NPAF provision, the members concurred in moving the workgroup’s two new sentences so they precede rather than follow the last sentence of the current version (the last sentence begins with the words, “the trier of fact may not allocate....”)

Rule 26.1(a)(10) concerning insurance agreements was revised as recommended by the CPPC. Rule 27 (“*discovery before an action is filed or during an appeal*”) was also revised in light of the CPPC’s suggestions. Among the CPPC’s suggestions was that the rule allow a person to perpetuate, in addition to the testimony of others, “his or her own” testimony. Another revision permits the court for good cause to dispense with a hearing that would otherwise be required under this rule, i.e., on a showing of exigent circumstances that do not allow time for a hearing. Mr. Pollock also noted an amendment to a sanctions provision in Rule 30 (“*depositions by oral examination*”) that would authorize the court to impose an appropriate sanction for “an unreasonable refusal to agree to extend the deposition beyond 4 hours.” The origin of this clause was a comment to the current rule. For consistency with the federal rule, the Task Force had proposed that a Rule 35 examination (“*physical and mental examinations*”) could be conducted by a “suitably licensed or certified examiner,” but a number of CPPC members objected to this language and workgroup 2 therefore reverted to the original language of “physician or psychologist.” Finally, Mr. Pollock noted a change to Rule 38.1 (“*setting of civil actions for trial, etc.*”), which addresses the situation of consolidating a trial on the merits with a hearing on a preliminary injunction.

**Workgroup #3.** A variety of changes had been proposed by a CPPC workgroup chaired by Mr. Wirken; some of these changes were minor or stylistic. Ms. Feuerhelm advised that workgroup 3 recommended the adoption of a number of those changes. Among them are changes (shown in the meeting materials) to:

- Rule 11 (which will be merged with changes Mr. Rogers proposed earlier today)

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- Rule 38 (which now provides that a party may “obtain” a jury trial by filing a “demand,” rather than “demand” a jury trial by filing a “demand”)
- Rule 39
- Rule 40
- Rule 41 (including non-substantive reorganization of section (b) regarding involuntary dismissal)  
Rule 42.1 (including non-substantive reorganization of the “waiver” section; and if the noticed judge is the only judge in the county, allowing the judge to reassign the case)
- Rule 42.2 (including retitling the first section “definitions” rather than “generally”)
- Rule 43
- Rule 51
- Rule 56 (in section (c), that if requested, the court “set oral argument” rather than “hold a hearing”)

An issue arose under Rule 45.1(b) concerning whether a foreign subpoena presented to an Arizona clerk “must” or “should” include the phrase “for the issuance of an Arizona subpoena [etc.]” below the case number. A foreign subpoena that fails to include the language might not be alterable to add the omitted words, so “should” would allow clerks to still issue subpoenas, notwithstanding the omission. The members generally agreed with this change, conditioned on Mr. Nash discussing it further with Mr. Jeanes.

The members also discussed Rule 47 (“*jury selection, etc.*”). The rule now includes a reference to the court “clerk,” but it makes no references to terms used in Title 21, such as “jury manager” or “jury commissioner.” See A.R.S. § 21-201. Members considered adding a definition of “clerk” that would encompass these other titles, but most members preferred to simply retain the word “clerk,” which has been used for decades without problems.

Rule 49(e) deals with “procedures on returning verdict.” Workgroup 3 thought the process described in the rule was awkward. It therefore proposed amending the rule by making certain deletions and by adding a cross-reference to polling the jury. The members agree to these changes.

Ms. Feuerhelm advised that the workgroup also considered a comment submitted by Commissioner Rees regarding the default judgment provisions of Rule 55. In Rule 55(a)(2)(E), the workgroup recommended deleting the words (shown by strikethrough) in a provision regarding attachment of a copy of a proof of service “establishing the date and manner of service of ~~the complaint~~ on the party claimed to be in default.”

The notice provision of the current draft version of Rule 55(a)(3) now states that “notice must be promptly provided....” The members agreed that “promptly” is not a very specific adverb; the word “whereabouts” in the current draft version is also vague.

The members discussed scenarios where an individual's home or business address was unknown, but the individual might be served at a public location; or whether notice could be provided through social media if that was the only, or the most effective, way of contacting the person. The members reviewed the approach to notice used in the default provisions of Rule 141 of the Justice Court Rules of Civil Procedure. Some members preferred the straightforward approach adopted by Rule 141, and its non-reliance on such ambiguous terms as "promptly" and "whereabouts." Ms. Feuerhelm will review this further. The members did not broach the subject of whether notice should be given before a default hearing, and if so, what notice, as this issue is more within the province of the CPPC.

In response to a comment from Judge Brain, the workgroup amended two sections of Rule 59 ("*new trial, etc.*") by adding the words "this deadline may not be extended by stipulation or by court order." A Task Force discussion of Rules 54 and 58 was deferred pending receipt of additional comments from the CPPC.

**Workgroup #4.** Mr. Hathaway reported that workgroup 4 is addressing comments from the CPPC and from Judge Mullins. The CPPC memo he received included some suggestions concerning Rules 59 and 65, which are assigned to workgroup 3, and although his materials today include these rules along with some non-substantive amendments, workgroup 3's draft is the primary one. Proposed revisions to other rules in his materials are minor and also non-substantive, and the revisions include some changes to cross-references. Mr. Nash's response to the comment from Judge Mullins about lodging arbitration orders is included in today's meeting materials. Mr. Hathaway intends to schedule a telephone conference with workgroup 4 members to have a further discussion of comments before the next Task Force meeting.

**4. New and retained comments to the civil rules.** The members discussed which comments to the existing civil rules should be retained or deleted, as well as the addition of new comments.

**Workgroup 1.** Mr. Jacobs advised that workgroup 1 would eliminate about seventy percent of the existing comments to the workgroup's assigned rules, as shown in a table included in the meeting materials. The workgroup proposes deleting the majority of comments to these rules, and it is open to deleting even more. The workgroup currently has no new comments.

**Workgroup 2.** Mr. Pollock stated that workgroup 2's materials in today's meeting packet show retained and new comments. For example, the materials show two retained comments for Rule 16, of the many that are now in this rule, and the addition of one new comment. A comment was retained if it was helpful to judges and practitioners, and yet its substance did not properly belong in the rule; the retained comment to Rule 25 is illustrative. Also,

- The workgroup proposed retaining comments that were the result of compromise. (Rule 26(d) arose from a compromise concerning confidentiality

- orders, and Rule 16 was a compromise between various counties on case management procedures.)
- The workgroup discussed moving portions of a comment to Rule 30 into the text of that rule, but instead kept the comment in order to abstain from a current controversy about paying expert fees to treating physicians for their deposition testimony.
  - Rule 37 has a lengthy and interesting comment concerning *Allstate v. O'Toole*, but it's now historically remote and the workgroup recommended deleting the comment.

Other comments were historically no longer relevant, were duplicative, or dealt with former committees or projects that occurred long ago. Mr. Pollock estimated that workgroup 2 proposed the elimination of about eighty percent of the existing comments to its assigned rules.

**Workgroup #3.** Mr. Feuerhelm advised that workgroup 3 proposed retaining twelve comments. It's also proposing a few new ones, and it may rewrite a couple. She described a new comment to Rule 51 as both important and short.

On the other hand, workgroup 3 suggested retaining a 2013 comment to Rule 56 that is lengthy, although this comment was modified to reflect the reorganization of Rule 56 as proposed by the 2017 amendments. Mr. Klain observed that in 2017, the 2013 comment will be four years old, and most of it may then have only marginal value. Mr. Rogers suggested retaining the 2013 comment to subdivision (a). Subdivision (b) of the comment is in large part a restatement of the text of the rule. Mr. Klain suggested that the comment focus on the 2017 amendments. He did not disagree with the substance of the 2013 comment, but some of these comments are historic and unnecessary, and keeping too many comments is generally not helpful. He added that the proposed rules will include a disposition table that will eliminate the need for many of the "signpost" comments.

Workgroup 3 has a new comment to Rule 59, but in retrospect, Ms. Feuerhelm advised that the workgroup might delete this, especially that portion that refers to a 1963 Wisconsin opinion. The members of the Task Force agreed with workgroup 3's recommendation to retain a 1966 State Bar Committee Note concerning Rule 65.

**Workgroup #4.** Mr. Hathaway noted that his workgroup deleted many comments, but it would like Task Force guidance concerning a couple. For example, the workgroup suggested retaining a 1993 comment to Rule 62(j); members of the Task Force recommended the deletion of that comment. The workgroup proposed deleting the comments to Rule 68. Mr. Rogers recommended retaining the 2007 comment to this rule, but Mr. Rosenbaum disagreed; he believes that if this particular comment adds meaning to the rule, the Task Force should probably amend the rule rather than retain the comment. Workgroup 4 proposed removing historical notes to the arbitration rules and other comments that were historical in nature, including a 1937 comment to Rule 60(c).

**5. Status of the rule petition.** Workgroups 2 and 3 have provided drafts of rule summaries for inclusion in the rule petition. Those drafts are in the meeting materials. Mr. Klain suggested that because of the anticipated number of pages of these summaries, it would be preferable to place the summaries in an appendix to the petition. The petition can still mention highlights of the rule changes described in greater detail in the appendix. The appendix will present the rules in a sequential order.

One of the chairs also commented that workgroup 2's summary may have a discussion of proportionality that's too extensive, to the point where it became a justification rather than an explanation of how the Task Force treated this concept. Workgroup 2 members will review that discussion and consider how it might be shortened. Mr. Rogers noted, however, that the justices would probably be interested in the Task Force rationale for choosing an adjective for its rules other than "proportional."

**6. Disposition table.** Staff prepared a disposition table that was included in the meeting materials. The table shows current rules that were deleted from the vetting draft, as well as rules that were moved, and the new location of those moved rules. The table will require updating as the Task Force continues to make changes to the rules. The Chairs noted that the workgroups will need to review the disposition table as the Task Force progresses towards the petition filing date to assure that the table is accurate and that nothing was missed. One member observed that the table was in a sans serif font, and this should be changed to a serif font.

**7. Roadmap.** The Chairs reminded the members that the CPPC will hold its second meeting to discuss the vetting draft on November 12, 2015, at the State Bar office in Phoenix. Because a majority of Task Force members serve on the CPPC, Task Force staff will notice this as a Task Force meeting, to be held concurrently with the CPPC meeting. However, the Task Force will take no formal action at that meeting. Task Force members who are not on the CPPC are welcome to be present, but their attendance is optional. The Task Force will convene its next meeting on Friday, November 20, 2015. The members also selected Thursday, December 17, 2015, for its final meeting of 2015.

On November 6, 2015, the chairs will present the amended rules to the Committee on Superior Court. The chairs may also make presentations to other judicial committees or groups in December. November 16, 2015, is the deadline for submitting comments to the Civil Rules Outlook mailbox. An extensive comment table was recently submitted to the mailbox by the Attorney General's State Government Division ("SGD"). This comment table was included in today's meeting materials, and it requires the further attention of all four Task Force workgroups.

Ms. Feuerhelm advised that she will update the vetting draft after the Task Force has reviewed and discussed additional comments and agreed to revised language. She will also integrate rule comments into the draft; she requested that workgroup chairs forward the new and retained comments to her as full text rather than as a list or a table. In order to assure consistency in appearance and style, Mr. Rogers noted the need for

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workgroups to format the new and retained comments pursuant to guidelines that he previously promulgated. Mr. Rogers added that for Ms. Feuerhelm to accurately update the vetting draft, each workgroup chair should sent her a complete redline version of the workgroup's rules that show all of the changes made to those rules subsequent to the vetting draft version.

**8. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:35 p.m.

DRAFT

**Task Force on the Arizona Rules of Civil Procedure**  
**State Bar of Arizona, 4201 North 24<sup>th</sup> Street, Phoenix**  
**Meeting Minutes: November 12, 2015**

**Members attending:** William Klain (co-chair), Pamela Bridge, Jodi Feuerhelm, Andrew Jacobs, Hon. Michael Jeanes, Brian Pollock, Greg Sakall, Hon. Peter Swann, Hon. Randall Warner

**Absent:** David Rosenbaum, Michael Gottfried, Rebecca Herbst, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady, Dev Sethi

**Staff:** Mark Meltzer, John W. Rogers

**Also present:** Members of the State Bar's Civil Practice and Procedure Committee

**1. Call to order; call to the public.** Mr. Klain called the meeting to order at 4:02p.m. He advised that this Task Force meeting, in a manner similar to the October 1, 2015 Task Force meeting, will be held concurrently with a meeting of the State Bar's Civil Practice and Procedure Committee ("CPPC"). Mr. Klain noted that the Task Force will not take action today on any CPPC agenda items or comments, and any votes by Task Force members who are present today would be in their capacity as members of the CPPC.

Mr. Klain then made a call to the public, to which there was no response. Mr. Klain proceeded to turn the floor over to Mr. Jacobs, who serves as chair of the CPPC, and Mr. Jacobs called the CPPC meeting to order at 4:05 p.m.

**2. CPPC agenda items.** Mr. Jacobs began the CPPC meeting with CPPC agenda item number 30, as set forth in his November 5, 2015 letter to CPPC members. He proceeded in sequence through agenda item number 40, and then returned to items numbered 26 through 28.

**30. Rule 29.** The Task Force proposed a revision to this rule that would allow parties to agree to modify disclosure, as well as discovery, procedures. The CPPC approved this change.

**31. Rule 30(c)(3).** The CPPC approved the Task Force version of this rule, which precludes "continuous and unwarranted conferences off the record during the deposition," except as may be necessary to preserve a privilege.

**32. Rules 33, 34, 36.** The CPPC approved, with a few dissenting votes, a Task Force proposal to change the time for responding to discovery requests under these rules from forty days to thirty days.

**33. Rule 35(c).** The Task Force draft would allow audio or video recording of examinations, with certain requisites. Although acknowledging controversy surrounding this rule, the CPPC approved the Task Force proposed draft, with a proviso that the CPPC might establish a future subcommittee to study the issue further.

**34. Rule 42.1.** CPPC members had an extended discussion concerning situations under which there should be a right to change of judge on remand of a case from an appellate court. The members determined that there are many permutations and nuanced circumstances of remands, which might be difficult to capture in a rule. The current Task Force draft permits a change of judge on a remand that requires a new trial or that reverses summary judgment on one or more issues. CPPC members approved the Task Force draft version by a vote of 18 to 6, conditioned on removal of the provision allowing a change of judge upon reversal of a summary judgment.

**35. Rule 45.1.** CPPC members had a robust discussion concerning this rule, and in particular, whether the procedures of the forum state or Arizona procedures should apply when discovery occurs in Arizona. The members discussed, among other things, which state had a greater interest in the proceeding, and the extent to which Arizona should insert different provisions into what was styled as a uniform act. A straw vote on whether the length of a deposition of an Arizona resident, which occurs in Arizona in an out-of-state case, should be limited to four hours showed 19 CPPC members in favor and 13 opposed. The members discussed whether the parties could agree to extend the time notwithstanding the draft rule's provision; some believed that such an agreement would require the consent of the witness, but others observed an inconsistency, that consent of the witness would not be required in a case filed in the superior court of Arizona. The CPPC concluded with no formal recommendation concerning the Task Force draft of this rule.

**36. Rule 51.** Rule 51(d)(2) is a provision that permits a court to consider a "fundamental error," even if the error was not preserved. Although this concept is generally grounded in criminal law, the draft rule makes it easier to raise fundamental error in a civil case. CPPC approved the draft rule by a vote of 28 to 4.

**37. Rule 59(f)(2).** CPPC approved the Task Force version of this rule, which concerns the treatment of an additur or remittitur in the event of a cross-appeal.

**38. Rules 58(e), 6(d), and 80(h).** The CPPC raised concerns about draft Rule 6(d), which provides that "the time period for performing the act begins on the date the order is filed." Mr. Pollock accordingly suggested the following revision to Rule 6(d): "Unless the court orders otherwise, if an order states that an act may or must be done within a specified time, the time period for performing the act begins on the date the order is filed. is the act or event from which the time period is computed under Rule 6(a)." CPPC approved the Task Force draft with this or a comparable modification.

**39. Rule 66.** CPPC approved the Task Force draft with the modifications that "counteraffidavit" and "sworn affidavit" simply be "affidavit."

**40. Rule 75(b).** Rule 75 concerns arbitration hearing procedures. Rule 75(b) contains a requirement for initial disclosures under Rule 26.1. CPPC members discussed whether a specific rule for disclosure in arbitration cases was warranted. Some members believed that the provision is helpful in clarifying that disclosure rules apply in

arbitration cases. Others believed that if this rule mentions disclosure, it should also mention the availability of other discovery procedures. CPPC first voted, with several dissents, to recommend deletion of Rule 75(b) [the so-called "Ager vote."] On reconsideration, by a vote of 15 to 14, the members agreed to retain Rule 75(b). Because of the close vote, CPPC requested the Task Force to further consider this rule.

**26. Rules 26.1(b), 34(b)(3)(E), and 37(g).** This was an introduction to subsequent items, and item number 26 required no action by the CPPC.

**27. Rule 26.1(b)(2)(B).** The Task Force draft included this provision for the resolution of disputes concerning electronically stored information. The draft rule requires the parties to present the dispute to the court in a single joint motion. Some members believed that the provision was unnecessary, and that a judge should fashion whatever resolution process he or she thought was appropriate. A Task Force member noted that the draft does not preclude a judge from requiring a different process in the scheduling order, as expressly permitted by Rule 16(c)(2); that proposed Rule 26.1(b)(2)(B) facilitates an expeditious resolution if the court has not ordered an alternative process; and that a new Rule 7.5 includes requirements for joint filings. The CPPC approved the provision, with one dissent.

**28. Rule 26.1(b)(2)(D).** CPPC members had a robust discussion about whether electronically stored information ("ESI") should be produced in the format requested, or in its native format. The Task Force version of this rule requires production "in the form requested by the receiving party," and if the receiving party does not specify a form, "in native format or in another reasonably usable form." A judge member observed that the proposed rule does not include a presumption concerning one format or another, but rather, encourages parties to discuss the matter and to reach agreement regarding the format. The proposed rule establishes a process rather than mandates a particular result. Mr. Klain advised that a Task Force workgroup, as well as the full Task Force, had long and spirited discussions on the issue of ESI production, and the proposed provision represents a compromise that was unanimously agreed to by Task Force members. He noted that the provision was not modeled on any corresponding federal or sister state rule, but instead it represented an effort by the Task Force "to get ahead" of these other jurisdictions. Given the lateness of the hour, the CPPC's vote on this proposed rule was deferred until its next meeting.

**3. Adjourn.** The Task Force meeting adjourned at 6:05 p.m., concurrently with adjournment of the CPPC meeting. The Task Force will meet again on November 20, 2015. The CPPC will reconvene on December 3, 2015 to discuss the remaining items on its October 1 agenda.

**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: November 20, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Pamela Bridge, Jodi Feuerhelm, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady by her proxy Sara Agne, Brian Pollock, Greg Sakall, Dev Sethi (by telephone), Hon. Peter Swann by his proxy George King, Hon. Randall Warner

**Absent:** Michael Gottfried

**Guests:** Katherine May

**Staff:** Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** The chairs called the meeting to order at 10:35 a.m. This is the fourteenth meeting of the Task Force. The thirteenth meeting was held concurrently with a meeting of the State Bar's Civil Practice and Procedure Committee ("CPPC") on November 12, 2015.

The chairs introduced proxies and a guest attending today's meeting. The chairs then asked the members to review draft minutes of the October 30, 2015 and November 12, 2015 Task Force meetings.

**Motion:** A member moved to approve the October 30, 2015 and November 12, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-13**

The chairs informed the members that earlier this month, they presented the work of the Task Force to the Committee on Superior Court ("COSC"). COSC unanimously approved the vetting draft, and expressed its appreciation and support for the work of the Task Force. Mr. Klain stated that the CPPC had approved the "great majority" of the Task Force work product, while Mr. Jacobs, who is chair of the CPPC, suggested that the CPPC had approved all of the Task Force recommendations, albeit with its recommended modifications to certain provisions. Staff continues to forward to Task Force members comments he received in the Civil Rules mailbox.

The chairs advised that today's meeting would proceed by a discussion led by each workgroup concerning comments that were received, or changes that were made, on the workgroup's rules since the October 30 meeting. Redlines in today's meeting materials reflect changes made to a previous draft, and not changes to the current rules. Items mentioned in today's minutes that do not expressly show formal approval were nevertheless approved by informal consensus, unless otherwise indicated.

**2. Workgroup #1.** Mr. Jacobs deferred to Mr. Rogers on rules concerning electronic filing. Mr. Rogers described revisions to the following rules, which are shown in the written materials:

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- Rule 5.1, specifically concerning submission of a court filing directly to a judge. Mr. King suggested, and the members agreed, to reduce the number of times the word "it" appears in this draft rule.
- Rule 5.1(d) (regarding a certificate of compulsory arbitration), and moving this provision to Rule 8(j). Mr. Sakall advised that some counties provide arbitration limits by "local administrative order," and he suggested adding those words after "local rule."
- Rule 5.2(b), and changing the font size prescribed in Rule 5.2(b) from 12-point to 13-point.

The AOC's Information Technology Division ("ITD") submitted a comment regarding Rule 5.2(c)(1)(A), and the Task Force's draft provision that "a text-searchable .pdf format is preferred." The ITD is concerned that this provision goes beyond what is provided by applicable administrative orders, and believed it would require considerably more storage space and consequently more expense. The ITD requested deletion of this provision. Task Force members responded with their views of the "user experience," and a concern that documents filed in a format other than PDF might be altered. Although technical standards may change in the coming years, the Task Force had previously agreed to include an expression of preference for PDF in the current draft, and the Task Force declined to reverse that decision notwithstanding ITD's comment. The chairs noted that the current draft still allows the filing of documents in formats other than PDF.

**MOTION:** Mr. Klain formally moved to support the current draft language of a preference for PDF. Following a second, the motion passed, with 15 members in favor and one opposed. **TF.ARCP: 2015-14**

Mr. Rogers continued his discussion of recent revisions, including:

- In Rule 5.2(c)(2)(B), that an official record may be filed electronically if it contains a seal of authority "or its equivalent."
- Changes to the wording of Rule 6(d) that clarify, but do not change, the calculation of time following the filing of a court order (this change was first suggested by the CPPC).
- Rule 7.1(a) concerning page limits (as a consequence of changing the font size), which mirror the page limits in district court. Mr. Jacobs proposed an amendment that would allow local rules to preempt and enlarge this statewide limit, but the majority of members opposed this, first, in the interest of statewide uniformity, and second, because the draft language of the rule ("unless otherwise permitted by the court") already allows a judge to expand the limit on a case-by-case basis. (Judge Warner suggested that the word "ordered" be used in lieu of "permitted.")

Mr. Jacobs discussed the remaining workgroup 1 rules. He advised that workgroup 1's meeting materials include a variety of minor revisions, including punctuation changes, suggested by a CPPC workgroup. In Rule 4.1(i) and other

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provisions regarding service, Mr. Jacobs recommended changing the word “defendant” to “party subject to service.” Members did not favor that change and discussed wording that would more precisely give the rule its intended meaning. The corresponding federal rules use the word “defendant,” as did the vetting draft, and members agreed to go back to that original vetting draft language. Mr. Jacobs continued by noting the following:

- Changes to Rule 4.2(c) regarding a returned receipt, which were revised following a suggestion from Maricopa County’s Self-Service Center.
- An amendment to Rule 5(f)(2) to clarify that the provision applies to disclosure as well as to discovery documents.
- In Rule 7.1, moving the words “typed or printed” to the beginning of section (a) so these words don’t have to be repeated multiple times thereafter.
- Extensive but not substantive reorganization of Rule 8(h)(3) regarding procedures for designating a complex civil action.

Members discussed whether Rule 12 should utilize the phrase “responsive pleading” rather than simply “answer.” The members considered using both of these, but eventually decided that the rule should only use the word “answer,” which is compatible with the corresponding federal rule. The members agreed that a “responsive pleading” is not a pleading permitted under Rule 7. However, and for consistency with the federal rule, the subpart title in this rule will still refer to a “responsive pleading.”  
Continuing:

- In Rule 15(a)(3), the members preferred the words “render moot” over “make moot.”
- In Rule 15(b)(1), the word “action” was changed to “claim.” This provision also refers to “unfairly prejudiced....” The members discussed whether prejudice under this and other rules must be “unfair.” They reviewed other civil rules, and the word “prejudice” is typically coupled with the adjective “unfair” or “material.” They concluded that not all prejudice in a court proceeding is “unfair” (e.g., a verdict is prejudicial to one side, but it is not “unfair”), and they concluded that use of the phrase “unfair prejudice” is appropriate.
- Rule 15(d) concerns supplemental pleadings for events that occur after the “date of the pleading to be supplemented.” Members asked whether this should be changed to after the “filing of the pleading to be supplemented.” The federal rule uses “date,” and the members agreed that changing this to “filing” was not necessary or helpful.

Mr. Jacobs added that workgroup 1 agreed to a few changes recommended by the Pima County Bar Association (“PCBA”), but these are not yet shown in the materials. The workgroup considered and rejected a PCBA recommendation that would allow service on a minor’s stepparents (in addition to allowing service on a parent or guardian.) Workgroup 1 has not yet reviewed comments from the Chamber of Commerce (“C-of-C”).

Judge Warner requested an opportunity to remark on a PCBA comment to Rule 42.2. He advised that the great majority of notices for cause are filed by self-represented litigants, who cite as the underlying cause such things as “the judge rules against me” or “the judge gave me a foul look.” PCBA’s comment asked to modify the current draft and require the presiding judge to hold a hearing on every notice for cause. Judge Warner opposes that; he wants to retain the current draft language, which gives a judge discretion to hold a hearing. Task Force members agreed with Judge Warner’s view.

**3. Workgroup 2.** Mr. Pollock advised that workgroup 2 made changes in response to comments from the C-of-C, from the Attorney General’s State Government Division (“SGD”), and from the PCBA, as well as after further review of its own work product.

Mr. Pollock first noted that the workgroup will add to Rule 16(d) (“scheduling conferences in non-medical malpractice actions”) a provision that would allow the court to enter orders concerning sharing or shifting costs for the production of electronically stored information (“ESI”). A parallel provision is already included in Rule 26.1(b)(2). A C-of-C comment proposed changing the time in Rule 23(c) for issuance of a certification order, from what the draft currently sets as “at an early practicable time,” to 120 days; Mr. Pollock responded that this was not feasible or realistic, and workgroup 2 opposed the proposed change. Mr. Pollock also noted the SGD’s comment concerning Rule 25(d). It raised the issue about whether substitution of public officers should be automatic, or if it should require the filing of a notice of substitution. A member raised a question about the process the court clerk would use to effect the substitution in these scenarios. Mr. Pollock advised that he will follow up on this question with the Attorney General’s office.

Mr. Pollock then presented an issue raised by the CPPC concerning Rule 42.1(e), and the circumstances that permit a notice of change of judge following a remand. The current Task Force draft modifies existing language by allowing a change of judge not only if the decision requires a new trial, but also if it “reverses summary judgment on one or more issues.” The CPPC recommended striking this additional language. After reviewing case law, Ms. Feuerhelm advised that ordering a new trial does not always require that a trial had been conducted. Summary judgment, for example, can also give rise to a new trial, as can other situations. In retrospect, the Task Force had concern that its current draft might give the impression that certain case law no longer applies, which is not the Task Force’s intent.

**MOTION:** Mr. Klain formally moved to revert to the former language, mirroring the phrasing of the existing rule, and to delete the draft provision on the reversal of summary judgment. Following a second, the motion passed unanimously. **TF.ARCP: 2015-15**

Mr. Pollock proceeded to a comment from the C-of-C concerning Rule 26(b). The comment proposed deleting the sentence providing that “It is not a ground for objection that the information sought will be inadmissible at the trial if that information appears reasonably calculated to lead to the discovery of admissible evidence.” In its place, C-of-C inserted a slightly revised version of the last clause in (b)(1)(C) of the vetting draft,

stating that discovery “may be obtained only if appropriate to the needs of the action considering the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery and the parties’ resources.” Mr. Pollock noted that the Task Force had previously discussed the federal rule, the Task Force draft reflected what the Task Force believed were the appropriate standards for discovery, and that he favored retaining the C-of-C’s inserted clause in (b)(1)(C). Mr. Pollock also noted that the corresponding federal rule would be amended this December to replace the “reasonably calculated” sentence to say simply: “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Mr. Pollock noted that this language would eliminate the often asserted contention that the scope of discovery is not relevance, but whether the discovery at issue is reasonably calculated to lead to the discovery of relevant evidence. The Task Force discussed this suggestion, as well as other possible restrictions on the scope of discovery.

**MOTION:** A member moved to strike language in draft Rule 26(b)(1)(A), as shown in the C of C comment, and to replace it with language from the federal rule. Following a second, the motion passed unanimously. **TF.ARCP: 2015-16**

The Task Force decided to continue its discussion of this portion of the rule at its December meeting.

Meanwhile, the members agreed that the C-of-C’s suggestion for including a spoliation provision in Rule 26.1(b) was incongruous and misplaced. The Task Force again discussed Rule 26(b)(5), specifically a requirement for filing notices of non-party at fault. While it would be useful for judges if the court’s record included these notices, a rule that mandated the filing of these notices would be a practice change and could be a trap for the unwary. The consensus of the members was these notices “should” be filed with the court. The members also discussed an expanded version of Rule 26(b)(6) concerning privilege and work product claims. Rule 26.1(f) touches on this topic, but it also includes a cross-reference to the expanded Rule 26(b)(6). The members generally agreed with this approach, but they suggested changing the word “contemporaneously” in the latter rule to “reasonably promptly.” Also,

- A sentence was added to Rule 26(c)(4) that requires a party who seeks entry of a confidentiality order by motion to submit a proposed order with the motion that includes proposed findings of fact.
- The title of Rule 26(g), formerly “discovery motions,” is now “good faith consultation,” and it now applies to disclosure as well as discovery disputes.

The members then discussed a deletion proposed by the CPPC of the words “the disclosing party believes” in Rule 26.1(a)(9). The CPPC compared these words to the words used in Rule 37(c) (“knew or should have known”) and Rule 37(d) (“knowingly”) and concluded that the words in Rule 26.1 are too subjective, but Task Force members declined to make the CPPC’s proposed change. They also discussed a C-of-C suggestion that would add to Rule 26.1(a) a new subpart (11); this new subpart would provide a

basis for not disclosing information, although disclosure might otherwise be required under the other ten subparts of this rule. The members agreed that this proposed subpart contravenes the underlying philosophy of the disclosure rules. However, a chair inferred that the C-of-C comment also could mean that if a party withholds something that may be relevant, the party should be required to disclose that it's withholding that information. Other members agreed with this inference, and Mr. Pollock will attempt to ingrain that interpretation into the next draft of Rule 26.1.

Another C-of-C comment concerned the presumptive form of disclosing ESI under Rule 26.1(b)(2)(D). The C-of-C requested that the draft language be changed from "the form requested by the receiving party" to "native form or in another reasonably usable form." The members had previously discussed this issue, and the current draft reflects their consensus. They noted that native format can be difficult to redact or bates stamp, among other things. The CPPC intends to discuss this provision at its next meeting, and the Task Force can revisit the matter thereafter.

Rule 26.1(d)(2) now includes an additional sentence that requires a party who obtains or discovers information that is relevant to a hearing or deposition less than 30 days away to disclose the information "reasonably in advance" of the proceeding. Mr. Rogers proposed adding the words "at a deposition" to the "failure to timely disclose" provisions of Rule 37(c)(1), but after discussion, the members decided not to. Also,

- In Rule 27(b), the workgroup proposed changing the word "may" in paragraphs (2) and (3) to "must," but the members decided that "may" was more appropriate.
- At the suggestion of the CPPC, the words "and disclosure" were added to the title of Rule 29 [now "modifying discovery and disclosure provisions and deadlines"].
- The members declined the C-of-C's suggestion to add a sentence to Rule 30(b)(4) about disclosure of documents in depositions taken by remote means.
- The words "preservation and" were added to the title of Rule 32(d) [now "preservation and waiver of objections"], and various provisions were changed by using better grammar.
- The members also declined the C-of-C's suggestion to add to Rule 37(a)(3)(v) a "clear and convincing" standard.
- The C-of-C's suggestion to delete from proposed Rule 37(g)(2)(B) a "finding of prejudice to another party" was deferred pending discussion of this provision by the CPPC.

**4. Workgroup 3.** Ms. Feuerhelm began workgroup 3's update with a discussion of Rule 55, and its use of the somewhat ambiguous term "whereabouts." Although members had previously considered using a more definitive term, Ms. Feuerhelm cited Ruiz v Lopez 236 P2d 444 (Ct. App. 2010), and she then concluded that the word "whereabouts" is a term of art and provides greater flexibility in the context of this rule. The members agreed with her view.

The CPPC did a preliminary review of Rules 54 and 58. Task Force consideration of these rules is deferred pending the CPPC's upcoming discussion of these rules.

Ms. Feuerhelm turned to Rule 45.1, and the CPPC's question about whether the parties can agree to enlarge time under that rule without the consent of the witness. The Task Force discussed the issue and concluded that deposition time limits exist to control costs; the limit is not a "right" of an Arizona witness in an out-of-state case. A witness can also seek protection from an excessively lengthy deposition under Rule 45.1(e)(2).

**MOTION:** A member moved to change the language of this rule to what previously existed, so that a four-hour time limit does not apply under Rule 45.1. The motion received a second and it passed, 9 in favor and 4 opposed. **TF.ARCP: 2015-17**

The Task Force received a comment from Judge Mullins requesting that Rule 56 provide more clarity on whether verified pleadings can be considered on a summary judgment motion. Ms. Feuerhelm found case law that verified pleadings, as well as disclosure statements, can be considered on the motion, but after further discussion, the members agreed that it was not necessary to engraft this case law into the rule. With regard to the C-of-C's comment on Rule 11, Ms. Feuerhelm advised that the C-of-C submitted a similar comment in a prior rule petition concerning Rule 11 [R-15-0004], and the State Bar's reply to that comment was included in the meeting materials. Task Force members had nothing to add to what was said in that reply. Ms. Feuerhelm's written response to the C-of-C's comment regarding Rule 45 was also in the meeting materials, and members also had nothing further on that issue.

**5. Workgroup 4.** Mr. Hathaway advised that the workgroup corrected various typographical errors and cross-reference errors that were noted in comments from the CPPC. The workgroup had not yet fully reviewed the PCBA's comments, but Mr. Hathaway thought that certain PCBA comments, for example, regarding the timing of events in arbitrations, seemed to favor one side. Ms. Sakall said that the PCBA's recommendations might have been influenced by whether plaintiffs' or defense counsel were assigned to the group was assigned to review a particular rule. Mr. Hathaway reviewed the C-of-C comment regarding Rule 80(g) ["verified pleadings"], which recommended adding to the rule the phrase "after independent reasonable inquiry into them." Mr. Hathaway did not add this recommended language in workgroup 4's most recent draft, and the members agreed with that decision.

**6. Draft rule petition.** Staff prepared several revisions to the draft petition. Staff also removed spaces for workgroups to insert detailed explanations regarding individual rules; these explanations will now be included in an appendix. However, Mr. Klain asked the workgroups to notify staff of any particularly significant changes that nonetheless should be mentioned in the body of the petition. The draft petition now includes the following dates for a modified comment period:

|                 |                             |
|-----------------|-----------------------------|
| April 15, 2016: | First round of comments due |
| May 13, 2016:   | Amended petition due        |

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June 10, 2016: Second round of comments due  
July 8, 2016: Reply due

Mr. Klain requested the members to consider whether these dates were appropriate and feasible. He said that July 8 is close to the deadline the staff attorneys have for submitting memoranda to the justices, and this date cannot be moved back. April 1 was suggested as a more workable deadline for the first round of comments. This would allow more time for the Task Force to prepare an amended petition. Mr. Klain suggested the rule petition should mention that the Task Force deferred certain policy-driven matters, for example, whether to allow recording of medical examinations in Rule 35. Stakeholders may comment on these issues, and some issues may warrant stakeholders filing a subsequent and standalone rule petition.

**7. Roadmap.** The Task Force will have its third joint meeting with the CPPC on December 3, 2015; however, the Task Force will not take action at that meeting. The chairs will present the rules to the presiding superior court judges on December 9, and to the Arizona Judicial Council on December 10. The next Task Force meeting is set for Thursday, December 17, 2015, at the office of Osborn Maledon.

Ms. Feuerhelm will have another draft available for the December 17 Task Force meeting. This draft will incorporate the changes the Task Force has made since distribution of the vetting draft in mid-September. It is critical that workgroups send to Ms. Feuerhelm by December 1, 2015 (1) updated, redline drafts of their assigned rules that show changes made to the vetting draft, and (2) a clean set of comments to the workgroup's rules. In addition, workgroups should provide their detailed rule-by-rule explanations to Task Force staff not later December 7 for inclusion in an appendix to the petition.

**8. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:08 p.m.

**Task Force on the Arizona Rules of Civil Procedure**  
**State Bar of Arizona, 4201 North 24<sup>th</sup> Street, Phoenix**  
**Meeting Minutes: December 3, 2015**

**Members attending:** William Klain (co-chair), Pamela Bridge (by telephone), Michael Gottfried, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Brian Pollock, Hon. Peter Swann

**Absent:** David Rosenbaum, Jodi Feuerhelm, Rebecca Herbst, Hon. Douglas Metcalf, Hon. Mark Moran, Prof. Catherine O'Grady, Greg Sakall, Dev Sethi, Hon. Randall Warner

**Staff:** Mark Meltzer, John W. Rogers

**Also present:** Members of the State Bar's Civil Practice and Procedure Committee

**1. Call to order; call to the public.** Mr. Klain called the meeting to order at 4:30 p.m. He advised that this Task Force meeting, similar to the October 1 and November 12, 2015 Task Force meetings, will be held concurrently with a meeting of the State Bar's Civil Practice and Procedure Committee ("CPPC"); that the Task Force will not take action today on any CPPC agenda items or comments; and that any votes by Task Force members who are present today would be in their capacity as CPPC members.

Mr. Klain then made a call to the public, to which there was no response. Mr. Klain turned the floor over to Mr. Jacobs, who serves as chair of the CPPC, and Mr. Jacobs called the CPPC meeting to order.

**2. CPPC agenda items.** The CPPC agenda was detailed in Mr. Jacobs' November 24, 2015 letter to CPPC members.

**Item 28: Rule 26.1(b)(2)(D).** The Task Force recommendation was that parties disclose ESI in the form requested by the receiving party, unless the court orders otherwise. Mr. Pollock explained that the Task Force was reluctant to mandate disclosure in native form because disclosure in native form might not be usable by the receiving party. The Task Force recommendation was a compromise between those who would require production in native versus those favoring production in non-native form.

A CPPC member commented that if the rule allows the requesting party to specify the form, it becomes a presumption, and the court has no guidelines under the proposed rule about how to overcome that presumption. He also noted that there occasionally may be only one reasonable form in which a document can be produced. This member recommended that the rule require production in native or other "reasonably usable" form. Other members responded that because the recipient is the one who will be using the data, the recipient's preference should be honored, unless the recipient's request creates an unreasonable cost burden on the producing party. This led to further discussion about cost-shifting provisions in the Task Force draft of this rule.

At that point, a CPPC member moved to approve the Task Force draft rule but conditioned on adding text to the rule that would highlight the judge's authority to shift costs. Another member proposed the following addition at the end of the first sentence of Rule 26.1(b)(2)(D): "...with the court authorized to shift costs as appropriate," or words to that effect. The CPPC then approved the Task Force draft with this addition, with 20 members in favor and 4 opposed.

**Item 29: Rule 37(g)(2).** The discussion of this rule concerned a Task Force provision that a sanction of dismissal for failing to take reasonable steps to preserve electronic evidence requires a showing of prejudice. Mr. Rogers noted, among other things, that electronic evidence that a party intended to delete might still be recoverable, and in that event there wouldn't be a rational basis for dismissing the case notwithstanding an intent to destroy evidence. Another member provided an example of destruction of a laptop, when the same evidence that was on the laptop remained on another computer.

CPPC members expressed concern that this rule would diverge from the corresponding federal rule. But Task Force members noted that Arizona case law (cited in the CPPC's materials) supported the proposed draft. A CPPC member moved to approve the Task Force draft, and the motion carried with 24 in favor and 1 opposed.

**Item 35: Rule 45.1.** The Task Force recently reversed its position on the four-hour limit for deposing an Arizona witness in an out-of-state case. That Task Force action prompted the CPPC to reconsider its previous recommendation. Mr. Klain and Mr. Pollock summarized the reasons that prompted the Task Force to change its position. Thereafter, and on motion, the CPPC voted to approve the most recent Task Force draft, with 21 in favor and 8 opposed.

**Item 41: Rule 26(b)(1)(A).** The CPPC spent more time on this than any other item on the December 3 agenda. This item also required consideration of Rule 26.1(a)(9), as well as the prior and most recent version of federal Rule 26(b).

Current Arizona Rule 26.1(a)(9) requires parties to disclose documents or information "which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence..." The most recent Task Force version of this rule requires disclosure of documents or information "that may be relevant to the subject matter of the action."

Federal Rule 26(b)(1) was amended effective December 1, 2015. The previous rule permitted discovery of any matter "that is relevant to any party's claim or defense..." The new version allows discovery regarding any matter "that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of [and citing various factors]." Additionally, the previous rule provided that "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The December 2015 amendments eliminated the "reasonably calculated" language and instead provided that "Information within the scope of discovery need not be admissible in evidence to be discoverable." Mr. Pollock stated that the latter sentence was added to clarify that previous language was

not intended to define the scope of discovery, but only that relevant information is not rendered nondiscoverable merely because it is inadmissible at trial (e.g., hearsay).

Current Arizona Rule 26(b)(1)(A) allows discovery of any matter “which is relevant to the subject matter involved in the pending action, or which relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The proposed Task Force draft of this rule, which is the provision at issue before the CPPC, would allow discovery of any matter “that is relevant to the subject matter of the pending action...” The remainder of the proposed rule would eliminate the “reasonably calculated” sentence and instead follow the language of the new federal rule, although the Task Force will reconsider that amendment at its next meeting.

Some CPPC members contended the elimination of the “reasonably calculated” language was warranted based on reasoning for the federal change—the rule as originally adopted was not intended to define the scope of discovery but was rather intended merely to clarify that information does not become nondiscoverable merely because it is inadmissible. Others argued that irrespective of the literal meaning of the language, many practitioners understand the “reasonably calculated” provision as adding to the permitted scope of discovery, i.e., information is discoverable *either* if it is relevant *or* if it is “reasonably calculated to lead to the discovery of admissible evidence.”

The discussion then led to the merits of a rule following this latter interpretation. Some CPPC members expressed the view that, so interpreted, the “reasonably calculated” language is overbroad, lead to fishing expeditions, discovery about discovery, and increased discovery disputes. These members believed that deleting the “reasonably calculated” phrase was warranted. Others members disagreed, and suggested that if it is interpreted as supplementing the “relevance” standard, the “reasonably calculated” standard levels the playing field of discovery, it generally has not been used abusively, and when it is, judges will rectify it. These members also said that “reasonably calculated” standard was more flexible and appropriate when seeking discovery of impeachment evidence, which might not be strictly “relevant to the subject matter of the action.” They believed that “reasonably calculated” was a phrase currently used and understood by judges and practitioners in Arizona as supplementing the “relevance” limitation on the scope of discovery.

Still others believed that deleting the phrase “reasonably calculated” from the disclosure provisions of Rule 26.1(a)(9), yet maintaining that phrase in Rule 26(b)(1), could be problematic because it might establish two different standards. Some responded that having different standards under these two rules was reasonable; discovery should be narrower than disclosure because disclosure is self-policing, which favors a rule that encourages the disclosing party to resolve doubts about relevance in favor of disclosure.

Other comments by CPPC members included the following:

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- The current language in Rule 26.1(a)(9) about a party disclosing evidence a party “believes” may be relevant is inappropriate and should be deleted because it seemingly makes the disclosing party’s subjective beliefs relevant in determining whether a disclosure should be made. (This deletion is already shown in the Task Force draft.)
- The phrases “is relevant” and “may be relevant” are two different standards. The latter is broader. “Reasonably calculated” could narrow or broaden a rule, depending on the context, but it should have a consistent meaning wherever it is used.
- The phrase “reasonably calculated” could be relocated into the first sentence of Rule 26(b)(1)(A) to clarify that the scope of discovery is defined by both relevance and whether the requested discovery is reasonably calculated to lead to the discovery of admissible evidence.
- It might be difficult for judges to apply standards in Rule 26 and Rule 26.1 if they are different.
- Words matter, and there might be more rather than fewer discovery disputes if the language of the current rules changes.
- It’s easier for counsel to explain an Arizona rule to out-of-state counsel and parties if the rule is congruent with a federal rule.
- Those who believe the Task Force should adopt federal rules for the sake of uniformity overlook that Arizona has different disclosure requirements than the federal rules, that those differences are well-grounded in Arizona policy, and that similar principles should apply concerning the scope of discovery.

At this point, a judge member of the CPPC stated that under his interpretation of A.O. 2014-116, the Task Force is not empowered to change the scope of discovery or disclosure. The Task Force should therefore maintain the scope as it is currently. Another judge member suggested that this issues concerning the scope of discovery be tabled for further consideration at the CPPC’s next meeting, after everyone had more time to think about it. ~~the issue~~. Mr. Klain supported this view, and reminded CPPC members that the CPPC currently is engaged in informal pre-petition discussions. He noted that after the petition is filed in January, the Task Force as well as the Court will welcome further, formal comments from the CPPC on these rules.

**3. Adjourn.** The Task Force meeting adjourned at 6:00 p.m., concurrently with adjournment of the CPPC meeting. The Task Force will meet again on December 17, 2015. The CPPC will reconvene on January 14, 2016.

**Task Force on the Arizona Rules of Civil Procedure**  
**Offices of Osborn Maledon, Phoenix**  
**Meeting Minutes: December 17, 2015**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Jodi Feuerhelm, Michael Gottfried by his proxy Sara Agne, Milton Hathaway, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes by his proxy Aaron Nash, Hon. Douglas Metcalf by his proxy Chas Wirken, Hon. Mark Moran, Prof. Catherine O'Grady, Brian Pollock, Greg Sakall, Hon. Peter Swann, Hon. Randall Warner

**Absent:** Pamela Bridge, Dev Sethi

**Staff:** Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** The chairs called the meeting to order at 10:32 a.m. This is the sixteenth meeting of the Task Force. The members have so far devoted more than 2,000 hours of their time to Task Force and workgroup meetings. They have spent many additional hours researching, drafting, and revising the rules outside of meetings.

The chairs presented this project to the Superior Court Presiding Judges on December 9, 2015. The presiding judges had no issues with the uniform font size or page limits proposed by the Task Force. The State Bar's Civil Practice and Procedure Committee ("CPPC") will assist the superior court in various counties with amendments to their local rules that might be required by these uniform requirements. The chairs also presented the project to the Arizona Judicial Council on December 10, 2015, which passed a formal motion of support for the work of the Task Force.

The chairs asked the members to review draft minutes of the November 20, 2015 meeting, and the December 3, 2015 meeting that was held concurrently with the CPPC. There were two changes to the November draft minutes. First, an item concerning proposed Rule 42.1 was attributed to Mr. Pollock; the item was actually presented by Ms. Feuerhelm. Second, on the discussion on Rule 12, the draft minutes state that the members decided that the rule should only use the word "answer," whereas they actually agreed to use both "answer" and "responsive pleading" in the rule.

**Motion:** With these corrections, a member moved to approve the November 20, 2015 and December 3, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2015-16**

**2. Good faith settlement hearings.** The vetting draft excluded current Rule 16.2, which provides for good faith settlement hearings. Ms. Feuerhelm and Mr. Rogers asked to revisit this rule. Mr. Rogers presented an analysis, beginning with statutory changes a number of years ago to Arizona's law on joint and several liability. These changes greatly limited the circumstances of joint and several liability, but in the limited situations where it continued to apply, a good faith settlement hearing could serve to cut off contributions claims. Those situations involved narrowly prescribed instances of parties acting in concert, vicarious liability, and actions under the Federal Employers' Liability

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Act. Although the instances when joint and several liability continue to exist under the statute are infrequent, Mr. Rogers recommended including a modified version of Rule 16.2 in the rule petition. His draft rule was included in the materials. One member felt there was no need to keep the rule; he noted, for example, that no rule is required to conduct a good faith hearing under *USAA v. Morris*. Another member nonetheless made a motion:

**Motion:** The rule petition should include Rule 16.2 regarding good faith settlement hearings, as shown in Mr. Rogers' draft. The motion received a second and passed with 12 members in favor and 1 opposed. **TF.ARCP: 2015-17**

In the next version of the rules, Ms. Feuerhelm will add Rule 16.2, and renumber the current draft Rule 16.2 (regarding case management conferences in complex civil litigation) as Rule 16.3.

**3. Unfair prejudice.** At the November 20 meeting, members discussed whether the word "prejudice," when used in the rules, is necessarily "unfair prejudice." (See section 2 of the November 20 minutes.) Ms. Feuerhelm researched the issue and did a global search of the draft rules for "prejudice," and she presented her recommendations.

**Rule 4(h).** The current Arizona rule allows amendment of a proof of service unless the court finds "material prejudice" to the "substantial rights" of the party subject to service. The corresponding federal rule simply provides that "the court may permit proof of service to be amended." Discussion ensued.

**Motion:** A member moved to adopt the federal version. The motion received a second and passed unanimously. **TF.ARCP: 2015-18**

**Rule 6(b)(2)(C).** The proposed Task Force version of this rule on extending time requires a finding that no party would be "unfairly prejudiced" by extending the time to act. The word "unfairly" is not in the current rule, and there is no corresponding federal rule. The members discussed whether mere prejudice was an acceptable showing, or whether it should be "unfair." Some members believed that including the word "unfair" might imply that the Task Force intended a substantive change to the rule. Other members believed that "unfair" adds essential meaning to the word "prejudice." One member noted a distinction between unfair prejudice that arises under procedural rules and that which arises under rules of evidence. Procedural prejudice implies an impairment of rights; it may not rise to the level of losing a case, but it hurts the party's position. (See further on evidentiary prejudice *State v Guarino*, a December 2015 Supreme Court opinion, which stated in part that "while evidence that makes a defendant look bad may be prejudicial in the eyes of jurors, it is not necessarily unfairly so.")

**Motion:** Ms. Feuerhelm moved to revert to the current rule, i.e., to remove the word "unfair" from the Task Force draft of this rule. The motion received a second and passed with 11 members in favor and 2 opposed. After further discussion and reconsideration, the motion again passed, 10 in favor and 3 opposed. **TF.ARCP: 2015-18**

**Rule 15:** Rule 15(b)(1) allows amendments during trial if, among other factors, there is no showing that an amendment would “unfairly prejudice” the objecting party’s claim or defense. Neither the current Arizona rule nor the corresponding federal provision includes the word “unfairly.”

One member observed that any amendment during trial would prejudice the opposing side, and therefore “unfair” prejudice should be the standard. A judge member stated that including the word “unfair” provides guidance to judges who must perform an analysis during an ongoing trial. Mr. Klain referred to Arizona case law, which includes in the concept of prejudice such notions as inconvenience, delay, and hardship. Some members supported conforming to the federal version, which would facilitate citation to federal case law interpreting the rule, while others believed that Arizona judges could interpret their own rules without referring to the opinions of federal judges.

**Motion:** Ms. Feuerhelm moved to revert to the current rule, i.e., to remove the word “unfair” from the Task Force draft of Rule 15(b)(1). The motion received a second and passed with 8 members in favor and 5 opposed. **TF.ARCP: 2015-19**

Task Force members agreed to Ms. Feuerhelm’s recommendations on the following rules, none of which require changes to the current Task Force draft:

- Rule 37(g)(2), Rule 15(c), Rule 19(b)(1) and (2), Rule 20(b), Rule 36(b), Rule 37(g)(2), and Rule 42(b), all of which use the word “prejudice” without a qualifier.
- Rule 24(b)(3), which uses the phrase “unduly delay or prejudice.”
- Rule 26(b)(5), which includes the phrase “lack of unfair prejudice to all other parties.”

**4. Workgroup 1.** Mr. Jacobs reported that he had no issues to discuss on behalf of the workgroup.

**5. Workgroup 2.** Mr. Pollock advised that workgroup 2 had several rules that required further Task Force input.

**Rule 25(d) [“Public officers; death or separation from office”].** The current rule (Rule 25(e)) provides for automatic substitution. The current Task Force draft requires that counsel for the public officer “must file a notice of the substitution.” Mr. Pollock spoke with litigators in the Attorney General’s office, and based on those conversations he believes those litigators do not have such a large caseload as to make the filing of a notice impractical or burdensome. The issue then presented was whether the filing of a notice would serve to change the case caption. Mr. Nash distinguished a caption in the court’s case management system (what the court uses) from a caption contained on a court filing (what the parties use). A notice alone won’t change a caption in the CMS; that would require a motion and a court order. But after further discussion, the members agreed to leave Rule 25(d) as it is in the proposed draft.

**Rule 26.1(b)(1) [“Disclosure of hard copy documents”].** Mr. Pollock reminded the members of a comment from the Chamber of Commerce about adding a new subpart (11) to Rule 26.1(a). Although the Task Force declined to do this, it believed the Chamber’s

comment had value. Accordingly, workgroup 2 most recent revision to this rule included the following provision: "If a party withholds any such hard copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian." Mr. Pollock noted that a parallel provision is not necessary in Rule 26.1(b)(2) because the parties should be discussing this pursuant to their duty to confer regarding electronically stored information ("ESI").

**Rule 26.1(b)(2)(D) ["Electronically stored information; presumptive form of production"]**. Mr. Pollock advised that at its December 3 meeting, the CPPC, with near unanimity, agreed to add to the first sentence the words, "with the court authorized to shift costs as appropriate." One member suggested making this a standalone sentence. (E.g., "If the requested form results in a cost burden, the court is authorized to shift costs.") Although this member thought this addition would be helpful to practitioners, others thought it was redundant because the concept is already expressed in Rule 26.1(b)(2)(A)(iii). Mr. Rogers observed that the CPPC did not readily connect the latter provision with 26.1(b)(2)(D), and the Task Force should be sensitive to the CPPC's concerns. Mr. Rosenbaum suggested that ESI production under Rule 34 could include a matching provision in subpart (b)(3)(E), although this would represent a divergence from the corresponding federal Rule 34. Mr. Pollock noted that there is already a cost shifting provision in Rule 16(b)(3)(A). The Task Force concluded its discussion by agreeing that it would not include additional language in its draft concerning cost shifting.

**Rule 37(g)(2)(B)(iii) ["Remedies and sanctions"]**. The most recent Task Force draft did not revise this provision. However, Mr. Pollock noted that the language in the provision, although not in the federal rule, was strongly supported by the CPPC (which had only a single dissent).

**Rule 26(b)(1) ["Discovery scope and limits, generally"] and Rule 26.1(a)(9) ["Duty to disclose; disclosure categories"]**. The Task Force continued its discussion of these related provisions and the phrase "reasonably calculated," which currently appears in both rules. The CPPC also had an extensive discussion of these provisions. Some believe that "reasonably calculated" defines the scope of discovery, that is, information is discoverable if it is either relevant "or" is "reasonably calculated" to lead to the discovery of information. Others believe that the scope is defined solely by relevance, and that the phrase "reasonably calculated" contemplates information that is inadmissible but is nonetheless relevant. The CPPC did not yet take a formal vote on this issue, but later it may file a comment to the rule petition.

Mr. Rosenbaum referred to comments on the new federal rules, which cite authorities debunking what they believe is an incorrect interpretation that "reasonably calculated" is a separate basis for discovery. ("Reasonably calculated" no longer appears in the federal rules.) Mr. Pollock on the other hand cited Arizona case law that was split on interpretation of the phrase. Some opinions indicate that relevancy alone is the standard, while others say either relevant or "reasonably calculated" will suffice. Other remarks from the members on this point included the following:

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- If “reasonably calculated” is deleted from the Arizona rule, some will view this as a substantive change that limits the scope of discovery. Judges might then get more discovery motions.
- Evidence that may be “relevant to the subject matter” is too broad in the sense it might have nothing to do with evidence that will be relevant at trial.
- As a practical matter, the standard of “relevant to the subject matter” may be congruent with a standard of “relevant to the claims and defenses.”
- There should not be different standards under Rule 26(b) and Rule 26.1(a).
- Arizona’s rules on scope are working well and there’s no need to change them.
- A standard of “reasonably calculated” invites fishing expeditions and allows discovery about discovery.
- “Reasonably calculated” is a limitation and a way to reign in fishing expeditions, and even if taken out of Rule 26.1, it should remain in Rule 26(b).
- “Reasonably calculated” in the context of disclosure requires parties to hypothesize about how information could lead to discoverable evidence, and parties should not be required to engage in that exercise.
- The federal rules have sent a message that discovery is getting out of control and should be limited. The Task Force would send the wrong signal if it does not adopt that approach. The Task Force should follow the lead of the federal rules changes on discovery.

Members then discussed possible revisions to these rules. The members’ consensus reaffirmed their prior decision to remove “reasonably calculated” from Rule 26.1(a)(9). The members also proposed revising the last sentence of the current draft of Rule 26(b)(1)(A) as follows:

“(A) *Scope*...It is not a ground for objection that the information sought, though relevant, will be inadmissible at trial if that information appears reasonably calculated to lead to the discovery of admissible evidence.

The members were mindful that this language may be inconsistent with Arizona decisional law cited by Mr. Pollock. Nonetheless, they proceeded to vote on the following motion:

**Motion:** A member moved to adopt the aforesaid revisions to Rule 26(b)(1)(A). The motion received a second and it passed, 10 in favor and 3 opposed. **TF.ARCP: 2015-20**

The members further proposed to revise the first part of the current draft of Rule 26(b)(1)(B) so that it reads as follows:

“(B) *Limits on Discovery*. Discovery is impermissible if it:  
[then continue with the language of (i), (ii), and (iii) of the draft].”

The members agreed that this new language, if adopted by the Court, would make discovery limits self-executing; unlike the current rule, and with this proposed amendment, parties would not require a court order to limit the scope of discovery.

**Motion:** A member moved to adopt the aforesaid revisions to Rule 26(b)(1)(B). The motion received a second and it passed unanimously. **TF.ARCP: 2015-21**

**6. Workgroup 4.** Mr. Hathaway discussed several rules on behalf of the workgroup.

**Rule 60 [“Relief from judgment or order”].** Mr. Hathaway requested input from the members regarding the distinction between Rule 60(e)(2) and Rule 60(a), which both deal with correction of a judgment. After discussion, the members suggested breaking these rules into two components, one to address situations where a correction was mandatory, and another for those where correction is permissive.

**Rule 75 [“Hearing procedures”].** The members discussed subpart (b) regarding initial disclosures. The members agreed with Mr. Hathaway’s suggestion that this provision should be relocated in Rule 74 concerning pre-hearing procedures.

**Rule 76 [“Post-hearing procedures”].** Current Rule 76(d) provides that if no application for entry of judgment is filed within 120 days from the date of filing a notice of decision, and no appeal is pending, the case will be dismissed. The Task Force draft does not contain an analogous provision, and a Division One decision earlier this year in *Phillips v. Garcia*, 237 Ariz. 407 prompted the workgroup to further consider its draft of this rule. Mr. Hathaway suggested that the draft revert to the current rule, but he would add that the clerk must give notice to the parties before dismissing the case. Mr. Klain recommended that the workgroup provide its proposed change to staff, who could then circulate it to Task Force members for review. Mr. Rogers suggested using Rule 38.1 as a guide to drafting. Judge Warner noted that a new notice requirement might require changes in the clerk’s processing of the case.

**Rule 80 [“General provisions”].** Mr. Hathaway simply noted that certain sections of this rule had been relocated, while other subparts were renumbered.

**7. Workgroup 3.** Ms. Feuerhelm discussed Rules 42.1 and 54.

**Rule 42.1 [“Change of judge as a matter of right”].** The words “a matter” have been added to the title of this rule. Ms. Feuerhelm also noted that in subpart (c)(3), the time period runs from the appellate court mandate rather than from any notice or action by the superior court clerk.

**Rule 54 [“Judgment; costs; attorney’s fees; form of proposed judgment”].** An addition to Rule 54(a) now includes a provision that no judgment is final unless it recites it is entered under subpart (b) or (c). Rule 54(b) also includes express language requiring a recital. Rule 54(a) contains a definition of a “decision.” The definition does not require that a decision be signed, but Rule 58(b)(1) requires that all judgments must be signed. Ms. Feuerhelm explained that an unsigned decision can trigger deadlines, for example, for requests for costs and attorney’s fees.

Rule 54(f) concerning costs includes a number of revisions, many of which were recommended by the CPPC. Rule 54(f)(2)(D) includes a provision for filing a reply, which is not provided for in the current rule. Ms. Feuerhelm discussed the timing structure of revised Rule 54(f), as well as the timing of claims for attorney's fees under Rule 54(g). Task Force members concurred with these revisions and commended Ms. Feuerhelm for her work in refining them. The members discussed a requirement that a party must include underlying documentation with a statement of costs, but decided against it. Proceeding further with the rule, Ms. Feuerhelm noted Rule 54(h) concerning a proposed form of judgment. The rule requires a blank space in the proposed form of judgment that allows the court to insert costs and fees if a specific amount is not stated in the form. There is a new Rule 54(i) regarding the scope of the rule and superior court jurisdiction under the rule. On a related matter, Ms. Feuerhelm pointed out the deletion of draft Rule 58(b)(3), the substance of which is now in Rule 54.

**8. Draft rule petition.** Mr. Rosenbaum noted that the "disposition table" in the meeting materials had been recently revised. It will require further revision, and he encouraged workgroups to submit any changes to staff as soon as possible. The members agreed that the table might have minimal value in a few years, but it should be included with the rule petition, as a separate appendix, in the event the court wants to promulgate with the civil rules amendments.

Rachel Jacobs at Snell and Wilmer, under the guidance of Mr. Jacobs, researched and prepared a lengthy list of cross-references in other sets of Arizona rules of procedure to the civil rules. The members expressed great appreciation for their efforts. The chairs will divide these cross-references among the workgroups, who will initially determine what changes are necessary to those other rules. For those rules that require changes, the Task Force will need to prepare versions with strikethrough and underline. This will be a substantial document, and because the rule amendments are still subject to reconsideration during the initial comment period, the chairs agreed that filing this document could be deferred until the time of filing an amended petition.

The draft petition now includes the following dates for a modified comment period:

|                |   |
|----------------|---|
| April 1, 2016: | First round of comments due (changed from April 15) |
| May 13, 2016:  | Amended petition due                                |
| June 10, 2016: | Second round of comments due                        |
| July 8, 2016:  | Reply due   |

Appendix D, the detailed rule-by-rule explanation, was attached to the draft petition in the meeting materials. Appendix D may require further revision, especially following today's meeting. Mr. Rosenbaum requested that the workgroups send their edits to staff. Appendix D should note that Rules 85 and 86 will be abrogated.

Mr. Rosenbaum also reviewed recent revisions to the draft petition. He suggested that the petition note that the Task Force did not abrogate any of the Rule 84 forms because they have continuing utility. Some forms, including the subpoena, may require

conforming changes to the proposed rule amendments. Ms. Feuerhelm will review the subpoena form, and Mr. Pollock will review the joint report and proposed scheduling order forms.

**9. Roadmap.** Ms. Feuerhelm set Monday, December 28, 2015 as a deadline for workgroup chairs to send their final rule revisions to her. She will then prepare complete clean and redline versions for filing with the rule petition the first week of January.

After conferring regarding a date, the next Task Force meeting was set for Thursday, April 14, 2016, at 10:30 a.m. Scheduling of additional meetings will abide the April 14 meeting. Mr. Rosenbaum suggested the workgroups review Rules Forum comments prior to the April 14 meeting as a foundation for discussions at that meeting.

Professor O'Grady announced that Judge John Bates, who sits on the United States District Court for the District of Columbia and was actively involved in the recent federal rule amendments, will speak at the Rogers College of Law on January 26, 2016. Task Force members should let her know if they are interested in attending this presentation.

**10. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 2:35 p.m.

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**Task Force on the Arizona Rules of Civil Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: April 14, 2016**

**Members attending:** William Klain and David Rosenbaum (co-chairs), Jodi Feuerhelm, Rebecca Herbst, Andrew Jacobs, Hon. Michael Jeanes, Hon. Douglas Metcalf, Hon. Mark Moran (by telephone), Prof. Catherine O'Grady by her proxy Sara Agne, Brian Pollock, Greg Sakall, Dev Sethi (by telephone) Hon. Peter Swann, Hon. Randall Warner

**Absent:** Pamela Bridge, Michael Gottfried, Milton Hathaway

**Guests:** Aaron Nash, Jennifer Mesquita, Stewart Bruner

**Staff:** Mark Meltzer, John W. Rogers, Nick Olm, Sabrina Nash

**1. Call to order, introductory comments, approval of meeting minutes.** The chairs called the meeting to order at 10:30 a.m. They noted the Task Force filed rule petition number R-16-0010 on January 7, 2016. The petition requested a modified comment schedule. The end of the initial comment period was April 1, 2016. An amended petition is due on May 13, and that will be open for comments until June 20. The Task Force may file a reply by July 8. The Court customarily considers its rules agenda in late August or early September. Rules the Court adopts during that agenda generally become effective on January 1.

Nine formal comments were posted on the Rules Forum during the initial comment period, most within the week before the April 1 deadline. Staff's summary table of those comments is in the meeting materials. In addition, members received informal comments, notably from Shirley McAuliffe and from the Administrative Office of the Courts ("AOC"), and references to these comments are in the meeting materials. Workgroups reviewed comments prior to today's meeting. Before proceeding to the comments, the Chairs requested the members to review draft minutes of the December 17, 2015 meeting.

**Motion:** A member moved to approve the December 17, 2015 minutes, another member made a second, and the motion passed unanimously. **TF.ARCP: 2016-01**

**2. Workgroup 1 comment review.** Mr. Jacobs presented the workgroup's response to comments pertaining to its assigned rules.

**Ms. McAuliffe comments.** The meeting materials included the workgroup's evaluations of Ms. McAuliffe's comments. The workgroup agreed with most of her

stylistic suggestions and it revised the rules accordingly. Task Force members expressed no objections.

*Mr. Bruner's comment regard Rule 5.1(c)(1)(A).* Mr. Bruner provided a formal comment on behalf of the AOC's Information Technology Division. Mr. Bruner's comment opposed the portion of this proposed rule that says, "a text-searchable .pdf format is preferred." He believes that converting documents from their native format to .pdf will create larger files, and require the clerk to allocate more storage space for documents.

Mr. Jeanes discussed this comment with his technology staff. His staff agreed the proposed rule could increase the storage space required for court documents. However, his staff added that alone does not warrant a rejection of the proposed rule. There are benefits from submitting documents in .pdf format that outweigh its additional cost. A judge member also expressed support for the Task Force's .pdf provision. He said that .pdf documents provide a better experience for those who use the data, they are easier to read, and they are less susceptible to manipulation and loss of information. He added that although the court may need to store more data, this should not be an overriding criterion, just as it is not for other industries that use .pdf format. Although one member suggested that this Task Force should defer to the concerns of the AOC's technology division, the discussion concluded with the members' agreement to keep the draft rule as-is, and to address its declination of Mr. Bruner's suggestion in the amended rule petition.

Mr. Bruner arrived at a later point in the meeting, and Mr. Klain summarized for him the members' earlier discussion. The chairs then invited Mr. Bruner to address the members. Mr. Bruner said that he opposed the provision because he perceived a financial impact on the courts arising from the need for additional storage space. He also was cautious about any format that might be proprietary and require the purchase of a particular vendor's software. One member asked Mr. Bruner what the relative percentages are now of .docx, .odt, and .pdf court filings; Mr. Bruner did not have that information. Mr. Bruner discussed scanned documents submitted in TIFF format, which require increased storage, and how he expects use of that format to decrease in the future, which might mitigate any increased storage required for .pdf filings. He characterized as "urban legend" a notion that Word can reformat a document subsequent to filing. However, one of the members observed a loss of data when he receives Word documents on his portable electronic device, how therefore he has a strong preference for .pdf, and how virtually every law firm has the ability to file in .pdf format. The chairs concluded that Mr. Bruner's remarks did not alter the members' previous views on this issue, and they thanked him for his appearance at today's meeting.

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**4.14.2016**

Mr. Jacobs noted changes proposed by Ms. McAuliffe in her recent emails to him, which were included in the meeting materials, concerning Rules 64.1, 12(g), 5.2(a), and 5.1(c). Mr. Jacobs recommended that the Task Force adopt all of her proposed changes, except one, and the members agreed. The exception concerned the title of Rule 5.2(a), and whether it should be in the singular, as she suggested, or the plural (“forms of documents”) as shown in the Task Force draft.

Mr. Jacobs advised that over the past several weeks, another Supreme Court task force began a similar restyling project for the rules of criminal procedure. Although that other project began recently, there are already divergences in particular rules, as shown in a supplemental packet he and Mr. Rogers prepared. Mr. Jacobs discussed these differences. The first concerned civil Rule 5(c)(3), which provides that if the precise manner of service is not noted in a certificate of service, it is “conclusively presumed” that the document was served by mail. The criminal rule deletes the word “conclusively,” so the presumption of service is rebuttable. One member suggested changing the language of the civil rule from “conclusively presumed” to “deemed,” but another member believed self-represented litigants do not readily understand that word. Mr. Jacob’s workgroup will discuss this further and decide the most appropriate phrasing.

Civil Rule 5.1(b)(3) permits a party to submit a document to a judge, who then has the duty to transmit the document to the clerk for filing. Mr. Rogers suggested that the heading of this provision should refer to paper documents, because these are invariably paper filings, but the members did not change the heading. Mr. Rogers also explained how the criminal group initially proposed deleting the provision regarding submission of documents to a judge, but subsequently agreed it was necessary. The criminal rule also included a provision where an incarcerated party’s document would be “deemed filed” when the inmate delivered it to a jail or prison custodian. Mr. Rogers noted that this particular provision derives from case law. Mr. Jacobs suggested that the provision be included as a new subpart of civil Rule 5.1(b). Mr. Jeanes found the proposal problematic because when the jail custodian mails a document to the clerk, the clerk has no way of knowing when the inmate delivered the document to the custodian. A judge member noted that this would only be an issue if an inmate’s document was untimely. Mr. Rogers suggested text for a new provision in Rule 5.1 that would provide a procedure for dealing with an inmate’s untimely filing. The members agreed with Mr. Rogers’ suggestion, and Mr. Jacobs will incorporate that in his revised text of this rule.

The Task Force declined to make certain changes for the sake of uniformity with the draft criminal rules. For example, the criminal rule deleted a provision in civil Rule 5.1(b)(3) that required a filer whose document was rejected because of a system failure to attempt to resolve the matter with the court clerk; the civil rule maintained the provision.

The criminal rule made changes to the caption requirements of civil rule 5.2(a); the Task Force declined to make similar changes, except for adding a new subpart that the caption include the judge to whom the case is assigned, and requiring the email address of a self-represented litigant with the litigant's other contact information. The criminal rules deleted the line-numbers requirement of civil Rule 5.2(b)(1)(A), but the civil rules kept the requirement. For consistency with the Arizona Rules of Civil Appellate Procedure, the civil rules retained the font requirements of Rule 5.2(b)(1)(B), although the criminal rules deleted them. However, the Task Force agreed to replace the "must" with "should" in these requirements. The Task Force also agreed to adopt the criminal rule's phrasing for civil Rule 5.2(c)(2)(B) concerning official records. The Task Force decided that it would not adopt the criminal rule's changes to Rule 6 regarding time computations, which had been the subject of previous Task Force discussions.

**3. Workgroup 2 comment review.** Mr. Pollock advised that workgroup 2 had adopted several stylistic changes suggested in a formal comment from the Pima County Bar Association and by informal comments from Ms. McAuliffe. He reviewed three formal comments submitted by the Arizona Attorneys for Justice ("AAJ") concerning the subjects of proportionality, preservation of electronic data, spoliation, and independent medical exams. He noted those comments addressed issues the Task Force had extensively discussed. An AAJ comment inquired whether the Task Force intended that the provisions of Rule 37(g) apply to social media; Mr. Pollock responded affirmatively. The AAJ directed another comment regarding medical exams to a draft of Rule 35 that the Task Force subsequently revised, and the comment was therefore moot. Task Force members agreed that no additional changes were necessary in response to the AAJ's comments.

Mr. Pollock also discussed a formal comment from Mr. Spencer Scharff regarding expert witness disclosures. Mr. Pollock reminded the members that they had previously discussed expanding the scope of Rule 26.1, as Mr. Scharff proposed, but rejected that, and the members accordingly declined Mr. Scharff's proposed rule change.

A formal comment from Ms. Jenny Yu concerned the time within which counsel is required to provide a copy of a report of an independent medical examination. After considering her comment, Workgroup 2 members agreed that a revision to Rule 35(d)(2) was appropriate. Task Force members discussed implications of a revision, including whether a party needs to make a request to obtain a report, scenarios in which the examined party made no request, current practices for disclosing the report, and the matters of privilege and waiver. The members agreed that the comment required only a modification to the 20-day time limit, and they adopted a revision proposed by the workgroup.

Finally, Mr. Pollock discussed a portion of a formal comment from the State Bar of Arizona regarding Rule 26.1(b). This portion of the comment requested adding new text that would allow a judge to shift costs concerning the disclosure of electronically stored information (“ESI”). Mr. Pollock summarized the history of this provision with the State Bar’s Civil Practice and Procedure Committee, which sprung from that committee’s discussion of producing ESI in native or non-native format. Mr. Pollock reminded the members that the Task Force had already incorporated cost-shifting provisions in proposed Rules 16 and 26; the State Bar requested that a similar provision also be included in Rule 26.1. Some members believed that this was unnecessarily redundant, but after discussion, the members agreed to add the requested language, with a modification. The addition proposed by the State Bar stated that the court “is authorized to shift costs, if appropriate.” The change approved by the Task Force uses the word “may” in lieu of “is authorized to....”

**4. Workgroup 3 comment review.** Mr. Feuerhelm reported on several issues on behalf of the workgroup, all of which the meeting materials documented.

First, she explained proposed revisions to Rule 84, Form 9, a subpoena, which incorporates changes to Rules 26 and 45. The revisions, among other things, clarified that if a person objects to a subpoena and the court has not ruled, the person must appear as commanded by the subpoena. The members agreed with the revisions. One member suggested adding a box on the first page of the subpoena that would include the admonition about excluded witnesses. The members did not agree to this suggestion, but they left it for consideration by the Civil Practice and Procedure Committee.

Ms. Feuerhelm next explained a modification to Rule 54(h)(3) to resolve an ambiguity about whether a judgment that omits fees is “final” for purposes of appeal. The proposed revision, which the members supported, was that the judgment is final unless a party moves to amend it within the time required by Rule 59.

A third change concerned Rule 11(c)(1), and a provision that the court “must” impose a sanction. The State Bar’s formal comment requested changing this to “may.” Ms. Feuerhelm noted that the Chamber of Commerce supports use of “must,” while the Pima County Bar and the State Bar favor “may,” which is used in the corresponding federal rule. The consensus of the members was to change “must” to “may,” but to explain this in the amended petition so that stakeholders and the Court understand the Task Force reasons for the change. Ms. Feuerhelm discussed another proposed change to Rule 11 that resolved an inconsistency between that rule and Rule 5.2 concerning email addresses. The Task Force agreed to that change.

Commissioner John Doody submitted a formal comment concerning Rule 55. Although it seems self-evident, the members agreed with his request that Rule 55(b)(2) require a hearing notice to specify the date, time, and place of a hearing. Commissioner Doody also raised a service requirement under the Hague Convention, but the members did not adopt his suggested change to Rule 55 concerning that matter. Ms. Feuerhelm revised Rule 55(a) in a further effort to remove from that rule any references to action taken by the clerk. She noted the Pima County Bar suggested several minor changes that the Task Force has previously considered, and the Task Force incorporated some of those suggestions in the proposed rules it filed with its rule petition. Finally, Ms. Feuerhelm mentioned a comment from Ms. McAuliffe concerning the title to Rule 56(g). The members agreed to change the title of the rule, as suggested by Ms. McAuliffe, from “failing to grant all the requested relief” to “declining to grant all the requested relief.”

**5. Workgroup 4 comment review.** There were no comments pertaining to rules assigned to Workgroup 4.

**6. Roadmap.** The workgroup chairs agreed to submit their respective revisions in track changes to Ms. Feuerhelm. She will incorporate those changes in a redline version that will simply show changes the Task Force made subsequent to filing the rule petition in January. This redline is the only version of the rules the Task Force will file with its amended petition. The Task Force will file a clean file version of the rules with its reply in early July.

Ms. Feuerhelm made changes to Form 9; the workgroup chairs should review other forms related to their rules and determine if any changes are necessary. Mr. Rogers believes that the rule changes probably affect only two forms, but the final version of the rules should include all of the forms in an appendix.

Workgroup chairs should submit to Mr. Rogers their detailed explanations of significant rule changes (such as the changes to Rule 11) that the Task Force made subsequent to the filing of its rule petition in January. Those explanations should also include significant recommendations raised by comments that the members discussed but declined to adopt, such as Mr. Bruner’s comment concerning Rule 5.1. Mr. Rogers will incorporate the substance of these explanations in an amended rule petition. The amended petition will include only a general reference to recent stylistic changes. Mr. Rogers suggested saving all of the changes the Task Force made since January for incorporation in a revised Appendix C, the detailed rule-by-rule explanations, which will be included with the reply for the Court’s consideration. The members should also note for staff any necessary changes to Appendix D, the disposition table, resulting from recent rule changes.

The chairs discussed the need to include proposed amendments to rules that cross-reference particular rules of civil procedure. A lengthy list of rules that cross-reference civil rules was included in the meeting materials. The amendments need to address only cross-references for which the Task Force has changed a civil rule number. The amendments do not need to address references in authorities outside the scope of Supreme Court rule making, such as statutes, administrative regulations, or local rules of court. Ms. Feuerhelm and Ms. Ferguson will format these proposed changes so they are consistent with the formatting of the civil rules. Mr. Jacobs will coordinate this effort.

Mr. Rogers will meet with representative of the rules publisher in June. They will discuss formatting of the new rules, and the Task Force approach to comments. Mr. Rogers anticipates that the new rules will include a table and an implementation order. The order should appear only once, rather than before each rule as shown in publications of previous sets of restyled rules. Mr. Rogers also expects publication of the rules as two separate sets, rather than each new rule directly following the old version of the rule. The members discussed which rule set should appear first in the volume.

This may be the last meeting of the Task Force, but in the event that the Task Force needs to meet again after the second round of comments, and prior to filing a reply, the members agreed to Wednesday, July 6, 2016, at 10:30 a.m., as the date and time of that meeting.

**7. CJRC update.** Mr. Klain updated the members on a new Supreme Court Committee on Civil Justice Reform (“CJRC”), which was established by an administrative order entered in late December 2015. The CJRC will be looking at a number of areas that relate to the Task Force, including ESI, summary dispositions, arbitration, and other rule changes. The CJRC is still gathering data and has not yet put forward any concrete proposals. The CJRC’s report to the Arizona Judicial Council is due in October. The CJRC may revisit some of the topics the Task Force considered, including recent amendments to the federal rules. Mr. Klain noted that while the Task Force was working within the existing structure of the civil rules, the directions to the CJRC were to “think outside the box.” The CJRC has a diverse membership, which includes five Task Force members (Judge Swann, Mr. Jeanes, Ms. Feuerhelm, Mr. Jacobs, and Mr. Klain.) Mr. Klain added that he has received feedback that prominent federal judges have complimented the Task Force work product, particularly regarding ESI and the issue of proportional versus appropriate discovery.

**8. Call to the public, adjourn.** There was no response to a call to the public. The meeting adjourned at 1:25 p.m.