

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: June 14, 2016

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

Absent: Veronika Fabian, Jack Jewett, Geoffrey Trachtenberg

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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