Committee on Civil Justice Reform
Working Group Two

MEMORANDUM

TO: Committee on Civil Justice Reform

FROM: Working Group Two

DATE: July 15, 2016

RE: Draft Changes to Ariz. R. Civ. P. 1, 4, 8, 16, 26, 26.1, 30, 31, 33, 34, 36, 37

This Memorandum refined the proposed revisions to the Arizona Rules of Civil Procedure set forth in our May 12, 2016 Memorandum. Its recommendations are the proposal of Working Group Two, which met about them on April 14, May 4, and June 24 (then with other committee members, to discuss their views and concerns about the proposal in the May 11, 2016 Memorandum), and again on July 14.

The particular revisions made to the May 11, 2016 draft are as follows:

I. Rule 8 Is Modified To Limit and Punish Evasive Answers, and to Include a Mechanism For Parties To Confer About What Tier a Case Will Be Assigned.

A. Our Proposal Promotes the Early Joinder of Issues To Speed Cases Along.

Rule 8 is the first place where the parties join in conflict over the issues. Yet too often parties retreat behind hedging formulations, designed to reserve the right to answer important questions later. That contradicts our charge to make litigation faster and cheaper. For that reasons, we propose cutting away these hedges. We also propose requiring an early conference of the parties about the tier to which their case should be assigned. Housing this in Rule 8(h) makes sense, because it presently is the home for determinations that a case is "complex," which is essentially the third tier in our model.

First, we propose to move into Rule 8 prohibitions (already present in case law) of certain non-responsive responses, such as "the document speaks for itself," "we deny all allegations inconsistent with the wording of the" document, and that "the allegation contains a legal conclusion, such that no response is necessary." See Ariz. R. Civ. P. 8(b)(2) (attached; all citations herein are to the attached draft).

Second, we also recommend proscribe "soft" denials, based on information and belief. Rule 8 contemplates admitting, denying, or stating that one lacks information sufficient to form a belief. Taking those words and twisting them into a soft denial "on information and belief" is an encouragement to answer "I don't think so." We think it's better to cause parties to actually deny, where they have information sufficient to support a belief, or to say they don't know enough, which operates as a denial. Ariz. R. Civ. P. 8(b)(5). We believe this is clearer and promotes issue clash early on in a case.

B. We Propose Revising Rule 8(h), To Broaden Its Role as an Early Categorizer of Cases, and to Link It to the Categorizing and Narrowing of Cases in Rule 26(e), By Requiring an Early Meeting of Counsel Focusing on These Issues.

Helpfully for our tiering proposal, Arizona already has a subrule of procedure designed to promote early case categorization within Rule 8. It is Ariz. R. Civ. P. 8(h), which governs a party's attempt to designate a suit "complex." We have moved many of the factors in this rule to Ariz. R. Civ. P. 26(e)(1), so that they now are part of parallel definitions of Tier 1 (streamlined), Tier 2 (normal), and Tier 3 (complex) cases.

At the same time, we have remade Ariz. R. Civ. P. 8(h) as a rule that requires early conferring by the parties about their case, in particular whether they can narrow and streamline it in any way, and about tiering, all toward the end of making the conduct of the entire case proportional. Ariz. R. Civ. P. 8(h)(1). The topics the parties are to discuss are anticipated witness and document disclosures, motions they expect to file, agreements they could reach to narrow the case, and the tier to which the case should be assigned under Ariz. R. Civ. P. 26(e).

Under the proposal, the parties will file a Report of Early Meeting, which at minimum will let the court know that the parties have met. Ariz. R. Civ. P. 8(h)(3)(A). That Report must be accompanied by a good faith consultation certificate under Ariz. R. Civ. P. 7.1(h), which means the consultation must be by telephone or in person. The parties are also required to tell the court about any agreements they reach that could narrow the case. Ariz. R. Civ. P. 8(h)(3)(A). The parties may provide the court with a short (four-page maximum without leave) description of the case for any evaluation of the case the court may perform, should the court choose to individually assign the case a tier under Rule 26(e)(1)(B). Ariz. R. Civ. P. 8(h)(3)(B). Rule 8(h) also tells the parties that they can submit a proposed stipulation to a tier, referring them to Rule 26(e)(1)(A)(i), which requires good cause and judicial approval of the stipulation, and requires them to move to vary their tier by time they jointly file their Report of Early Meeting.

II. Rule 26 Is Modified To Add Qualitative Considerations To the Tiers, To Encourage the Parties and the Court to Actively Participate in Selecting the Right Tier, and To Make Clear By Comment That No Proportionality Factor Should Predominate in That Analysis.

A. We Modified Proposed Ariz. R. Civ. P. 26(e), Governing Tiering, To Add Qualitative Attributes of Cases To the Criteria For Tiering.

The primary critique of Utah proportionality is that it overly privileged monetary considerations, and failed to take account of the other proportionality factors, including the importance of the issues at stake. (Importantly, there is no debate about the usefulness of each of the proportionality factors.) For that reason, we conferred at length with Brittany Kauffman, representing the Conference of Chief Justices' CJI Committee, and Shelley Spacek-Miller, representing the National Center for the State Courts to explore alternate ways to tier cases, seeking a model that was more qualitative and less exclusively quantitative. That is also

consistent with the Supreme Court's mandate to examine the work product of the Conference of Chief Justices in fashioning our reform proposals.

What we learned from the Conference of Chief Justices is that there are sets of characteristics that generally distinguish the streamlined path cases and the complex pathway cases. Given that, we constructed a rule that sets out those characteristics, just like current Ariz. R. Civ. P. 8(h) does in defining cases that should be designated complex. Those factors appear in proposed Ariz. R. Civ. P. 26(e)(1)(B), as factors the court may consider if it chooses to tier the cases by examining the cases' characteristics. In doing this, we conserved the core of present Ariz. R. Civ. P. 8(h)(2) by folding the primary factors that presently make a case "complex" into proposed Ariz. R. Civ. P. 26(e)(1)(B)(iii), which defines Tier 3.

B. We Modified Proposed Ariz. R. Civ. 26(e) To Expressly Authorize Stipulations, as Well as Motions, To Move Among Tiers, For Good Cause Shown.

As a further attempt to meet the concerns of those who find the Utah system of tiering unduly rigid and monetary, we added more provisions permitting parties to seek to opt out of their tier. While the Utah Rules of Civil Procedure do not even offer parties the option to move among tiers, and our original draft did, we have now added language permitting parties to stipulate to move to a different tier. Ariz. R. Civ. P. 26(e)(1)(A). Our draft also requires the parties to meet and confer early on about streamlining their case as appropriate and about tiering, so they can decide whether to stipulate or move the court to assign them a different tier. Ariz. R. Civ. P. 8(h).

C. We Added a Comment to Rule 26 Explaining Tiering, and Explaining in Particular That No Single Proportionality Factor Predominates.

We also attempted to meet the concerns of those who saw Utah proportionality as unduly monetary in focus by doing what the Task Force did – adopting a Comment that expressly said that no one factor would predominate. Indeed, we adopted the key sentence from the Task Force's proposed comment to Ariz. R. Civ. P. 16 to make that same point. The Comment explains tiering, explains that proportionality and relevance are the keys to discovery, and explains – fully consistent with the approach of both the Task Force and the December 2015 amendments to the Federal Rules of Civil Procedure – that all of the factors matter, and that they must all be weighed. This Comment both harmonizes Ariz. R. Civ. P. 26 with Fed. R. Civ. P. 26, and respects the concerns of many in the Task Force that monetary considerations not predominate (which were also addressed in the above-noted ways).

D. We Softened the Resistance to Discovery in Our Draft By Cutting From Ariz. R. Civ. P. 26(b)(3) the Burden on the Proponent of Discovery To Show Its Relevance and Proportionality.

One significant feature of the Utah model that Working Group Two debated and originally recommended adopting was the requirement of Utah R. Civ. P. 26(e) that a proponent of discovery bear the burden of showing that any requested discovery is both relevant and proportional. Especially given the relevance-based foundation of Ariz. R. Civ. P. 26.1, and as a further accommodation to critiques of the Utah model, we have stricken this from the new draft.

E. We Eliminated Utah's Description of Overlimit Discovery as "Extraordinary," To Remove Any Unintended Connotation That Leave to Take Additional Discovery Is Subject To a Showing of Extraordinary Need, Or That It Should Almost Never Be Granted.

Utah's proportionality amendments describe discovery beyond tier limits as "extraordinary." This may connote an extremely high standard to permit additional discovery, or may connote that such discovery should almost never be granted, or both. In this draft, we struck "extraordinary," so that such discovery is now merely described neutrally as "discovery beyond tier limits." Ariz. R. Civ. P. 26(e)(4).

F. In Response to Concerns, We Expanded the Amount of Deposition Discovery Permitted in Tier 1 Cases From Three Hours to Five Hours.

Utah's proportionality rules limit Tier 1 cases to three hours of deposition discovery. After further review and deliberation, and to create a default that would less frequently require negotiation or intervention, we have increased that amount to five hours.

III. Rules 26 and 26.1 Are Modified To Add Tiering To Expert Discovery.

During our prior meeting, there seemed to be some consensus that tiering would make sense for expert discovery. For that reason, we added a provision to Ariz. R. Civ. P. 26.1 that would mandate expert disclosures modeled on the requirements of the Federal Rules of Civil Procedure. Ariz. R. Civ. P. 26(c)(2). We left Tier 1 and 2 cases governed by existing Ariz. R. Civ. P. 26.1(a)(6), but made Tier 3 cases subject to the federal disclosure requirements embodied in proposed Ariz. R. Civ. P. 26(c)(2). Ariz. R. Civ. P. 26(e)(6). In our draft, courts may also order or parties may also agree to the more stringent federal requirements. Id.

IV. Rule 36 Is Modified Consistent With Rule 8, To Promote Direct Answers Without Deflection and Delay.

The theory and practice of Rule 36 is very much like that of Rule 8. Requests for admission parallel allegations in the complaint. The responding party must meet the substance under both rules, and to move the case along. Thus, we imported into Rule 36(a)(5) the same

language we placed into Rule 8(b)(2), which bans a variety of responses that seek to avoid meeting the substance of allegations or requests to admit (the document speaks for itself, the respondent denies any allegations inconsistent with the document, the respondent declines to answer because the request contains legal conclusions or assertions).

V. Rule 37 Is Modified Further To Strengthen It and To Make Superior Courts More Likely to Impose Sanctions For Nondisclosure.

One of the key features of this set of proposed revisions to the Arizona Rules of Civil Procedure is a stronger Rule 37. To that end, in our revisions, we already: (a) added to Ariz. R. Civ. P. 37(c)(1) a requirement that a court specifically determine that untimely disclosure was harmless before permitting the use of untimely disclosed information; (b) added a strong new Ariz. R. Civ. P. 37(h) underscoring the court's generalized authority to issue such orders as are in furtherance of discovery and disclosure, and to effectuate compliance with discovery and disclosure obligations. To that we add three further revisions:

First, in the text of Ariz. R. Civ. P. 37(d), we add language underscoring that the court has "discretion [to] impose any sanctions the court deems appropriate in the circumstances." This language is a greater and clearer encouragement to the use of the power to sanction, and by expressly referencing discretion, it reinforces to courts that their decisions should be reviewed for abuse of discretion.

Second, we tweak Ariz. R. Civ. P. 37(f)(2) to explain that failures to appear for deposition or to serve written responses to discovery requests are not only "not excused" by the objectionability of the requested discovery, they are also "not mitigated."

Third, we add another Comment, to make clear that the proposed revisions to Rule 37 are designed to enhance and reinforce the sanction power, as a way of incentivizing more fulsome and complete initial disclosures. The Comment also explains the even-greater emphasis on initial disclosure as the foundation of civil practice, the Arizona Rules of Civil Procedure, and these revisions to them. We expect that the revisions to the rule, coupled with the comment, will empower Superior Court judges who are presently disinclined to punish noncompliance with discovery and disclosure rules lest they be reversed, given an expectation that all nondisclosures are harmless or curable, and that their discretion is limited.

Conclusion

With these revisions, Working Group Two sought a middle path between case categorization without reference to dollars, and case categorization solely with reference to dollars. This revised draft not only listens to important concerns, but relies in balance on all of the federal proportionality factors to create an innovative system for tripartite case categorization in a legal culture that promotes "Supersize Me" discovery. This model empowers courts to tier cases actively but does not require them to. It empowers litigants to seek tiering they believe proper by using qualitative factors to recategorize cases, subject to court oversight and approval.

It is a true attempt at "right-sizing" cases, without using a one-size-fits-all approach. And it takes seriously the core feature and innovation of Arizona civil practice, which is mandatory early disclosure of relevant matter, by empowering courts to promote it more effectively. It is a significant improvement on undifferentiated case management, a weak Rule 37, and today's culture of excessive—and excessively costly—discovery. This Committee should adopt it.