

Committee on Civil Justice Reform (“CJRC”)

State Courts Building, Phoenix

Meeting Minutes: August 23, 2016

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

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

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

Staff: Jennifer Albright, Mark Meltzer, Julie Graber

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

which contained protections for draft reports, and for communications between a party's attorney and an expert witness. In draft Rule 26.1(c)(3)(F) and (c)(4)(E), the members agreed to strike these words: "a list of all other cases in which, during the previous 4 years, the witness testified as an expert ~~at trial or by deposition; but if compiling such a list would be unduly burdensome, a reasonable summary of the expert's testimonial history over the previous 4 years.~~" The rationale is that the five words before the semicolon were unnecessary, and that deleting the remainder of the sentence was appropriate because an expert who testifies frequently should be able to provide a list.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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