

# **Committee on Civil Justice Reform (“CJRC”)**

## **Meeting Agenda**

**Tuesday, September 13, 2016**

10:00 AM to 2:30 PM

State Courts Building \* 1501 West Washington \* Conference Room 345 \* Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 6252

Item no. 1	<b>Call to Order</b>  <b>Introductory comments</b>	<i>Mr. Bivens, Chair</i>
Item no. 2	<b>Approval of August 23, 2016 meeting minutes</b>	<i>Mr. Bivens</i>
Item no. 3	<b>Discussion of a draft report to the Arizona Judicial Council and revised workgroup proposals</b>  - <b>Case management reform</b>  - <b>Discovery reform</b>  - <b>Compulsory arbitration reform</b>  - <b>Court operations reform</b>	<i>Mr. Jacobs</i>  <i>Ms. Feuerhelm</i>  <i>Judge Harrington</i>  <i>Ms. Desai</i>
Item no. 4	<b>Roadmap</b>	<i>Mr. Bivens</i>
Item no. 5	<b>Call to the Public</b>  <b>Adjourn</b>	<i>Mr. Bivens</i>

*The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.*

Please contact Jennifer Albright at (602) 452-3453 or Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

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## 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.

**The Committee on Civil Justice Reform's  
Report to the Arizona Judicial Council**

**A Call To Reform**

[seal of the Supreme Court of Arizona]

**October 1, 2016**

*Draft as of September 8 as circulated to  
Committee Members*

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## Executive Summary

Arizona has long been a leader in civil justice reform. Twenty-five years ago, the Arizona Supreme Court enacted the path-breaking Zlaket Rules. Those 1992 reforms cut waste and inefficiency from pretrial procedures by requiring mandatory, relevance-based disclosures intended to scale back civil discovery. The Zlaket Rules changed the culture of civil justice in Arizona.

In 2009, the Institute for the Advancement of American Legal Systems (“IAALS”) conducted a comprehensive Arizona Rules Survey to explore the opinions of judges and lawyers 17 years after Arizona’s 1992 reforms. Respondents with experience in both state and federal court in Arizona preferred litigating in state court over federal court by a two-to-one ratio. Respondents who favored the state court forum cited Arizona’s disclosure and discovery rules and regarded state court as faster and less costly. *IAALS Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure I (2010)*, p. 12-14. Other surveys in the same time frame yielded similar results. See A. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience* [ 43 Ariz. St. L.J. (Summer 2011)]. **[hyperlink all citations]**.

The wisdom of Arizona’s early innovations has since been confirmed by follow-on developments in the federal rules, which now require some mandatory early disclosures. Other states have also followed Arizona by adopting relevance-based, mandatory disclosures of their own (Utah, Colorado, and Minnesota). More recently, federal courts have proposed a pilot program to test Arizona-style disclosures in five district courts.

Unmistakably influenced by Arizona’s lead on these issues, a national movement has risen in the past decade to reform American courts. Working through organizations like the Conference of Chief Justices (“CCJ”), IAALS, the National Center for State Courts (“NCSC”) and the American College of Trial Lawyers (“ACTL”), leading judges, lawyers, and scholars have studied the duration and cost of civil discovery, the often prohibitive increase in costs to civil litigants, and the reality that cases burdened with too much costly discovery seldom reach trial. All national reform studies see the need to reform discovery

. Discovery is not the intended end or destination of civil justice. The intended destination is a fair trial or settlement, based on relevant evidence. Discovery should be a raft that helps litigants to reach the intended destination equipped with relevant evidence. But in today’s litigation environment, the raft of discovery can sometime seem the destination itself, particularly with the advent of electronically stored information. Today, in too many civil cases, parties can spend months or even years in discovery, churning for more and more evidence that never reaches trial. In such cases, the costs of discovery can quickly become disproportionate to the issues at stake, to the point of forcing a resolution driven by economics, not by the merits. After detailed study of these issues, national reformers have proposed new ways to make civil cases cheaper, faster, and easier to use by the wide variety of litigants who look to our courts for justice.

Against this backdrop of national reform proposals, the Arizona Supreme Court established this 23-member Committee on Civil Justice Reform in December 2015 (“Committee”). Ariz. Sup. Ct., Admin. Order, No. 2015-126 [hyperlink]. The Court appointed members from the public and private sectors with broad and differing perspectives on Arizona’s civil justice system. Our Committee includes judges from around the state, drawn from the Superior Court, Court of Appeals, and Supreme Court, as well as a court clerk and a court administrator. Our Committee also includes lawyers from around the state, representing the plaintiffs’ personal injury bar, consumer rights and public interest groups, defense attorneys, and large law firms small, medium and large. Our Committee also includes advocates for Arizona businesses and for the public at large.

The Supreme Court charged our Committee to review leading national reform proposals, including the 2016 report of the National Conference of Chief Justices, *Civil Justice Initiative* (“CCJ-CJI”), the NCSC’s accompanying *Landscape of Civil Litigation in State Courts* report, the 2015 IAALS/ACTL report titled *Reforming Our Civil Justice System: A Report on Progress and Promise*, and the December 2015 amendments to the Federal Rules of Civil Procedure, all of which recommend changes to American courts. The Supreme Court also directed our Committee to develop rules amendments and pilot projects, “informed by careful consideration of national efforts and studies,” with the goal of reducing the time and cost of civil litigation in Arizona. AO-2015-126.

Our Committee believes that Arizona is ideally postured, once again, to lead in civil justice reform. We propose reforms that build on Arizona’s unique legal culture of innovation, pragmatism, mandatory disclosure, and cooperation among opposing counsel. We believe that enacting these reforms will allow Arizona’s already-innovative courts to better serve the goal neatly described in Civil Rule One -- “to secure the just, speedy and inexpensive determination of every action.” We organize our proposed reforms into four broad categories:

In our first category, **case management reforms**, we follow the guiding principle of proportionality in discovery, as recently adopted by Arizona’s Supreme Court. We also propose a system of differentiated case management for Arizona courts with limits on discovery based on the issues in each case. We propose to resolve most discovery disputes without resort to costly formal motions. We propose to strengthen disclosure obligations under the rules by empowering judges under Rule 37 to shift litigation costs among parties where appropriate. We propose to strengthen Rule 11 and to enforce that rule where appropriate. And we propose to eliminate certain practices by which some litigants try to hide or hedge their positions.

In our second category, **discovery reforms**, we propose simplifying disputes over electronically stored information (“ESI”), whether before or after a lawsuit is filed. We propose a new Rule 45.2 that would protect parties and nonparties alike from unreasonably burdensome requests to preserve their ESI, shifting discovery costs to the requestor where appropriate. We believe the time has come to adopt the recent reforms to expert discovery in the Federal Civil Rules, which can only save parties time and money. We propose

clarifying the rights of nonparties to resist unduly burdensome subpoenas, and we look to enhance remedies for deposition abuse.

In our third category, we propose **compulsory arbitration reforms** through a pilot program in Pima County that would offer the option of a short trial to give parties a true day in court before a Superior Court judge, or a jury of their peers.

Finally, we propose **court operations reforms** through enhanced judicial training and technology, while providing more useful information to the public about what to expect in civil court.

As the format for our final report, we first present a narrative description of our Committee's 13 main proposals, followed by what we intend as useful conclusory observations, followed by Appendices that contain the details of our proposed rules changes and recommendations. We also provide redlined versions of our proposed rules changes against both the existing Arizona Rules of Civil Procedure and against the 2016 recommendations of the Supreme Court's Task Force on the Arizona Civil Rules of Procedure.

It has been an honor for all of us to serve on this important Committee. We express our gratitude to the Arizona Supreme Court for the opportunity. We also thank Jennifer Albright and Mark Meltzer, and their colleagues at the Administrative Office of the Courts, for their patient and sometimes heroic support. We also thank Brittany Kaufman, Director of the IAALS Rule One Initiative, and Shelley Spacek, Sr. Research Analyst for the National Center of State Courts, for their generous attention and collaboration.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2016

### **Members of the Committee on Civil Justice Reform**

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**Committee Chair**, Don Bivens, Snell & Wilmer, Phoenix

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**Chair, Court Operations Reform Work Group**, Roopali Desai, Coppersmith Brockelman, Phoenix

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**Chair, Discovery Reform Work Group**, Jodi Feuerhelm, Perkins Coie, Phoenix

---

**Chair, Compulsory Arbitration Reform Work Group**, Hon. Charles Harrington,  
Superior Court of Pima County

---

**Chair, Case Management Reform Work Group**, Andrew Jacobs, Snell & Wilmer,  
Tucson

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Hon. Dawn Bergin, Superior Court of Maricopa County

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Hon. Jeffrey Bergin, Superior Court of Pima County

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Ray Billotte, Court Administrator, Superior Court of Maricopa County

---

Hon. Robert M. Brutinel, Arizona Supreme Court  
Krista Carman, Warnock MacKinlay &  
Carman, Prescott

---

Veronika Fabian, Choi & Fabian, PLC, Flagstaff

---

Glenn Hamer, Arizona Chamber of Commerce and Industry, Phoenix

---

Michael Jeanes, Clerk of Court, Superior Court of Maricopa County

---

Jack Jewett, Flinn Foundation, Phoenix

---

William G. Klain, Lang & Klain, P.C., Scottsdale

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Stephen Montoya, Montoya Jimenez, Phoenix

---

Michael O'Connor, Salt River Project, Phoenix

---

Mark N. Rogers, ON Semiconductor, Phoenix

---

Hon. Peter Swann, Arizona Court of Appeals, Division One

---

Hon. Timothy Thomason, Superior Court of Maricopa County

---

Geoffrey Trachtenberg, Levenbaum Trachtenberg, Phoenix

---

Hon. Patricia Trebesch, Superior Court of Yavapai County

---

Steven Twist, Services Group of America, Scottsdale

---

David Weinzwieg, Arizona Office of the Attorney General

**Supporting Staff from the Administrative Office of the Courts**

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Jennifer Albright, Senior Policy Analyst, Court Services Division

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Mark Meltzer, Senior Policy Analyst, Court Services Division

## **Case Management Reforms: Improving How Courts Manage Parties**

### **The Challenge of Undue Expense and Duration**

A wide range of studies – including those the Arizona Supreme Court directed to our attention – confirm that for most parties civil litigation has become too expensive and too protracted. The NCSC’s study *The Landscape of Litigation in State Courts* (the “Landscape Study”) examined roughly one million non-domestic cases resolved between mid-2012 and mid-2013. From the Landscape Study, the CCJ concluded that litigation costs routinely exceed the economic value of cases. National Center of State Courts, *The Landscape of Civil Litigation in State Courts*, 9 (2016).

The Landscape Study also cites a variety of data supporting the conclusion that litigation costs are disproportionately high and unduly influence the outcome of cases. For example, “[a]n IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% agreement that case outcomes are driven more by the costs of case than by the merits. Advisory Committee on Federal Civil Rules, *Report to the Standing Committee* (May 2, 2014), at 7.

Likewise, surveys of the Litigation Section of the American Bar Association and the National Employment Lawyers Association found that “78% of plaintiffs’ attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the [amount at issue in] small cases.” *Id.* Unfortunately, these data are illustrative (though far from exhaustive) and broadly representative of other studies of litigation costs and their effects. The bottom line is that many private individuals and small businesses cannot afford to have their day in court.

### **Proportionality As a Guiding Principle**

Our Committee believes that one answer to the problems of undue cost and time is to keep litigation proportional to what is at stake. While our Committee was refining our final recommendations, the Arizona Supreme Court made an important change to the Arizona Rules of Civil Procedure, adopting the principle of proportionality in Civil Rules 16 and 26, effective January 1, 2017. That change aligns Arizona’s civil rules with the December 2015 amendments to the Federal Rules of Civil Procedure, which also emphasize proportionality. Our Committee agrees with these changes by the Arizona Supreme Court, and finds strong support for these changes in the national reform studies the Supreme Court commended to our consideration.

The IAALS/ACTL report *Reforming Our Civil Justice System: A Report on Progress and Promise* (April 2015) (the “IAALS Report”) argues that “Proportionality should be the most important principle applied to all discovery.” IAALS Report, at 17. The CCJ-CJI report’s second recommendation to courts across the nation is that, “beginning at the time each civil case is filed, courts must match resources with the needs of the case.” CCJ Report, at 18. Stated differently the courts need to right-size the costs

of a case to the stakes of a case. To accomplish that, the CCJ-CJI's third recommendation is that courts "should use a mandatory pathway-assignment system to achieve right-sized case management." CCJ Report, at 19.

Similarly, the December 2015 amendments to the Federal Rules of Civil Procedure center on keeping discovery proportional to the needs of each case, by adopting "proportionality" as the governing principle of discovery in revised Federal Rule 26(b)(1), Scope of Discovery. The 2015 amendments struck from the Federal Rules the now obsolete phrase "reasonably calculated to lead to the discovery of admissible evidence," which has for decades been the touchstone for the scope of permissible discovery.

Our Committee concluded that IAALS/ACTL Report, the CCJ-CJI Report, and the December 2015 revisions to the Federal Rules all recognize a common truth: discovery should be a *means* to the end of a fair trial or settlement of a dispute. Discovery is not the end of the civil rules – it is merely a means, and one that should not defeat the goals of Rule 1.

To keep the costs of discovery proportional to the stakes of each case, our Committee adopts the recommendation of the Conference of Chief Justices, Civil Justice Initiative to create three differentiated and proportional case management paths for different types of cases: (1) a streamlined path for simpler cases, (2) a general path for most cases, and (3) a complex path for cases that justify more extensive case management and discovery. CCJ Report, at 19-27.

### **Building Differentiated Case Management For Arizona Courts**

Our committee examined a range of potential models of differentiated case management to best fit Arizona's existing legal culture, which is a culture of mandatory disclosure and cooperation among counsel. First, we examined the model of Arizona's neighbor, Utah, which like Arizona have rules of civil procedure modeled on the Federal Rules. In 2011, the Utah courts enacted by rule a system of proportionality-driven differentiated case management. Utah R. Civ. P. 8, 26. Utah's system slots cases into three tiers. But unique to Utah, the system sets limits on discovery driven strictly by the dollar amount at issue. Thus, the limits of discovery permitted in a case depend solely on the amount in controversy. Discovery beyond those limits is termed "extraordinary" discovery in Utah, and becomes possible only after the parties have completed all discovery permitted by the economic tier to which the case is assigned.

Our Committee disagrees with the Utah system, but agrees with the recent 2015 amendments to the Federal Rules, by concluding that economics could be a significant factor, but should not be the only factor, in determining what type of discovery might be "proportional" to the needs of a particular case.

Next, with that broader view in mind, our Committee examined information from IAALS and the NCSC to consider how other, qualitative case factors could best be incorporated into a tiered case management system. Reform literature clarifies how

different functional factors of civil cases can be used to group cases into case management tiers. For example, automobile tort cases comprise a great proportion of the simpler cases, as do cases with relatively low amounts in controversy, such as debt collection cases. By contrast, multiparty cases, complex commercial disputes, and cases with scientific witnesses tend to be cases that require more discovery. *[Insert cites to the IAALA and NSCS materials]*

Our Committee proposes a model for Arizona that ultimately looks to economic considerations as a default, but which also looks to other qualitative factors of each case, to permit individualized tiering to one of three case management models. Under our proposal, at the outset of a case parties must state whether the amount in controversy is generally consistent with a streamlined discovery path, a general discovery path, or a complex discovery path – what our proposal calls Tiers 1, 2, or 3 in proposed new Rule 26.2. For example, if a party states an amount in controversy under \$50,000 barring other factors that case would presumptively be in Tier 1. If the amount is between \$50,000 and \$300,000, or there is a claim for nonmonetary relief, barring other factors the case would presumptively be in Tier 2. If the amount in controversy exceeds \$300,000, the case would presumptively be in Tier 3. [Note: we need to revisit these numbers, because a case under \$50,000 could easily be subject to compulsory arbitration DWB]

Our committee also concluded that Utah’s system, while a useful starting point, does not provide parties or their counsel with sufficient flexibility to move their case to another case management tier for non-monetary reasons particular to that case. Thus, under our proposal parties are allowed to ask the court for, or stipulate to, placement in higher tiers. Also under our proposal for Arizona, parties can ask for discovery beyond tier limits once the presumptive limits of discovery have been *requested*, which is a marked difference from Utah’s practice of only permitting parties to seek over-limit discovery after all permitted discovery has been *completed*.

### **Empowering Courts To Manage Cases Actively**

Our proposed reforms look to increase judicial management of civil cases. But where the parties are exchanging mandatory disclosures as they should, the courts should have little to manage. When discovery issues do arise, courts would be empowered to insure that discovery remains proportional to what is at stake in the case. Our proposed reforms also encourage courts, where appropriate, to shift costs those parties who seek over-limit or disproportional discovery. A greatly strengthened proposed Rule 37 encourages equitable cost shifting in discovery and disclosure, and a new Comment and enhanced sanction language make clear that trial courts have wide discretion to manage cases without fear of easy reversal by a higher court.

Likewise, our proposals would empower courts to cut through costly and time-consuming discovery disputes by hearing first from the parties orally before permitting any formal, written discovery motion to be filed. The many judges and lawyers who already follow this procedure in Arizona report that it saves time and money.

**Proposal 1: Enact Differentiated Case Management That Makes Discovery Proportional to the Needs of the Case, Determined Both Qualitatively and Economically.**

The centerpiece of our case management proposals is a new Rule 26.2 that sorts cases near the outset into one of three tiers, based on a combination of the case's qualitative factors that define Tiers 1, 2, and 3, including the amount in controversy. Under new Rule 26.2, when parties file a Complaint or Counterclaim, they will state the amount they are placing at issue (excluding duplicative claims), as required by a new Rule 8(g). The sum of those amounts results in a default assignment of the case to a particular case-management tier.

But that default assignment is just a presumption. Proposed Rule 8(g) requires the parties to meet when the answer or responsive pleading is due and to discuss what tier they think the case should occupy. From there, either or both parties can move the court to assign the case to a different tier, if they think the case warrants more discovery. Following Utah, our Committee requires a party moving for additional discovery to attest to the court that they have told their client an anticipated amount the additional discovery will cost, and that the client agrees to seek such additional discovery.

Moreover, even if neither party asks the court to reconsider the presumptive tier, the court retains the power, based on a required short report of counsel, to conduct its own examination of the pleadings and to assign the case to what the court considers the proper tier.

**Proposal 2: Help Courts Enforce the Disclosure Rules, and Help Them Shift Costs To Keep Discovery Proportional, By Strengthening Rule 37.**

Our Committee strongly urges a strengthened Rule 37. The cooperative exchange of robust disclosures between the parties, as contemplated by Rule 26.1, is essential to the effectiveness of any reform that would reduce the cost of discovery. In short, by enforcing Rule 37 on its terms, courts can increase the cooperative disclosure of relevant information and decrease the need for additional adversarial discovery. Research supports the need for action here.

The 2009 IAALS study of the Arizona bench and bar confirmed what our Committee continues to hear anecdotally from lawyers and judges alike – existing Rule 26.1 is seldom enforced by penalty for noncompliance under Rule 37. The 2009 survey reported that 58% of respondents believe that the rules are “occasionally” or “almost never” enforced. Only 4% think that the rules are “almost always” enforced. [cite] This undeniable cultural perception that Rule 26.1 is seldom enforced presents a striking problem, because one of IAALS' core principles of national civil justice reform is the mandatory early disclosure of relevant materials, just like Arizona Rule 26.1 requires. IAALS Report, at 19 (Principle 15). Thus, as IAALS recommends and as our Committee recognizes, Rule 26.1 remains the lynchpin for reform. For Arizona's justice system to

reduce discovery costs, Rule 26.1 needs to work better, meaning it needs to be followed and enforced. This will require a cultural change in the Arizona's bench and bar.

To these ends, our Committee recommends a substantial revision of Rule 37. Our proposed revision would create a broad-ranging authority in Rule 37(g) (modeled on Utah's Rule 37(g)) for a court to shift disclosure and discovery costs as the court deems just to secure compliance with Arizona's disclosure and discovery rules, and to keep the costs of discovery proportional to what is at stake. Thus, parties who request higher levels of discovery might be permitted to do so, provided they bear the incremental fees and costs incurred by both sides to do so. Likewise, obstreperous conduct by any party in the process of disclosure or discovery parties could more readily be subject to the imposition fees and costs.

There is an appetite for this reform. Our Committee heard from trial court judges that they would like to enforce Arizona's existing disclosure and discovery rules more actively, but they feel reluctant to do so, in part, because of the very real prospect of appellate review reversing the imposition of sanctions for nondisclosure. *See, e.g., Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284 (1995). In response, our Committee suggests a partial abrogation of *Allstate* by requiring an affirmative finding that a nondisclosure was not prejudicial as a precondition to permitting the use of late disclosed evidence. Our Committee adds language to Rule 37(d) that underscores the court's "discretion [to] impose any sanctions the court deems appropriate in the circumstances."

Finally, our Committee also adds a detailed Comment to proposed Rule 37, that (1) underscores the power of fee shifting as an integral part of the new system of proportionality-driven case management, and (2) stresses the expectation that courts will use such power to keep discovery costs proportional to what is at stake.

**Proposal 3: Curtail Satellite Litigation Over Discovery Disputes By Requiring the Use of an Expedited Process to Resolve Discovery Disputes in Place of Formal Briefing, Unless the Court Directs Otherwise for Good Cause.**

One of the best opportunities to improve case management in Arizona courts would be for all courts follow what is already current practice by many trial judges – to require parties to raise discovery disputes first in a short discussion with the court before the court permits any written discovery motions. In addition to being a current practice in many Arizona state and federal courts, this practice is recommended by IAALS in its 2014 report, "*Working Smarter, Not Harder: How Excellent Judges Manage Cases.*" *Id.* at 23. Courts that currently follow this practice find that most discovery disputes can be solved by oral discussion. Written discovery motions are seldom necessary. Given the substantial delay and the costs required to resolve most formal discovery disputes, our Committee strongly urges all Arizona courts to adopt this practice for the benefit of the parties and the courts.

Our Committee's proposed Rule 26(d) would resolve discovery disputes with an expedited procedure that promotes efficiency while still safeguarding the rights of parties.

We would require the parties to submit a short written statement of the discovery issues in dispute, and then require the court to issue a minute entry resolving the dispute, so there is a judicial record of the dispute and how it was resolved. This approach avoids a potential disadvantage to informal resolution of discovery disputes. If during this expedited process the court determines that further briefing is necessary, the court can always require the parties to proceed formally under Rules 26(c) and 37(a), which remain in place. And, if nonparties are subject to subpoenas, they also retain the right to file written motions if they wish, and thus avoid the expedited procedure should they choose to do so for some reason.

**Proposal 4: Cut Down Motions For Sanctions Under Rule 11, But Make Sanctions More Likely For Real Abuses.**

Arizona's current Rule 11 practice is both over-extensive and under-extensive. It is over-extensive because parties file too many Rule 11 motions. Rule 11 relief is often sought without sufficient cause as an ancillary, throwaway point in motions directed primarily to other issues. The rigors of the federal Rule 11, which require a writing and a separate motion, would alleviate these problems with current Arizona practice.

Yet Arizona's Rule 11 practice is also under-extensive, because courts too seldom impose sanctions when there have been genuine abuses of the civil rules. Thus, just as our Committee found cause to strengthen Rule 37 in support of our proposed case management reforms, so too we seek to strengthen Rule 11 to promote active court management of claims and contentions that parties assert in court.

To make Rule 11 motions less frequent, but granted more commonly when they point to real abuses, our Committee suggests reforms that build upon the recent work of the State Bar's Civil Practice and Procedure Committee, and of the Task Force on the Arizona Rules of Civil Procedure. Both of those groups proposed adding to Rule 11 the requirement that the parties meet and confer before filing a Rule 11 motion, to give the accused party and the accuser a chance to resolve the issue without involving the courts. Both of those groups also proposed adding the requirement of a short writing to memorialize what conduct is accused, to permit the accused party to consider more fully how to cure any problem, and also to clarify the dispute for the court. Our Committee agrees with each of these desirable changes.

Our Committee, however, proposes going further to realize more fully the promise of Rule 11, which is to deter and curtail litigation over non-meritorious contentions. Our proposed Rule 11 would strengthen the certifications a filer must make when signing court pleadings. Filers would certify not simply that factual contentions have or will likely have evidentiary support after discovery, but instead, certify that factual contentions and the denials of same are well-grounded in fact. A filer would certify not merely that claims and contentions are non-frivolous, but that claims and contentions are colorable, which is meant to be a higher standard than non-frivolous, though still not a standard that requires a claim or contention must succeed to avoid sanctions.

**Proposal 5: Promote Early and Efficient Identification of Disputed Issues By Preventing Parties From Hiding Behind Unresponsive Phrases Like “The Document Speaks For Itself.”**

Too often, parties and lawyers hedge when they should be answering. Rules 8 and 36 both contemplate that in response to contentions, a party may deny, admit, deny in part explaining the basis for the denial, or may deny based on a lack of knowledge preventing a party from admitting or denying. Despite the clarity of these Rules, our Committee notes that pleadings and responses to requests for admission too often fail to follow the permitted options. In particular, parties often state with respect to contentions about documents that “the document speaks for itself,” without bothering to say whether they are denying, admitting, denying in part while explaining, or denying for lack of information sufficient to permit admission or denial. The law does not permit such an evasive response. *[cites]*. Accordingly, our Committee proposes new prohibitions of such evasion in Rules 8 and 36, so parties can get to the bottom of their dispute quickly, as the Rules contemplate.

Details of our Committee’s recommended rules amendments to implement our case management proposals 1 through 5 are attached in Appendix \_\_\_.

**Discovery Reforms:**  
**Improving How Parties and Nonparties Take and Provide Discovery**

The case management reforms outlined above are only part of our Committee’s proposal to make litigation faster and cheaper. There are other opportunities to improve efficiencies and fairness in the rules that govern how parties take discovery from each other, and from nonparties.

We offer proposals to address how the explosion in ESI has also created exploding discovery costs for parties and nonparties alike. With the advent of ESI-driven discovery, long-established Rule 26 became insufficient to answer newly arisen questions, and a body of new law developed to explain to parties the burdens and responsibilities on each side. Our Committee proposes to make that body of law simple and accessible by writing it directly into Rule 26. Additionally, where the rise in ESI has led to demands that parties and nonparties preserve massive amounts of information, we believe that fairness should sometimes require proponents of those demands to pay for the preservation they want. We propose a new Rule 45.2 to accomplish that.

We also propose other reforms to ease the burdens of overdiscovery and discovery abuse. We recommend reducing the expert discovery costs for all parties in expert-driven litigation by adopting the reasonable reforms in the Federal Civil Rules that curtail satellite litigation over discovery of draft expert reports and expert communications with counsel. We propose that parties subject to abusive conduct in depositions get extra time for questions, as recent amendments to the Federal Rules guarantee. And we propose shifting nonparties' costs to prepare privilege logs to the requesting party, again where fairness requires.

**Proposal 6: Improve Procedures for Resolving Disputes Over Discovery and Disclosure of Electronically Stored Information in Rule 26.**

Our Committee proposes to make disputes over the production of ESI easier for courts and litigants by providing standards for such disputes in Rule 26. In making this proposal, our Committee takes to heart the suggestion of many that rules work best, and are most accessible to users, when the rules set forth the legal standards required to use them. In this way, users are not forced to perform legal research to understand the practical application of a procedural rule. Thus our Committee recommends including in Rule 26(e) a list of factors that (1) might make a request for ESI unduly burdensome and expensive, and (2) might constitute good cause to discover ESI.

Our Committee likewise proposes to simplify disputes over the disclosure of ESI under Rule 26.1 by requiring the parties to confer about a variety of considerations. These considerations include where the ESI is located, whether it should be produced in phases, which parts are less likely to contain discoverable information, how to search for what is discoverable within the whole, how it should be produced, and how costs should be allocated. All of this extends Arizona's traditional emphasis on cooperation among counsel into the realm of electronic production, to minimize delay and costs in service of the goals of Rule One.

**Proposal 7: Protect Parties From Unreasonably Burdensome Requests to Preserve Their Electronic Information.**

One challenge with exponentially expanding digital information is that discovery can generate burdens on nonparties, perhaps for little reason. Today nonparties can receive

long, detailed letters demanding that they take extensive and expensive steps to preserve data for the potential use in a dispute in which a nonparty has no stake. Our Committee understands that it is often necessary for litigants to obtain discovery from nonparties, and that seeking to preserve relevant evidence is the responsibility of litigants' counsel. However, none of this means it is fair to push disproportionate and asymmetric costs upon the preserving nonparty.

Our Committee addresses such potential unfairness by creating a procedure (to be located in proposed Rule 45.2) for the recipient of a preservation demand to place the demand before a court, so the recipient can object to the preservation demand (as is already true now), but may also obtain a court order that declares the preservation to be unreasonably burdensome, such that the demanding party must pay for some or all of what it has demanded. This new provision is in keeping with the Superior Court's expanded authority under proposed Rule 37(g) to shift the costs of discovery and disclosure, to keep them proportional, and to reward cooperative (and punish uncooperative) behavior.

#### **Proposal 8: Make Expert Discovery More Efficient.**

Our Committee believes the time has come to adopt in Rule 26 the recent federal reforms to expert discovery to limit discovery into drafts of expert reports, and related communications between expert and counsel. It is true that discovery of drafts and expert communications can be justified as consistent with Rule 26.1's mandate to produce everything relevant, and that such discovery can be used in examining an expert with effect. But the challenge before Arizona's system of justice is to find fair ways to curtail the cost and duration of civil cases. Our Committee concludes that any usefulness in discovery of expert drafts and communications is more than offset by the time and money saved by eliminating fights over such materials, and by the benefits of increased efficiency in counsel's work with experts.

Finally, our Committee concludes that in complex, generally higher-dollar (Tier 3) cases, and also in cases with a Daubert hearing on the admissibility of expert testimony, it will be more efficient for the court and the parties to require a full, Federal Rules-compliant expert report. Thus, our Committee adds such requirements, but only for particularly complex matters, leaving all other cases subject to more relaxed expert disclosure requirements.

#### **Proposal 9: Protect the Rights of Parties and Subject to Burdensome Subpoenas.**

Our Committee concludes that the balance of power between parties and nonparties in Rule 45 merits adjustment, because nonparties are too frequently subject to burdensome participation in the discovery process. For that reason, our Committee recommends added protections in Rule 45 against overdiscovery. Specifically, we propose in Rule 45(d) to require a party seeking discovery from a nonparty to first serve the proposed subpoena on the other parties *before* serving the subpoena on the nonparty, to give the other parties a

prior opportunity to object to the subpoena, if warranted. Under our proposed Rule 45(c), the party subpoenaing a nonparty would be required to pay the subpoenaed nonparty's reasonable expenses to prepare a privilege log. Finally, our proposal clarifies that the objecting party is entitled to move for a protective order, a point commonly understood but not expressly clear in existing Rule 45.

**Proposal 10: When Limited Deposition Time is Consumed by Abuse, Grant the Abused Party Additional Time for Questions**

Arizona has already led in discovery reform by constraining most depositions to four hours. But parties and counsel can sometimes eat into that time by coordinated interference in the deposition, or by choreographing unresponsiveness by the witness. Our Committee recommends adopting the language in recently amended Federal Rule 30(d), which creates a right in the taker of such a deposition to extra time, to redress abuses of that type. This proposal fits with the active management and discovery reforms contemplated by our Committee's other proposals, in particular with the broad authorization of courts to shift costs in proposed Rule 37(g).

Details of our Committee's recommended rules amendments to implement our discovery proposals 6 through 10 are attached in Appendix \_\_\_.

**Compulsory Arbitration Reforms: Improving How  
Courts Handle Smaller Civil Cases**

Arizona is already a leader among states in the arena of compulsory arbitration, having established in 1974 a court-related arbitration program, in which lower-dollar civil cases are heard by an arbitrator (member of the state bar), pursuant to A.R.S. § 12-133 in 1974. See Roselle L. Wissler and Bob Dauberg, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rule Changes*, 2007 J. Disp. Resol. 65 n.1 (2007) (cataloguing eighteen states that have since adopted parallel

arbitration programs for smaller cases, generally in the 1980s and 1990s, but noting that no new programs had been adopted since 1997). Arizona’s existing arbitration system is designed to resolve smaller disputes more quickly and less expensively than is possible in full-fledged civil litigation. Our current system accomplishes these goals, but at some reduction of rights to litigants in smaller cases. Discovery is generally reduced in such cases. So too the rules of evidence are relaxed to permit medical experts to provide written testimony without the need for cross-examination. As a result Arizona’s compulsory arbitration system reduces delays in the cases arbitrated, and also reduces the civil docket of the Superior Court which, in turn permits the Superior Court more time to deal with the remaining civil cases.

But our compulsory arbitration system comes with downsides. First, it diverts cases away from judges and juries. This is problematic, because litigants generally lend more credence to, and express more satisfaction about, resolution of a case by a judge or jury, as opposed to resolution a randomly assigned member of the state bar. Juries and judges tend to make people feel that their case has been “heard” by the American system of justice.

. Second, by diverting litigants away from trials, compulsory arbitration necessarily denigrates the historic constitutional and cultural roles of jury trials in our communities. Third, by diverting lawyers away from trials, compulsory arbitration decreases the courtroom experience and competency of today’s lawyers, and promotes a “vanishing trial” culture in which some lawyers may tend to avoid trials because they lack trial experience. Fourth, compulsory arbitration puts litigants before an involuntary arbitrator who may have significantly less knowledge than a judge about the substantive area of the case, not to mention less practical experience in conducting an adversary proceeding, all of which impacts the quality of justice.

Fifth, arbitrations also have their inefficiencies, laced with potential unfairness. Arbitration decisions are subject to *de novo* “appeals” that, in practice, are really complete retrials in Superior Court. To complicate things, such retrials are not always based on the same evidence that was presented at the arbitration hearing. Often, when defendants lose a personal injury case in compulsory arbitration, and then exercise their right to a *de novo* retrial, defendants retain expensive experts for the retrial who never appeared at the original arbitration that resulted in an arbitration award in favor of the plaintiff. Having hired costly experts, such defendants can and do serve offers of judgment that suddenly expose plaintiffs to thousands of dollars of defense costs if the plaintiff loses the *de novo* retrial, this time facing new evidence that the arbitrator never heard.

All of these factors work to discourage plaintiffs from participating in a trial *de novo*, and instead to settle for less than the award the arbitrator determined to just and fair based on the evidence at the arbitration. Here again is a point in our court system in which the outcome of the case can be driven more by procedural costs and risks, than by the merits of the case.

**Proposal 11: Institute a Pilot Program Under Which the Plaintiff Can Elect  
A Short Trial Instead of Compulsory**

## **Arbitration.**

Our Committee believes the downsides of compulsory arbitration can be mitigated by permitting the alternative option of a short trial in Superior Court. Under our proposal, the plaintiff would have the right to elect a short trial instead of compulsory arbitration. If the plaintiff elects the short trial, they would get a two-day-or less trial in Superior Court, before a judge or a six-person jury. Substituting a Superior Court trial for compulsory arbitration would permit litigants a true day in court before a qualified judge, or by a jury of their peers.

The short-trial option would also promote more jury trials in our communities, which would underscore the important historic and cultural role that juries play in the American system of justice. The short-trial option would also provide more opportunities for lawyers to gain experience in art of trying civil cases. For the court system, short trials before a Superior Court judge or jury would also eliminate the prospect of an inefficient retrial *de novo* of the very same case. To further incentivize short trials, and to mitigate against the potential chilling prospect of expert cost shifting in a trial *de novo* with new evidence under Arizona's current system of compulsory arbitration, our proposal would preclude offers of judgment under Rule 68 for litigants in a short trial.

Different counties currently handle compulsory arbitration in different ways. Our Committee received input from different counties about how best to test drive our short trial proposal. Our conclusion is to recommend a pilot program in Pima County Superior Court. We believe Pima County is willing to host such a pilot program, and Pima County is also well suited as a test venue. The number of compulsory arbitration cases in Pima County is large enough to permit meaningful study, but also small enough that, if a large percentage of plaintiffs opted for a short trial, Pima County Superior Court could handle those short trials without straining court resources.

By way of illustration, in 2015, Pima County had 793 compulsory arbitration cases filed, while Maricopa County had 14,624. Pima County had 220 arbitration awards filed in 2015, while Maricopa County had 1,135 in the last year for which data were available (2014). From these arbitration awards Pima County had 73 appeals for trials *de novo* to the Superior Court, (9% of the total of all arbitration filings for the year), while Maricopa County had 329 appeals (a little over 2% of the total of all arbitration filings for the year). From these data, our Committee concludes that Pima County already handles a considerably higher percentage of trials *de novo* under the existing system of compulsory arbitration, at least as compared to Maricopa County. Therefore, Pima County seems in a good position to handle a pilot program that might produce more short trials. but which in turn would likely reduce the number of retrials *de novo* required by appeals from an arbitrator's award.

Details of our Committee's recommended rules amendments to implement our pilot program in proposal 11 are attached in Appendix \_\_\_.

## **Court Operations Reform: Improving Judicial Training and Public Information For Civil Cases**

### **The Role of Court Operations in Meeting the Goals of Rule One**

Given the current, challenging environment for funding court improvements, meeting the goals of Rule One necessarily requires courts to optimize performance through smart training and resource management. CCJ Report, at 30-33. This includes management of judicial assignments, uniformity where warranted in administrative

procedures, and best practices in using technology. To better understand these issues, our Committee met with Arizona judges and chief judges, we researched and obtained information about judicial training, we met with court technologists, and we met with leaders in access-to-justice issues, all with an eye to potential areas for improvement.

We explored how trial court assignments are made in different counties, specifically the practice of judicial rotation used in some counties. We note that a strict practice of rotating judges through different subject areas can inject additional delay and inefficiencies in civil cases, when judges who have become familiar with the parties and the issues in an ongoing case are suddenly replaced by a new judge with no background. Abrupt judicial rotation requires a new learning curve for the new judge. Particularly in the context of more complex civil litigation, anything that requires the parties or the court to spend more time getting back up to speed usually requires the parties to invest more time and money, and probably slows things down in the process.

Of course, judicial rotation affects cases beyond the civil docket, such as criminal, family law, and juvenile cases, among others. And, not every judicial rotation injects costs and delays into every civil case. We note also that recent extended judicial assignments in Arizona's pilot Commercial Courts and Complex Courts may assuage rotation issues in many civil cases. Ultimately, we concluded that an in-depth study of the pros and cons of judicial rotation in Arizona ranged beyond the Supreme Court's direct charge to this Committee to focus on Civil Justice Reform. But we commend this issue to the Supreme Court's serious attention, and we suggest that this issue might benefit from further scrutiny by a future task force or committee.

Our Committee focused our efforts on improvements to judicial and staff training in Superior Court, improved use of technology and access to judicial resources, and improved public access to information about judges, their standing orders and courtroom practices, all with a view to enhancing efficiency and public confidence in our courts.

**Proposal 12: Provide More Judicial Training Specific To Civil Cases And Leverage Technology To Make Judicial Resources More Readily Available to Judges**

We start from the proposition that all judges who handle civil cases should be as informed and as prepared as possible. Judicial training in Arizona is governed by the Arizona Code of Judicial Administration ("ACJA). A new judge receives some training on civil cases during new judge orientation or at the annual Arizona judicial conference. But depending on the county to which the new judge is assigned, the judge may never handle a civil case for a several years, and the judge's front-end training may become stale.

Our Committee proposes that judges who rotate into a civil case assignment long after initial training should have the benefit of re-training based on the most current information about civil court operations and case management. Our proposal aligns with the CCJ-CJI's recommendations 8 and 9. CCJ Report at 29-30. Specifically, we

recommend that judges receive AOC, Education Services Division approved, civil bench assignment training within 60 days before the judge starts a civil bench assignment.

The content of civil bench training should include substantive topics that commonly arise in civil cases, but should also be tailored by the presiding judge of each county to cover particular case management and court operations for that county. Our Committee recommends that such training should include our proposed changes to Arizona's Rules of Civil Procedure covered above in this report, as well as training on civil trial procedures, issues bearing on the award of attorneys' fees and sanctions, uniform procedures for issuing orders, rulings, and final judgments. Judges should also be trained to understand how actions and orders of the Court affect operations of the Clerk of each Court.

**Proposal 13: Make the System Better Understood By Litigants By Posting of Judicial Profiles and Preferences.**

Our Committee also believes that civil litigation can be demystified for self-represented litigants (and improved for lawyers and their clients) by providing more transparent information about a judge's background, individual case management practices, and courtroom protocols and preferences. The Superior Court in Maricopa County devotes a page on its website to its judges. About half of these judges provide a link next to their names to explain their personal protocols.

Such protocols vary from judge to judge. The most useful protocols include information on motion practice, discovery disputes, trial scheduling, marking exhibits, jury selection, available courtroom equipment, and expectations concerning courtroom etiquette. Others provide only minimal information. Some judges provide no protocol information at all.

Especially in light of the hundreds of trial court judges now on the bench, and the practice of judicial rotation, our Committee recommends a central webpage where litigants and counsel can view the profile and preferences for every Superior Court judge. To that end, we propose a template for judges to use in posting relevant information.

We encourage each county to post these protocols on its website. Alternatively, the Administrative Office of the Courts is developing a new statewide website ("AZCourtHelp") to assist self-represented litigants in navigating the legal process and the courthouse. This statewide resource might also be an appropriate place to post information about judges and their protocols.

Our Committee further recommends standardization in the timely adoption and look of each judge's profile. We recommend that a dedicated AOC staff member assist judges with the process of preparing a relevant profile. Although each judge should be able to modify the content of particular practices and preferences, uniformity in how such information appears on web-pages will promote ease of use, transparency and a better understanding of our justice system by litigants and the public.

## **Proposal 14: Create a User-Friendly and Current Website Where Judicial Training Resources Are Readily Accessible by Judges**

Our Committee also proposes leveraging technology to help courts work smarter, as recommended by the Conference of Chief Justices. *See* CCJ Recommendation 8 (Courts must provide judges and court staff with training that specifically supports and empowers right-sized case management), CCJ Recommendation 10 (recommending wise use of technology as pillar of case management reform). The Arizona Judicial Branch’s Wendell website, maintained by Administrative Office of Courts, Education Services Division, seems a good place to house judicial training resources. But our Committee recommends that Wendell provide more “on demand” materials to judges, to provide judges with immediate access to substantive information and materials when needed.

We also recommend that the materials posted on the Wendell website be subject to continuous and robust review for currency. For example, our Committee found that at the time of its work, the civil jury instructions posted on the website were several years out of date.

Details of our Committee’s recommended amendments to ACJA § 1-302(I)(b), and our proposed template for judges to use in posting relevant information are attached in Appendix \_\_\_\_\_.

## **CONCLUSION: A CALL TO REFORM**

Nationally, the time is ripe for civil justice reform. Essentially every national study identifies needs and ways to improve the capacity of American courts to deliver on the goal of Civil Rule One “the just, speedy and inexpensive determination of every action.”

Arizona stands uniquely postured among the states. once again, to lead in civil justice reform, by virtue of our history of judicial innovation, and our 25-year-old legal culture of mandatory disclosure and cooperation among opposing counsel. Of all the

states, Arizona is already acclimated to the cultural innovations required reduce costs and delay in civil litigations.

The reforms proposed by our Committee are firmly rooted in the recommendations of the Conference of Chief Justices, the Institute for the Advancement of the American Legal System, the National Center for State Courts, the 2015 amendments to the Federal Rules of Civil Procedure, and a host of other leading judges, lawyers and scholars. Yet, our Committee’s proposals rarely include the wholesale adoption of national recommendations. Rather, we have tried to tailor our recommendations of best fit what we know to be Arizona’s unique civil litigation culture and environment.

Our proposed reforms, mostly, do not require additional financial resources for Arizona’s court system, although few judges and lawyers would argue that Arizona’s court system, like many states, struggles for adequate legislative funding.

We also believe the time is now for the Supreme Court’s serious consideration and implementation of civil justice reforms. Particularly with respect to the Conference of Chief Justices recently released report, Arizona stands immediately ready to move ahead first with the recommendations of our country’s top jurists.

For all these reasons, we believe the time is now for the Arizona Supreme Court to lead the way. We intend our Committee’s final report as a call to action for Arizona’s courts, and for the benefit all American courts, to best deliver “justice for all in the 21<sup>st</sup> Century.

## **Materials Consulted**

The Committee reviewed a considerable amount of material in formulating our recommendations. We provide a list of the primary materials upon which we based our work, which were those the Arizona Supreme Court recommended it review in Administrative Order 2015-124. We also provide a list of secondary materials that Committee members reviewed in fashioning the recommendations in this final report.

### **Primary Materials**

## **Secondary Materials**