

December 14, 2023

Hon. Robert Brutinel, Chair
Arizona Judicial Council
1501 West Washington Street
Phoenix Arizona 85007

Re: Report on the FASTAR Pilot Program

Dear Chief Justice Brutinel:

1. Introduction. Administrative Order No. 2017-116, entered on October 25, 2017, established the Fast Trial and Alternative Resolution program (“FASTAR”) as a 3-year pilot program in the Superior Court of Arizona in Pima County. The Order also adopted interim rules of procedure for the pilot. Because the COVID pandemic, which began in early 2020, made it difficult to evaluate the impact of the program, Administrative Order No. 2020-158 extended the pilot program until December 31, 2021. The Supreme Court again extended the program by Order No. R-20-0012 to December 31, 2023.

As directed by A.O. No. 2017-116, the Superior Court in Pima County and the AOC’s Court Services provided progress reports to the Arizona Judicial Council in March 2019, December 2019, and December 2021. The Court’s Order in a related rule petition, No. R-20-0012, required the submission of this fourth report, which covers the progress of the program from December 2021 through November 2023.

2. Background. In December 2015, the Supreme Court directed the Committee on Civil Justice Reform (“the Committee”) to develop recommendations, including rule amendments and pilot projects, to reduce the cost and time of resolving civil cases in Arizona’s Superior Court. The Committee issued a report discussing, among other topics, Arizona’s compulsory arbitration system. The Committee identified areas of concern within the state-wide compulsory arbitration system, such as:

- Many court-appointed arbitrators lack the experience, expertise, availability, or willingness to conduct arbitration proceedings.
- The process of appealing from an arbitration award is burdensome and expensive, particularly in personal injury cases; and
- Arbitration is a factor in a nationwide phenomenon in civil cases known as the “vanishing” jury trial.

As one of its proposals, the Committee recommended establishing a pilot program to reduce the cost and time of resolving smaller value cases, and secondarily, to enhance opportunities for courtroom trials. The Arizona Judicial Council approved the

Committee's recommendation, and the Supreme Court entered [Administrative Order No. 2017-116](#) establishing the program. At the request of the Pima County presiding judge, the Order lowered the jurisdictional limit for compulsory arbitration to \$1,000, effectively replacing compulsory arbitration in Pima County with FASTAR.

On January 9, 2020, Judge Bryson filed rule petition [No. R-20-0012](#). The petition requested the Supreme Court to permanently adopt the FASTAR program in Pima County, and recommended amendments to the rules associated with the program. The Supreme Court opened the petition for public comment and then the COVID pandemic struck, resulting in modified court operations and a temporary halt on jury trials. In June 2020, after the comment period for R-20-0012 had closed, Judge Bryson modified his request by asking the Supreme Court to extend the pilot program to allow for further evaluation of the program after the effects of the pandemic on court operations had ceased. On October 7, 2020, the Supreme Court issued Administrative Order No. 2020-158, extending the program until December 31, 2021.

At its August 24, 2021, Rules Agenda, the Supreme Court continued its consideration of R-20-0012 and re-opened the petition for additional public comment. After the comment period, the Supreme Court considered R-20-0012 at its December 7, 2021, Rules Agenda. The Court amended the FASTAR Rules, extended the program to December 31, 2023, and ordered the submission of this report to the Arizona Judicial Council.

3. Overview of the FASTAR Program. Under FASTAR Rule 101, a civil case requesting only monetary damages not exceeding \$50,000 generally qualifies for the program, with some limited exceptions. Instead of filing a certificate of compulsory arbitration with the complaint, as required by the Arizona Rules of Civil Procedure, FASTAR requires the plaintiff to certify whether the case is eligible for FASTAR when filing the Complaint. Within 20 days after the defendant's first filing, the plaintiff must file a "Choice Certificate." This certificate requires the plaintiff to choose either a "Fast Trial" or "Alternative Resolution" track for case resolution. If the plaintiff fails to file a choice certificate, the case defaults to the trial track.

Fast Trial track. If the plaintiff chooses a Fast Trial, the court sets a trial date (either a bench or jury trial) no sooner than 190 days but no later than 270 days after the filing date of the complaint. The Fast Trial track includes rules for expedited and limited disclosure and discovery.

These FASTAR rules on disclosure and discovery include special provisions for depositions of medical providers and other expert witnesses. Those provisions limit the

time for taking these depositions to two hours (one hour per side) and provide that an expert's fee for the deposition may not exceed \$500 per hour, unless the Court for good cause orders otherwise. The rules allow video recording of the deposition by any unobtrusive and reliable device, eliminating the cost of a professional videographer. FASTAR rules also allow the introduction of the video recording at trial. The length of trial is limited to two days. A final judgment after a Fast Trial is appealable to the Court of Appeals, as provided by law.

Alternative Resolution track. A plaintiff who chooses Alternative Resolution must (a) waive the right to a trial before a judge or a jury, and (b) waive the right to any appeal from an alternative resolution decision or award. In contrast, a defendant in an alternative resolution proceeding who is dissatisfied with the subsequent alternative resolution award can appeal the award to the superior court, thus preserving the defendant's right to a trial.

Unless the parties agree to the arbitrator, a court-appointed arbitrator will conduct the Alternative Resolution proceeding. The arbitrator must set a hearing date within 2 to 4 months after their appointment. The subsequent Alternative Resolution proceeding and the process for entry of an award generally correspond to current provisions for compulsory arbitration under the Civil Rules, with the notable exception of time limits under Civil Rule 76, which were recently expanded by R-23-0022.

4. Comparative Data.

Before implementation of FASTAR: Civil filings in the Pima County Superior Court in 2015 included:

- 793 compulsory arbitration cases.
- 220 arbitration awards.
- 73 appeals requesting a trial *de novo*. (This figure represents about 9% of the total number of compulsory arbitration cases, and about one-third of the awards.)

Pre-FASTAR, the average time to case disposition in the Pima County Superior Court for all compulsory arbitration cases, including those dismissed for lack of service or prosecution, was about 8 months. In cases in which a party appealed a compulsory arbitration award, and the Court conducted a trial *de novo*, case resolution took up to 2 years. For the last full year of the compulsory arbitration system in Pima County, when any party could appeal the arbitration award, the court conducted 5 trials *de novo*.

FASTAR data: The reporting periods for FASTAR run from November 1 of a calendar year through October 31 of the following year. Below is a breakdown of the number of cases per reporting period during the program.

Reporting Period	Dates	Total Cases	Disposition Time
1	11/2017 – 10/31/2018	2,109	151 days
2	11/2018 – 10/31/2019	2,376	154 days
3 (COVID)	11/2019 – 10/31/2020	2,206	175 days
4 (COVID)	11/2020 – 10/31/2021	2,560	152 days
5	11/2021 – 10/31/2022	1,811	144 days
6 (partial)	11/2022 -9/30/ 2023	1,910	111 days

The times to disposition for FASTAR cases during each of the five full reporting periods is approximately five months from the filing of the complaint. Not surprisingly, the pandemic period, had a longer average time to disposition. The data in the table above includes every FASTAR case, that is, it includes cases in which no choice certificate was filed, and those cases then proceeded to the entry of default or dismissal before the court could assign them to the fast trial or alternative resolution tracks.

Under FASTAR Rule 103, a choice certificate can be filed with the complaint, or within 20 days after the defendant files an answer. Plaintiffs customarily wait until after the defendant files an answer before filing a choice certificate. We believe this happens because plaintiff's counsel wants to know before making that choice who will be appearing as opposing counsel. Alternatively, counsel may simply want to confirm that an answer will indeed be filed before taking further action. Accordingly, if a case proceeds to default or is dismissed for lack of prosecution or for lack of timely service, or if a case is settled before the defendant files an answer, a choice certificate likely will not be filed with the court. Choice certificates have consistently been filed in slightly less than half of the FASTAR cases. If a plaintiff fails to file a choice certificate within 20 days after the defendant has answered, then under Rule 103(c) the case will proceed by Fast Trial.

As shown in the table below, throughout the 6 reporting periods, practitioners chose alternative resolution in approximately 57% of filed choice certificates. This differed in Reporting Period 4, however when trials were paused during the pandemic. In that reporting period, 64% of the filed certificates chose alternative resolution.

Full Reporting Period	Total Disposition Including Dismissed Cases	Average Time Dismissed	Alternative Track Average Disposition Time	Fast Trial Track Average Disposition Time
1	151 days		185 days	152 days
2	154 days		194 days	176 days

3 (COVID)	175 days	184 days	241 days
4 (COVID)	152 days	181 days	169 days
5	144 days	179 days	170 days

Like non-FASTAR civil cases, many FASTAR cases settle before trial. During the 5 full reporting periods, it was not unusual for a trial date to be set and then vacated before the trial began. This is reflected in the table below.

Full Reporting Period	Number of Cases with a Trial Date Set and Subsequently Vacated	Number of Trials Completed
1	37	5
2	166	15
3 (COVID)	127	2
4 (COVID)	45	7
5	54	9
6 (partial)	51	7

5. Amendments in R-20-0012.

Judge Bryson filed this rule petition in January 2020, seeking permanent adoption of the FASTAR Rules in Pima County. After the pandemic hit, Judge Bryson modified his request and instead sought an extension of the program. R-20-0012 also asked for amendments to some of the FASTAR Rules based on observations of the program during its first 3 years. The Supreme Court adopted several of those amendments in its December 8, 2021, Order. The adopted rule amendments include the following.

Rule 102(d): Subsection (d) to Rule 102 now allows a party to request a judge to exclude an otherwise eligible case from FASTAR if extraordinary case characteristics indicate the case is not suitable for FASTAR. The rule amendment gave the court discretion to remove an otherwise eligible case from the program if it simply was not suitable for expedited litigation.

Rule 108(b) was amended to require the parties in an alternative resolution case to submit discovery disputes to the assigned judge rather than the assigned arbitrator. This amendment was important for plaintiffs who waive their right of appeal when choosing the alternative resolution track. The amendment allows any party to seek relief from the assigned judge when a discovery dispute arises.

Rule 117 was amended to modify the rules concerning the admission of medical bills. During the comment period to R-20-0012, practitioners criticized the difference in

the admission of medical bills at a fast trial versus alternative resolution. The process for admission of medical bills at an alternative resolution hearing under FASTAR Rule 123(d) is modeled on Ariz. R. Civ. P. 75(d). Under both rules, and in the absence of a prehearing objection, the arbitrator must admit the bills. A foundational showing of reasonableness and necessity is not required at an alternative resolution hearing. By comparison, the original FASTAR Rule 117(d) required a party requesting the admission of a medical bill at a fast trial to establish that the amount of the bill is reasonable, and that the professional service described in the bill was medically necessary. This conformed to the practice for admission of a medical bill in any other superior court civil trial. The modifications to Rule 117 were intended to ease the burden for admission of medical bills in fast trial proceedings.

6. Assessment of the Program.

The Pima County bench supports the FASTAR program. It has not been a burden on judges or court administrators and has provided the opportunity for a trial in cases where one would not be permitted under the compulsory arbitration process. It has also decreased average overall disposition times by approximately 3 months.

While many are supportive of the program, it is not without its critics. One common criticism is that FASTAR has not increased the number of jury trials. In the last report to this Council, we noted that the programs effect on trial rates was difficult to assess. The data from the last two years demonstrates there has not been a substantial increase in trials. It is important to emphasize, however, that increasing trial rates is not the primary purpose of the pilot program. While increasing the trial rate may be a potential benefit of the program, FASTAR's primary focus and goal is to reduce the cost and time needed to resolve smaller value cases. The data we have collected thus far indicates the program is succeeding in those areas.

Another criticism is that the deadlines within the program are too rigid and unfairly inflexible. This criticism is often raised when discussing the limited time to complete service of the summons and complaint. The Superior Court believes this concern has been addressed by the amendment to FASTAR Rule 102, allowing a case to be removed from the program if a judge finds it is not suitable for FASTAR.

The FASTAR program has become familiar and accepted in Pima County. Disposition times under both tracks in the FASTAR program are shorter when compared to a traditional compulsory arbitration program. Further, based on the data noted in this report, and the limitations the FASTAR Rules place on discovery practices, the program almost certainly reduces litigation costs. The rules for compulsory arbitration (Rules 72

through 77 of the Arizona Rules of Civil Procedure) have no comparable cost reducing mechanisms. The FASTAR program is therefore a valuable improvement for both the court and litigants. Presiding Judge Jeffrey Bergin accordingly recommends its permanent adoption and intends to file a rule petition seeking permanent adoption of the FASTAR rules. His petition will propose that these rules be adopted statewide for use by any county that wants to establish a similar program. A copy of the draft petition is attached to this report in Attachment 1.

7. Recommendations.

(1) We ask this Council to support Judge Bergin's request to file a Petition to permanently adopt the FASTAR program's procedural rules and, by extension, the FASTAR program.

(2) We also request the Court to extend the program pending the Court's consideration at its August 2024 Rules Agenda of Judge Bergin's forthcoming rule petition. Attachment 2 to this report is a form of order that would extend the FASTAR pilot program and the FASTAR rules until further Court order.

We appreciate the opportunity to provide this report.

Respectfully submitted,

/s/ _____
Kellie L. Johnson
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County

/s/ _____
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