

PIMA COUNTY BAR ASSOCIATION
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Rules Committee Chair

IN THE SUPREME COURT
STATE OF ARIZONA

In the matter of:

Supreme Court No. R-24-0004

**PETITION TO PERMANENTLY ADOPT
THE FASTAR RULES IN PIMA
COUNTY, AND MODIFY FASTAR
RULES 101 AND 126**

**COMMENT OF THE PIMA COUNTY
BAR ASSOCIATION IN SUPPORT OF
THE PETITION**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association respectfully submits the following comment in support of Petition R-24-0004 filed by Hon. Jeffrey T. Bergin. The Fast Trial and Alternative Resolution (FASTAR) program enjoys broad support among Pima County trial attorneys. But even more importantly, the FASTAR program helps give a new generation of attorneys civil jury trial experience. The Petition should be adopted.

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1 As of 2017, the percentage of federal civil cases resolved by jury in the United
2 States was 0.7%, continuing a decades-long decline.¹ (To give some perspective, it was
3 5.5% in 1962, 1.2% in 2002, and 0.8% in 2013.)² The current picture in our state trial
4 courts is similar: 0.4% of civil actions terminated in a jury trial in the last fiscal year.

5 There is no question that civil jury trials are becoming rarer. Why this is the case
6 is a more complex problem, one that will not likely be solved with a rule change. The
7 causes are structural. For starters, billing practices are getting more onerous by the year,
8 and the incentives to turn small fights into big ones loom over most private practitioners.³
9 Add to this increasingly complex procedural rules that, contrary to many appellate court
10 decisions, *are* in fact traps for the unwary.⁴

11 When this Court considered a petition to make FASTAR permanent in 2020, some
12 practitioners wrote in opposition. Candidly, many continue to raise valid concerns. We
13 would draw the Court’s attention to Brian Marchetti’s thoughtful suggestions should the
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15 ¹ <https://www.uscourts.gov/file/25347/download>.

16 ² *Id.* Criminal cases have seen a similar decline: 8.2% were disposed of by jury trial in
17 1962 and 3.6% by 2013.

18 ³ Or as Burr Udall put it, “When I started to practice law, you send the client a bill at the
19 end of a case and said, ‘you owe me X dollars.’ All of a sudden, and I think it came from
20 insurance companies, they said, ‘we want you to bill it one-tenth of an hour for
21 whatever,’ and people in this day and age just bill the hell out of their cases, in my view.”
THE PIMA COUNTY WRIT, Vol. 41, Nos. 9-11 (2023).

22 ⁴ *Cf. Witt v. Merrill*, 208 F.2d 285, 286 (4th Cir. 1953) (“The liberal Rules of Civil
23 Procedure must not be transformed by judicial interpretation into technical traps for the
24 unwary.”) “Liberal” perhaps when compared with its Byzantine predecessor, the Federal
25 Equity Rules or perhaps the Field Code. But in no sense are our rules of court anything
26 but a Minotaur’s labyrinth for the unwary. Just ask anyone who has misplaced a request
for admission. See *Ariz. R. Civ. P. 36(a)(4)*. Or filed a notice of appeal two days late.
Arizona Dept. of Econ. Sec. v. Hall, 120 Ariz. 514, 515 (App. 1978), *overruled on other*
grounds by In re Marriage of Gray, 144 Ariz. 89 (1985).

1 FASTAR rules become permanent. See [Comment of Brian Marchetti, Esq., et al.](#) In
2 particular, it would make sense to harmonize FASTAR Rules 117(d)(1) and 123(d). If
3 medical records come into evidence more easily in arbitration than in a short trial, it
4 stands to reason that more plaintiffs would prefer arbitration to avoid having to call
5 additional experts. FASTAR Rule 104(c)'s hard service deadline of 90 days could be
6 increased to 120 days without compromising FASTAR's goal to reduce litigation time.
7 And sauce for the goose is sauce for the gander—plaintiffs arguably should have the
8 same right to appeal from arbitration that defendants do.⁵

9 A perfect system should not be the enemy of a good one. No, FASTAR is not a
10 talisman that will remove the underlying structural forces that have made civil jury trials
11 so rare. But it is a meaningful step toward letting more cases go to trial more quickly and
12 at a lower cost to litigants. This change would go a long way, as the effects of the
13 disappearing jury trial are multiple. At least anecdotally, we are seeing a generation of
14 civil litigators who have tried few if any civil cases to a jury. Just as critically, fewer
15 trials means fewer appeals. If appellate litigation is the engine of our common law, trials
16 are its fuel; without them, the law will sputter and stagnate.⁶ Respectfully, this Court
17 should adopt the Petition.

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23 ⁵ Although we recognize that the likely justification for this asymmetry is to funnel
24 litigants into fast trials.

25 ⁶ Over the last fifteen years, there is a notable downward trend in the number of cases our
26 Court of Appeals has decided. See <https://law.justia.com/cases/arizona/> (organized by
Division and publication status).

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RESPECTFULLY SUBMITTED this 1st day of May 2024.

PIMA COUNTY BAR ASSOCIATION

By s/James W. Rappaport
James W. Rappaport
Rules Committee Chair