APPENDIX A

STATE BAR OF ARIZONA
CIVIL PRACTICE AND PROCEDURE COMMITTEE

Minutes of June 5, 2008 Meeting
State Bar Headquarters, Phoenix, Arizona

1. ATTENDEES

A. Members Present:

Phoenix:

Chair John W. Rogers; Members John P. Ager, Ellen M. Crowley, Gregorio M. Garcia, Richard A. Halloran, Hon. Robert C. Houser, Jr., Thomas L. Hudson, Matthew J. Kelly, Karen L. Killion, George H. King, William G. Klain, Anne C. Ronan, Barry R. Sanders, Hon. Peter B. Swann, Craig W. Soland, Lawrence G. Tinsley, Jr., and Charles W. Wirken.

By telephone:

Bridget S. Bade, Beth Capin Beckmann, Michael J. Farrell and Sarah Jezarian.

2. CALL TO ORDER

Chair John Rogers called the June 5, 2008 meeting of the 2007-08 Civil Practice and Procedure Committee to order at 4:33 P.M. A quorum was present.

3. GENERAL DISCUSSION ITEMS

A. Approval of Minutes of May 1, 2008 meeting.

1. **MOTION:** Barry Sanders moved that the minutes be approved as circulated. Bill Klain seconded the motion. The motion **PASSED** unanimously.

4. AGENDA ITEMS

A. Agenda Item A: Status of Pending Rule Change Petitions (Appendix 1)

1. Ellen Crowley reported that there were no new rule change petitions filed.

B. Agenda Item J: State Bar Convention CLE (status) (Appendix 10)

1. Bill Klain reported that the materials for the seminar were delivered to the seminar speakers, and that the Power Point presentations were being sent to John Rogers, Chair of the Committee.

2. The Chair said that he will send an email to all of the seminar speakers, copying the IT personnel at his firm, to facilitate loading all of the Power Point presentations on a single laptop computer, by the end of next week.

C. Agenda Item E: Ariz. R. Evid. 701 – 706 (opinion rules) (Appendix 5)

1. The Chair reported that he met with the Board of Governors, and that he circulated this Committee's comments on this subject to the Criminal Practice and Procedure Committee and to the Family Law Section. The Family Law Section had only one small change to the Committee's proposal, but the Criminal Practice and Procedure Committee objected to all of this Committee's proposed changes to the Evidence Rules. In light of these objections, the Chair asked whether the Committee had any reservations concerning its proposals. The Committee had no such reservations.

D. Agenda Item I: Ariz. R. Evid. 408 (offers to compromise) (***action item***) (Appendix 9)

1. Barry Sanders recalled that the subcommittee had previously recommended adopting in their entirety the changes made to Rule 408, Federal Rules of Evidence, into Rule 408, Arizona Rules of Evidence. The subcommittee did have one area of concern, specifically the portion of the federal rule that would permit the use of statements made in settlement talks with regulatory agencies in subsequent criminal prosecutions. Mr. Sanders recalled that the Committee directed the subcommittee to revisit this issue. After the subcommittee reconsidered its position, it changed that position, recommending that Arizona not adopt the portion of Federal Evidence Rule 408 relating to the use of such statements. The subcommittee then circulated a short memorandum detailing its thoughts, including a redline version of its proposed changes to Arizona Evidence Rule 408. The Chair reviewed the subcommittee's work and provided helpful edits to its proposed petition. Mr. Sanders said that if Arizona adopted the portion of Federal Evidence Rule 408 relating to the above-referenced statements, this would encourage scripted comments in settlement negotiations with regulatory agencies. He commented that the more settlement discussions that are admissible under the rules, the more likely it is that lawyers will be called as witnesses. He also noted the concern in the defense bar that authorities would initiate settlement negotiations in order to obtain useable admissions, if this portion of the rule were amended to conform with the federal counterpart. Mr. Sanders said that the subcommittee's prior draft petition referenced the desire for uniformity between the Arizona and the Federal rules of evidences as a motivating factor for the proposed amendments, but in light of the subcommittee's decision not to propose the change with respect to settlement negotiations with regulatory agencies discussed above, the subcommittee removed the reference to uniformity from its draft petition.

2. Bill Klain said that he recalled from the Committee's last discussion of this issue that there was some hesitation about doing away with the use of statements made in settlement for impeachment. He said that there was some thought given to taking an alternative position on this issue.

3. Mr. Sanders said that he remembered that the Committee had discussed the issue referenced by Mr. Klain, and that the only issue that remained to be decided was the

issue concerning the use of statements made in settlement talks with regulatory agencies in subsequent criminal prosecutions.

4. The Chair commented that *Hernandez v. State*, 203 Ariz. 196, 52 P.3d 765 (2002) creates a large exception to Rule 408, *Arizona Rules of Evidence*. He said that he wanted to bring to the Supreme Court's attention that adopting the proposal at issue would reverse the holding of *Hernandez*. The Chair asked the Committee whether any of the Members had any concerns about asking the Supreme Court to overrule *Hernandez* by way of a rule change petition.

5. Mr. Sanders noted that the *Hernandez* decision set out two interesting views concerning the use of settlement discussions, specifically the view of Justice McGregor speaking for the majority, and the dissent authored by Judge Howard. Mr. Sanders commented concerning the tension between the admission of relevant evidence, and the desire to encourage settlement, and pointed out that the Supreme Court sided with the federal interpretation of Rule 408 favoring admission for impeachment purposes, but noted that since the *Hernandez* decision was rendered, Federal Rule 408 was amended. So, Mr. Sanders noted, much of the rationale for the majority opinion in *Hernandez* is no longer valid. Judge Howard, Mr. Sanders related, argued in dissent that the majority opinion's exception to the inadmissibility of settlement discussions swallowed the otherwise exclusionary provisions of Rule 408.

6. The Chair commented that the *Hernandez* decision explained its conclusion in terms of balancing the search for truth against promoting settlement. The decision said that the rule should strike a balance between these objectives, and that it should not matter whether the evidence concerning settlement discussions is admitted directly or as impeachment evidence.

7. Mr. Sanders recalled the broad protections afforded mediation discussions in Arizona law, and asked why there were two sets of rules concerning the admissibility of settlement discussions, depending on whether they were made in a mediation process.

8. The Chair said that Rule 408 could pose a trap for the unwary, given that practitioners often invoke Rule 408 in settlement communications, believing the communications to be protected, but unaware of the exceptions to that protection created by the *Hernandez* decision.

9. Bill Klain was concerned about not allowing the use of highly probative evidence like admissions. At an automobile accident scene, for example, an admission would be very probative. But, if that admission were coupled with an offer to settle, it would not be admissible.

10. The Chair noted that if someone believes that evidence is probative and relevant, and wants to use it no matter what, then there is no point in having Rule 408 at all.

11. Thom Hudson said that he likes the petition. There will be hard cases, but he believes that the petition frames the issue well for consideration.

12. George King noted that exclusion of settlement discussions does impose a cost on the truth-seeking function of litigation, but that the cost is worth paying. He compared the cost/benefit considerations to the attorney-client privilege rule. For example, a party's call to his lawyer after an accident would be extremely probative, but that evidence is unquestionably protected by the attorney-client privilege.

13. The Chair noted the consensus to approve the proposed petition. He also noted that the Committee declined to recommend making the changes made to Rule 408, *Federal Rules of Evidence*, concerning the use of "conduct or statements made in compromise negotiations regarding the claim" that allowed the use of such conduct or statements "when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

14. **MOTION:** Thom Hudson moved that the Committee recommend amending Rule 408, *Arizona Rules of Evidence*, as described in the petition. George King seconded the motion. The motion **PASSED**, with all but one of the Members in favor.

15. The Chair asked whether there were any comments concerning the proposed petition. He said that the subcommittee will need some editorial leeway, such as to add a redline version showing the proposed changes. Specifically, the Chair noted that there was an extra ")" on page one, line eleven, and an extra quotation mark on page two, note one. The Chair also pointed out that the Criminal Practice and Procedure Committee and the Family Law Section will need to review this proposed petition.

16. **MOTION**: Thom Hudson moved that the Committee recommend that the Board of Governors submit the proposed petition to the Supreme Court. George King seconded the motion. The motion **PASSED** unanimously.

17. Beth Beckmann asked whether the Committee believed that the attorneys practicing in juvenile law should be consulted, considering that severance and dependency matters often involve settlement discussions.

18. The Chair noted that the Board of Governors Rules Committee decides to whom to direct rules petitions for comment.

19. Ms. Beckmann commented that practitioners in juvenile law are often neglected in discussions regarding proposed rule changes.

E. Agenda Item K: Ariz. R. Civ. P. 35 (physical examinations) (***discussion***) (Appendix 11)

1. Larry Tinsley recalled that this issue was discussed in the Committee's meeting two months ago, an issue originally raised by Judge Schneider. Specifically, the issue is whether to allow the videotaping of physical examinations under Rule 35, *Arizona Rules of Civil Procedure*, as a matter of right. Mr. Tinsley, Judge Schneider and Judge Swann formed a subcommittee to investigate the possibility of proposing an amendment to Rule 35 to allow

videotaping as a matter of right. The subcommittee, Mr. Tinsley reported, consulted with the plaintiff's and the defense bar. They found that the defense bar was not supportive of videotaping, but that the plaintiff's bar was supportive. The subcommittee proposed some changes to Rule 35, such as eliminating the need to file a motion and obtain an order to allow an independent physical examination. Mr. Tinsley said that in practice, the motion-and-order procedure is not commonly used. Typically, he said that a party will notice an independent physical examination, and then litigate any objections to the notice. Mr. Tinsley thought that the provision in Rule 35 to obtain an order seemed unnecessary, and that would be better to use a model whereby a party serves a notice to obtain an examination, and then the recipient objects to the notice, if appropriate, and the Court rules on the objection. Mr. Tinsley said that the Chair provided edits to the subcommittee's proposed changes to the rule. Since the last time the Committee discussed the issue, the subcommittee removed from the draft proposal the language that would have allowed videotaping of the claimant from the beginning of the day of the examination. Mr. Tinsley said that the current draft proposal from the subcommittee would allow videotaping of an examination as a matter of right, unless good cause is shown to prohibit videotaping, such as where the taping would adversely affect the examination. He did not believe that videotaping would impose an undue burden on any party, but a party could raise an objection on those grounds. Mr. Tinsley recalled that Judge Swann noted that some examiners would raise their fees if the examination were videotaped, and therefore the subcommittee's proposed changes to Rule 35 would require that all such costs would be borne by the noticing party.

2. Karen Killion noted that she is a member of the defense bar, and opined that many experts would not serve as expert examiners of their examinations were videotaped. She recalled a situation where the day before a scheduled examination, the plaintiff indicated that he was going to videotape the examination, the court allowed the requested videotaping, and the expert then refused to go forward with the examination the next day.

3. Mr. Tinsley said that the defense bar did raise this issue with the subcommittee. The subcommittee, after discussion, concluded that adoption of the proposed rule would change the culture of independent examinations. He said that the subcommittee believed that physicians conducting independent examinations would likely adapt to videotaping, and that videotaping is not intrusive. With respect to last-minute notice of videotaping, Mr. Tinsley said that the proposed rule requires that a party provide such notice within five days of the original notice of examination being served.

4. Ms. Killion asked whether it would be better to notice the videotaping with the original notice of examination.

5. Mr. Tinsley said that the rule would allow noticing of videotaping to be included in the original notice.

6. The Chair said that he understood why videotaping would be advantageous, because it would avoid disputes as to what took place during an examination. But, he asked what reasons doctors would have to not want to have examinations videotaped.

7. Ms. Killion said that in the case of a neuropsychiatric examination (e.g., for a person with a traumatic brain injury), if the person knows that they are being videotaped, it might alter the results of the examination.

8. Mr. Tinsley pointed out that the example cited by Ms. Killion is covered in the proposed rule changes by the provision allowing for an exception for good cause shown.

9. Judge Swann said that he had this issue come up before him, and in that case, he ordered that the examination be audiotaped with no notice to the examined party.

10. Judge Houser said that he had the same issue come before him, and that he deals with objections to videotaping on a case-by-case basis.

11. Anne Ronan asked whether most independent physical examinations are in fact videotaped.

12. Peter Collins said that no, most examinations are not videotaped. But, he said that plaintiffs will ask to videotape to avoid intrusive questions or to make the opposing lawyer appear at the examination. Mr. Collins said that he believed that the default of allowing videotaping is the better choice.

13. Thom Hudson noted that Rule 26(c) allows a party to seek an order requiring that the examination be conducted by an individual different from the individual specified by the examining party.

14. Larry Tinsley noted that there are different provisions for objecting to an examination, including the general protective order provisions of Rule 26(c), as well as Rule 35(c), which applies specifically to examinations.

15. The Chair said that Mr. Hudson raised a good point. There is a deadline for raising objections to videotaping of an examination, but what may be missing is informing parties that if the oppose the examination, they must file a motion. The Chair suggested language to add to the proposal to require the filing of any motion concerning the examination within ten days of the service of the notice.

16. George King pointed out that a party must obtain an order before being relieved of the obligation to appear at, for example, a noticed deposition. He said that the mere filing of a motion for protective order is insufficient to avoid that obligation.

17. The Chair said that even though what Mr. King said is true, there are still problems with last-minute motions for protective orders.

18. Mr. Hudson noted that Rule 30 refers to recording depositions by "sound or sound and visual means," while Rule 35 is not technology-neutral in that respect, referring specifically to taping. He pointed out that Rule 30 does require that the means of recording be specified in the notice, and that the rule also requires that the video recording cannot be done in a

away that misrepresents what occurred. He asked whether the subcommittee considered any of these features of Rule 30 in their work on Rule 35.

19. Mr. Tinsley said that the only matter considered along those lines was whether to allow twelve hours of videotaping, and that idea was rejected. He said that the subcommittee did not consider using the technology-neutral language used in Rule 30(b).

20. Judge Swann said that he supports the suggestion of using the technology-neutral language from Rule 30(b), and noted that there could be objections to videotaping if taping in a small room provided an inaccurate representation of what occurred.

21. Bill Klain noted that the term "psychiatrists" are not in the list of allowed examiners in Rule 35.

22. Anne Ronan noted that psychiatrists are physicians, and physicians are on the list of allowed examiners in Rule 35.

23. Bill Klain noted that on page 11-8 of the materials, line 10, there was a passage that was a bit awkward regarding good cause. He suggested changing "unless the parties agree to or the court orders" to "unless the parties agree otherwise or the court orders ...."

24. Ms. Ronan asked whether the subject of an examination has standing to object to videotaping of the examination, for example, if the subject is concerned that the video will end up being posted on YouTube.

25. Judge Swann said that typically, the person being examined wants the examination to be videotaped.

26. The Chair said that he had a few comments. He said that the last section of the proposed rule concerning the situation where a party does not appear for an examination refers to Rule 37(d), but it should refer to Rule 37(b)(2)(E). Then, Rule 37(b)(2)(E) should be modified to include notices of physical examinations.

27. Rick Halloran asked whether the entirety of Rule 37(b) deals just with court orders?

28. Peter Collins suggested that sanctions for failing to appear for a noticed physical examination could be placed under Rule 37(f), with the other sanctions for failing to attend.

29. George King agreed with Mr. Collins' idea concerning Rule 37(f).

30. Thom Hudson also agreed with Mr. Collins' idea.

31. The Chair suggested adding a new subsection, subsection (4), to Rule 37(f) to provide for sanctions for a party who fails to appear for a noticed physical examination. The

Chair said that he had one other question concerning Rule 35(b). In that rule, the Chair noted that any party can file a notice for an examination, but that the rule also gives rights to the examining physician to videotape the examination. The Chair asked whether the right to videotape shouldn't in fact be a right that belongs to the parties, not a right belonging to the non-party examining physician.

32. Mr. Tinsley said that in his practice, one independent medical examining physician routinely videotapes his examinations.

33. The Chair asked whether the party noticing the examination would ordinarily take care of arranging for videotaping, if the examining physician wanted the examination videotaped.

34. Mr. Tinsley said that it could be done in that fashion.

35. The Chair asked whether third parties are given similar rights in other rules.

36. Mr. Hudson commented that it is odd for a third party to be able to serve a notice on a subject such as videotaping an examination.

37. Mr. Tinsley suggested that the examining physicians could be directed to work through the parties if they desired to have an examination videotaped.

38. The Chair noted that in product liability actions, the expert will want to examine the product that is the subject of the suit.

39. John Ager said that it is consistent with allowing a party the right to object to also give the party the right, on behalf of the examining physician, to have the examination videotaped.

40. The Chair compared the proposed changes to Rule 35 to the analogous rule in the family law setting, and noted that this rule (Rule 63, *Arizona Rules of Family Law Procedure*) does not refer to the title of the examiner (*e.g.,* psychologist or physician), but to the subjects of the examination ("mental, physical or vocational condition of a party or any other person").

41. Judge Swann said that in civil cases, vocational experts generally never meet with the subjects of their work. He said that there are very few vocational experts in the state, and that these experts generally rely solely on a review of the individual's records, as opposed to an in-person examination.

42. Mr. Tinsley noted that Rule 35 evolved to deal with mental and physical examinations.

43. Peter Collins said that vocational rehabilitation specialists will do interviews, and others will do examinations in order to determine functional capacity. He said that he has never had a problem with those types of examinations. Typically, he has noticed such examinations and they have been videotaped without objection.

44. The Chair asked whether the rule needed to be broader, to encompass non-doctor experts.

45. Karen Killion cited Rule 35, *Federal Rules of Civil Procedure*, as allowing a "suitably licensed or certified examiner" to perform examinations. She asked whether the subcommittee considered adopting the language from the federal rule as to the qualifications of the examiner.

46. Mr. Tinsley said that the subcommittee did not consider either the suggestion of the Chair or the suggestion proffered by Ms. Killion, as both suggestions were beyond the mandate of the subcommittee.

47. The Chair said that the Board of Governors Rules Committee will ask whether the Committee considered conforming Rule 35, *Arizona Rules of Civil Procedure* to its Family Law counterpart, Rule 63, *Arizona Rules of Family Law Procedure*. At this point, the Chair asked the subcommittee to consider the Committee's comments and revise its proposals accordingly.

F. Informational update regarding e-filing (not on the agenda)

1. Judge Swann related that he was involved with an appearance at the Supreme Court, with Judge Mundell, Michael Jeanes, and Vice Chief Justice Berch. The Supreme Court is considering adopting a unified electronic filing system for all courts in all counties. Judge Swann suspects that such a unified system may take a long time to implement. He recalled the Committee's support of the order in Maricopa County Superior Court making e-filing mandatory in civil cases by represented parties. Judge Swann believes that Maricopa County should proceed full speed ahead with e-filing, despite the pendency of the Supreme Court's comprehensive e-filing project. He asked the Committee Members whether the Committee would waiver in its support for the Maricopa County e-filing program.

2. The Chair noted that the views of the Committee were communicated through the appropriate channels, not directly to the Supreme Court, in light of Supreme Court's consideration of a comprehensive project.

3. Judge Swann then asked the communication regarding the Committee's continued support for the current Maricopa County e-filing program be made to the State Bar President. He said the question is whether the Committee's position regarding the Maricopa County e-filing program has changed. At least, Judge Swann asked for the Committee to have its position recorded in the minutes.

4. The Chair noted that the minutes of the Committee's meetings are available to the public. The Committee was very much in favor of the Maricopa County e-filing program. The Chair reported that Michael Jeanes, Clerk of the Superior Court, had made Maricopa County ready for electronic filing in all types of cases. The Chair said that he would be disappointed on a personal level if Maricopa County delayed its electronic filing program in order to wait for the completion of the Supreme Court's comprehensive project.

5. Judge Swann expressed his concern that without reaffirmation of the Committee's support for Maricopa County, the Supreme Court might take action to delay Maricopa County's e-filing program, while it works on creating an e-filing program for the other counties.

6. The Chair said that this will likely be a bottom-up process, considering that Michael Jeanes has been working on electronic filing since 2003.

7. Judge Swann said that the Chief Justice of the Arizona Supreme Court is committed to electronic filing.

8. **MOTION:** Judge Swann moved that the Committee submit a memorandum to the President of the Arizona State Bar indicating that the Committee continues to hold its previously-expressed opinion in support of the order authorizing electronic filing in Maricopa County, despite the potential of a state-wide electronic filing initiative. Thom Hudson seconded the motion. The motion **PASSED** unanimously.

G. Agenda Item G: Ariz. R. Civ. P. 45 (subpoena) (***discussion***) (Appendix 7)

1. Matt Kelly identified the major issues for the Committee concerning this matter. One issue is a proposed form for subpoenas. Another issue is whether there ought to be a meet-and-confer requirement as between the issuing party and the recipient of a subpoena, if there is a dispute, prior to either side seeking Court intervention to resolve the dispute. Another issue is whether a recipient can condition compliance with a subpoena on payment of fees, other than the fees allowed by statute for copying, mileage, etc. Mr. Kelly reported that the subcommittee suggested circulating its proposals for comment.

2. George King said that the language "all and singular business and excuses being laid aside" in the proposed form subpoena (at the top of page 7-20) was confusing and unnecessary. He said that the form should not list actual fees that might be allowed by statute, but that the form should only cite the statute itself, in the event the amount of the fees, or the items allowed, are amended by the Legislature. Mr. King also said that the form should indicate (on page 7-22 of the materials) that the recipient should serve copies of any objections on all parties to the action.

3. Mr. Kelly said that the party who has the subpoena issued and served is responsible for distributing any objections to the other parties.

4. Rick Halloran said that the last paragraph on page 7-20 of the materials is confusing.

5. Mr. Kelly indicated that the language of that paragraph comes from Rule 45 as it currently exists. He noted that the charge to the subcommittee was to see if Rule 45 could be improved.

6. Mr. Halloran said that the above-referenced confusing paragraph did not track the language from Rule 45.

7. Anne Ronan said that it made sense to her to use bullet points to clarify this confusing paragraph.

8. Craig Soland said that there was a typographical error on page three (page 7-21 of the materials) of the form subpoena. Specifically, he said that paragraph (v) under the line "You may object to this subpoena if" should read "the subpoena subjects you to an undue burden" (language added to the existing text is underlined).

9. The Chair said that he will circulate a Word version of the draft form subpoena to the Committee. He commented that Rule 45 is a very difficult rule to understand. He said that it makes sense to take the opportunity now to make the language of Rule 45 simple. He suggested that the subcommittee look at the language of the new federal rule (Rule 45, *Federal Rules of Civil Procedure*), which was made more simple. Also, the Chair suggested that the subcommittee compare Rule 45 to its counterpart in family law, Rule 52, *Arizona Rules of Family Law Procedure*. He said that the subcommittee should propose that both of these rules e changed and both should have the same forms. The Chair noted that the Family Law Procedure rules had headings, which he found useful. He indicated that the Committee will take up this issue in September in the 2008-09 Committee year.

10. Greg Garcia said that he was recently appointed to the Committee, and that he had just started getting notices.

11. The Chair expressed his deep appreciation to the Committee Members for their dedication and hard work over the past year.

5. ADJOURNMENT

MOTION: Chas Wirken moved to adjourn the meeting. Bill Klain seconded the motion. The motion was **PASSED** unanimously, and the meeting was adjourned at 5:57 P.M.

Submitted this 26th day of August, 2008

/s/ George H. King

George H. King, Secretary
Civil Practice & Procedure Committee