Honorable Carmine Cornelio
Arizona Superior Court in Pima County
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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND ARIZONA RULES OF CIVIL PROCEDURE 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74, and 77	Supreme Court No. R-13-0017 Final Response to Pending Petition to Amend Arizona Rules of Civil Procedure 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74, and 77

I write to supplement my original comments and to address the Response of the State Bar to those comments. The State Bar has adjusted the language and amended its Petition. The Petition and Amended Petition are not well founded. The Bar has also suggested a Committee. This is because there is (apparently) a clear division among the State Bar's own members as to the merits of the Petition. I write to put on record my position, and to object to the need and formation of a Committee.

I continue to oppose the Petition as amended. Based on the Petitioner's suggestion that a Committee be formed, it is clear that the State Bar is <u>not</u> asking this Court to act on its Petition now. It should, and reject it.

The State Bar, in its Response, assumes that I do not oppose mandated settlement conferences (with what I see as the consequent institutionalization of settlement conferences) in all cases. The attendant increased costs and delay would be significant. I strongly oppose mandatory settlement conferences (as provided in both the original and Amended Petition) in all cases. I have outlined the reasons for my continued opposition below.

<u>What about Rule 1</u>

We should all be aware of the public perception (premised on reality) that litigation is too expensive and lengthy.

"Just, speedy, and inexpensive determination of every action" (Rule 1) is the first Rule of Civil Procedure. Its mandate should be the foremost in all of our minds as we consider changing any rules under which our system operates.

We at the state trial court level should also keep in mind that we are not the Federal Court, nor should we aspire to be. The vast percentages of civil cases we see are not complex nor do they involve significant dollars. We should have rules that best address the types of cases (and majority of cases) we have. For the other more complex cases, rules are already in place.[1]

The proposed rule changes make it more likely that all cases will be processed in a way that is more (rather than less) expensive as well as more (rather than less) speedy.

Mandated Comprehensive Conferences

Considerations of the Practice and Culture Differences in Pima and Maricopa Counties

The New York Times recently reported that 94% of the attorneys in Arizona live and practice in Maricopa or Pima County.[2] Clearly, there appears to be strong disagreement on the need for and benefits of the proposed rule change. The Pima County bench (and local bar) does not believe that the current rules related to trial settings, the use of comprehensive pretrial settings, case management and ADR are either antiquated or out of date. Instead, they are the preferred way of doing things. We have written in opposition and suggested that instead of statewide rule change, there could be a local rule change in Maricopa County (and perhaps Yavapai).

[1] Again, under the existing rules, any party can request a comprehensive pretrial conference. The same is true as to a settlement conference.
[2] The article, No Lawyers for Miles, So One Rural State Offers Pay, NY Times, April 9, 2013, was about Idaho.

The State Bar's true reason for the proposed rule change is disclosed in its response to the objections and comments from the Pima County Bench and me.

"In essence, the Petition seeks to acknowledge by rule what has become reality [in Maricopa County and three other of the 15 counties in Arizona]. See Response, page 2.

The State Bar also suggests that the current rules and differing county court practices in Pima and Maricopa "**. . .** leads to uncertainty, inefficiencies and a patchwork system of case management throughout the state that increases the cost of litigation **. . .**" Page 4, Reply.

Rules should not be changed simply to become consistent with the "reality" of practice in Maricopa County and two other counties.

Similarly, I do not agree that because there are differences in the case management systems of Maricopa and Pima counties there is an increase in the costs incurred by litigants. The State Bar presents no evidence or facts to support this assumption.

I strongly believe that the proposed requirement of case management conferences and settlement conferences in all cases will clearly increase the costs of litigation. The suggested rule changes will mandate more (not less) attorney time, court time, and cost expenditures (i.e., mediation fees). The Pima County bench and my original comments demonstrate this as to case management. Also the small language change (in the Amended Petition) regarding settlement conferences does not lower costs for parties for settlements, it increases it.

In fact, the State Bar has made no showing or even an attempt at showing why its proposed rule changes would decrease (rather than increase) costs. The Petition and Response just asserts it as a given.

Mandated Case Trial Management Conferences

The State Bar's Petition notes that its proposed rule change regarding early and mandated case management derived from Federal Court and Arizona's (i.e. Maricopa's) complex litigation

program.[3] Given that the vast majority of our cases are not complex, why impose on the parties and courts the costs of treating these cases as something they are not?

Contrary to the claim by the State Bar in its Response, the Pima County bench's culture and current practice is not antiquated; nor obsolete to the point of irrelevance. The trial notices issued by this bench (see Judge Rash's Notice attached to the Bar's response) simply recites (and reminds the lawyers or parties) deadlines in existing rules.[4]

In other words, we (Pima County) have found no need to conduct a hearing or to require lawyers to consult about deadlines already set out in the rules. Hence my thought that the new rules would increase costs/fees to parties.

I am hard pressed to understand the State Bar's position that requiring mandatory case management conferences in every case saves costs and fees. Neither the original Petition nor its response to comments explains how requiring lawyers to spend time and courts to conduct hearings (or review stipulations) saves costs and fees.

Taking a procedure and practice that works well for complex cases and making it mandatory in all cases is, I submit, contrary to Rule 1.

The State Bar acknowledges in its Response, the merit and reality of my concern on disclosure abuses if the proposed rules are adopted and trials are set later in the procedural life of a case.

The State Bar believes that, while it is a real concern, the potential for disclosure abuses is ameliorated somehow with new language that provides that disclosure cutoffs exist even without trial dates.

[3] The Pima County bench considered (and rejected) having a complex litigation program where (as in Maricopa) one judge was assigned that program and had a longer rotation.
[4] The "amalgamation" of rules is accurate. See Arizona Rules of Civil Procedure 7.2, 37, 38.1 & Pima County Local Rules of Practice of Pima County Superior Court 3.4 for the deadlines we recite in trial notices.

The touchstone of any important and significant sanctions is that a party complaining of late disclosure demonstrates real prejudice. The balancing of interests required of trial judges regarding sanctions for "late" disclosure becomes much more difficult when there is no impending trial date regardless of the "new" language proposed by the State Bar. A trial judge's job is hard enough when faced with disclosure issues and possible sanctions. The proposed new rule makes it more difficult.

Mandatory ADR/Settlement Conferences/Timing

I appreciate the State Bar's consideration of my comments in this area and its attempt to address some of my concerns with new proposed language and an amendment to the Petition.

Under the new proposed language, settlement conferences absent "good cause," remain mandatory in all cases, but allows a trial to be set before the settlement/mediation actually occurs. This addresses the delay the original language made inherent when trial settings awaited the scheduling and conducting of a settlement conference, and the probable futility of conducting settlement conferences in all cases, before trials were even set.

However, the new proposed language does not address the problems and costs associated with mandatory settlement/mediation conferences in all cases, which the State Bar still proposes.

Overburdening the Courts and Costs to the Parties

Requiring settlement conferences in all cases imposes significant costs in all cases. These costs will have to be absorbed by either the court system or the parties. Parties will either have to pay a private mediator or go through a court sponsored settlement conference procedure. With a typical rate of $400-$500[5] per hour for private mediations a "usual" "easy" settlement conference running 4 hours plus one (or more) hours of prep time the minimum costs for private mediation is thousands of dollars for just the mediator (as the rule changes suggests). When one

[5] Mediation fees seem to outpace attorney fees per hour. Perhaps this is because there is only one client for attorney to bill. Mediators' fees are commonly split pro rata among the parties.

adds the costs of attorney's fees for two parties, it is obvious that court mandated private mediation is going to cost each party a minimum of $5,000 in even the most simple of cases.

If the parties choose to use the court's services for the proposed mandatory settlement/mediation conference, much of the increased costs will be shifted to the court system. If a party is facing a required mandatory settlement/mediation conference with these increased costs, it is rational to assume that many (maybe most) parties who are not electing (but being ordered) to attend a settlement conference would elect the "free" court supplied mediations/settlement conferences.[6] Aside from the issues of staffing and facilities, the increasing numbers of court sponsored settlement conferences may well reduce the effectiveness of court sponsored settlement conferences. If the court is unable or unwilling to supply these "free" settlement conferences, all litigants will have to bear these new imposed costs for the private mediation or settlement.

The bottom line is that the proposed rule changes force courts to impose the cost of a private mediator and additional attorney's fees on all parties all the time simply because a party has a dispute and would like a trial and the court system does not have a settlement program or it is overwhelmed.[7]

When Lawyers were Lawyers/The harm of Institutionalization

It may be counterintuitive that I, as a presiding ADR judge of many years, oppose mandated settlement conferences in all cases; I do.

In the "good old days" lawyers used to talk and settle cases without either the court or court rules being involved or mandating such discussion. In fact, the percentage of civil cases that settle versus going to trial has not changed significantly (if at all) over the last several decades. Well over 95% of cases settle and this was true before settlement conferences were

[6] Free in that no mediator is paid, but the lawyers (of course) are.
[7] The rule acts, in effect, as an unfunded mandate upon the counties. Unless the Supreme Court intends to fund the anticipated deluge of settlement conferences and the consequent need for additional judges, staff conference rooms, et cetera; perhaps the rule also could allow the court a fee for conducting settlement conference.

ever heard of, let alone became "de rigueur." There is no reason to believe that the new rule will increase settlement rates or lower costs to either the parties or the courts. It will, however, discourage lawyer to lawyer negotiations.

Setting a Floor/Ceiling

Lawyers already complain to me that parties now "hold their powder dry" when they discuss (lawyer to lawyer) settlement because a settlement conference is scheduled or may be scheduled. Why make your best offer/demand informally?

When settlement conferences are mandated in all cases, lawyers (or parties) will be even less frank about their true settlement positions. They will await the mandated settlement conference.

The State Bar notes that its ADR committee provided "feedback" that it believes most litigants would benefit by mandated settlement conferences in all cases. It should come as no surprise that the ADR committee of the State Bar supports mandatory ADR. Its members have a vested financial interest (and benefit) in doing so.[8]

Conclusion/Mandated Settlement Conferences

It is encouraging that my original comments had a positive and helpful impact on the State Bar's position on the proposed rule changes.

I hope these additional comments are similarly persuasive in convincing either the State Bar or this Court that adopting a rule that will mandate settlement conferences in all cases will

- Cause more expense to parties;
- Cause more expense to the courts, and therefore, the general public;

[8] With the years towards my retirement ticking away, I realize it may be against my own financial interest to oppose mandatory settlement conferences in all cases. If such a rule passes there will be an explosion of parties needing private mediation.

- Impair lawyer to lawyer settlement discussion which will make early settlement and settlement without a settlement conference less likely; and
- Diminish the public's perceptions that the courts provide a reasonable venue to resolve their disputes.

No Committee Needed

The State Bar acknowledges that there is a "split" in favor of and against its proposed rule changes.

To solve the petitioner's own lack of full support for its petition it, rather than withdrawing the petition, suggests the formation of a committee. Why?

The Petition never established that the proposed rule changes would benefit the Bar, Bench, or public. It simply sought to impose one way of doing things. Case differentiation and case management are (absent the showing of a problem) best left to individual judges and counties.

I submit that there are better and more important things for the courts to for ask for and seek volunteers for committee time on proposed rule changes that are unnecessary.

Conclusion

The "one size fits all" proposed by the State Bar should be rejected. Too many cases would be subjected to added costs by a rule change that has true benefits only in large and complex cases. Neither the Pima County bench, nor the Pima County Bar supports the proposed rule change. In fact, they actively oppose it. There has been no showing, in the Petition, why the existing rules do not accomplish the claimed benefits of the new Proposed Rules. Again, currently:

- Rule 16.1 provides that any party can request a settlement conference and that the court shall order one. It also provides that a court may, without such a request, order one.
- Rule 16(b) provides that upon written request of any party the court shall schedule a comprehensive pretrial conference. This rule also provides that a court may set one without a request.

These two rules are available to any party (or judge) who believes there are benefits to either a settlement conference or early case management conference. They do not mandate them (as the Proposal would do both) in all cases.

The Petition of the State Bar makes no showing as to why these two current rules are a failure or why more is needed. Nor have the Petitioners demonstrated why the adoption of a local rule (by those counties which agree with the State Bar) would not be as effective.

Accordingly, the State Bar has not demonstrated why statewide rule changes are necessary nor why a Committee need be formed to study and debate them.