COMMENTS ON THE NEW PROPOSED RULE CHANGES BY THE ARIZONA ASSOCIATION FOR JUSTICE

AzAJ applauds the Task Force for its initial efforts to streamline the Arizona Rules of Civil Procedure making them more user-friendly and concise.

In particular, trial lawyers are particularly receptive to the changes proposed with respect to Rules 11, 26.1, 37, and 47(c)(3)(A). AzAJ applauds the Task Force's draftsmanship and innovation on those Rules.

In general terms, the trial lawyers also agree that it is beneficial and appropriate to make the Arizona and Federal Rules of Civil Procedure harmonious where there has historically not been substantive distinctions between the state and federal rules. However, with respect to the discovery rules, AzAJ lawyers believe that Arizona practice has long been substantively different than federal practice and that our rules should continue to embrace Arizona's unique philosophy concerning discovery as evidenced in Rules 26 through 35.

In 1992, the Arizona Supreme Court adopted a radical solution to the desire to make sure that justice truly reflected a search for the truth rather than a lawyer's contest to see who could more effectively hide it. These "Zlaket Rules" introduced the notion that parties needed to inform their opponents what their cases were about legally and factually. Some of the Task Force's proposed Rule amendments may jeopardize Arizona's unique and salutary culture of disclosure. AzAJ is concerned that some of the Rules changes appear to compromise Arizona's disclosure scheme for the sake of consistency with the Federal Rules and that this could hamstring the search for the truth. And in a few cases, the proposed amendments seek to solve non-existent problems and could negatively affect the practice of law.

COMMENTS ON PROPOSED RULE CHANGES

RULE 16

Under Rule 16, pretrial conferences are set to schedule litigation. This language was added to Rule 16 as an additional subject for the pretrial conference.

> [E]nsuring that discovery is appropriate to the needs of the action considering the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery, and the parties' resources;

Thus, the new Rules seek consideration of "the amount in controversy" in each pretrial conference. The Rules are already designed to streamline litigation from the old unlimited rules. In the typical car accident case, the uniform discovery provided in the rules is the only discovery used. The addition of this language contemplates consideration of further reductions where the judge can impose further limitations on this already abbreviated discovery as a rule.

The Rules should be interpreted to allow the parties to operate without judicial intervention unless there is an objection. Rule 16 already permits the parties to raise these types of issues without any changes in the Rules. Asking the judge in every case to address

this issue will create a substantial burden on trial judges to fix a problem which does not exist in AzAJ's opinion. In fact, this issue, to the extent it is a concern, was addressed by the Legislature when it provided for smaller claims to be resolved in either Small Claims Court (cases less than $3,500.00), Justice Court (cases less than $10,000.00), or through compulsory arbitration under Rules 72-77 (cases less than $50,000.00 for most counties). Judicial review should be the exception, not the rule.

RULE 26(b)(1)(C).

AzAJ believes this change is unnecessary as the current rule already provides the Court with discretion to limit discovery in any given case based on the various factors outlined in the Rule. Instead, the proposed change mandates a subjective determination of the "appropriate" amount of discovery in every case inviting unnecessary motion practice and waste of judicial resources.

RULE 35

Most of the proposed changes to ARCP 35 are not substantive. However, there is one potentially unintended change. Under the current rule, a Rule 35 examination can only be done by a physician or a psychologist. The proposed rule would allow an examination by a "suitably licensed or certified examiner".

Defendants have occasionally sought to have a Rule 35 exam conducted by a vocational rehab expert. Under the current rule such an examination by a vocational rehabilitation expert is not allowed because the vocational rehab expert is not a physician or psychologist. However, even under the proposed rule the committee believes that such a vocational examination should not be allowed. Rule 35 is intended to allow a defendant to have an "independent" evaluation of the plaintiff when the "mental or physical condition" of the plaintiff is in controversy.

The rule is not currently intended to include an examination of the plaintiff's vocational status. Under the current rule a defendant may retain a vocational expert, but the vocational expert does not get to interview the plaintiff. The defendant's retained vocational expert must rely on the plaintiff's deposition, employment records, and any opinions by a physician about the plaintiff's work restrictions and limitations. Based on the records the retained vocational expert may opine about the financial consequences of the plaintiffs assumed disabilities. Because a vocational expert does not have medical training, he cannot opine about the nature of the plaintiff's mental or physical condition or even whether the plaintiff's condition would limit his ability to work. Rule 35 should not have any applicability to a vocational assessment. To the extent that the proposed rule is intended to extend the scope of a Rule 35 examination beyond mental and physical conditions, it should say so in the title, in the first sentence and in the comments. To the extent it may be construed to expand IMEs to areas other than to medical or mental health care experts, it should be rejected or modified.

The rule is also inappropriately vague. It does not specify any category of expertise which would be included, and it gives no guidance as to what "suitably licensed or certified" means. Hairdressers have licenses. Astrologers can be certified. The potential for satellite litigation and unintended consequences looms large.

The implied ex parte interview, with a wide open field of experts allowed by the change, raises difficult issues for trial judges in determining the scope of communications allowed with a represented party. This change is certain to increase the load of discovery disputes. Unless the necessity of this change is demonstrated to be compelling, the Committee recommends its rejection.

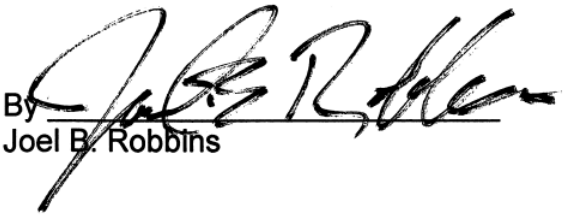
RULE 37(g).

This rule seems inconsistent with the other changes in that it is unclear whether it applies to Facebook or social media postings, electronically stored video, electronically stored email, cell phone data and text messages. It would seem to include without limitation, everything electronically stored, which creates a great deal of potential abuse. For this reason the committee would suggest rejecting this proposed change.

The Arizona Association of Justice would like to thank the committee for reworking the Rules so as to clarify them and to the extent that they make the system of litigation more just. To the extent that the Rules do not accomplish this goal, AAJ would urge rejection or modification of the amendments to Rules 16, 26(b)(1)(C), 35 and 37(g).

The Committee on Proposed Civil Rules Changes,
ARIZONA ASSOCIATION OF JUSTICE

David Abney, Esq.
Shannon Clark, Esq.
Lincoln Combs, Esq.
Justin Henry, Esq.
Robert Hommel, Esq.
Richard Langerman, Esq.
Krista McCarthy, Esq.
Richard Plattner, Esq.
Joel B. Robbins, Esq.
J. Tyrell Taber, Esq.

By 
Joel B. Robbins