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COMMENTS ON R-17-0010 BY THE ARIZONA ASSOCIATION FOR JUSTICE

Petition to Amend the Arizona Rules of Civil Procedure: to Modify Rules 8, 8.1, 11, 16, 26, 26.1-.2, 29, 30, 31, 33–37, 45, 45.2; Abrogate Rule 16.3; Adopt New Rules 26.2 and 45.2; and Modify Rule 84

AzAJ would like to thank the Committee on Civil Justice Reform (CCJR), its Chair Don Bivens, and all of the Committee members that have devoted their time and effort to this project.

SUMMARY AND SUGGESTIONS

AzAJ appointed a committee to review the Petition. This committee has met numerous times to discuss the Petition. The overriding theme of our discussions has been the concern that many of the new rules proposed in the Petition are geared towards, and primarily applicable to, commercial litigation cases rather than personal injury and other tort cases. Our committee believes that many of these new rules will likely cause more confusion amongst the personal injury bar (including the many pro per parties that appear in these cases) and won't make processing tort cases easier, more efficient or less costly. While these are worthwhile goals that AzAJ fully supports, we don't believe the Petition will achieve them in tort cases. Instead, enforcement of the current rules and the early setting of firm trial dates are the best ways to achieve the efficiency and cost-saving goals of the Petition.

Therefore, AzAJ suggests that the CCJR either: (1) take more time to discuss the practical application of the rules and try to determine if the goals can be met through other means, (2) create a pilot program for the rules to be used in commercial cases to determine if they are successful, at which time they can be considered to be applied to all civil cases, or (3) to simply exempt personal injury and other tort cases from the new rules.

SPECIFIC COMMENTS AND CONCERNS

Proposed Rule 8(b) – States that any party that claims damages to be in a Tier 1 or 2 case "waives any right to recover damages in an amount above the limit for the tier pleaded, unless the party later amends the pleading under Rule 15." This is confusing

because it seems to suggest that a party can amend their pleading after a jury reaches a verdict. Moreover, so as to not lose the opportunity to collect what a jury awards, tort practitioners will likely claim that every case is a Tier 3 case. Finally, this provision likely runs afoul of Article II, Section 32, of the Arizona Constitution that prohibits the enactment of any law that limits the amount of damages recovered for causing the death or injury of any person.

Proposed Rule 8(h) – The "meet and confer" requirement – The rule does not clarify what constitutes "meet and confer." Is this an in person meeting? If so, it is extremely difficult to coordinate telephonic conferences amongst counsel, let alone in person conferences. The proposed rule only allows 15 days to "meet and confer" and then another 5 days to file a joint report regarding the meeting. These are extremely ambitious deadlines, especially if the meeting need occur in person. AzAJ suggests that the rule be clarified that the "meet and confer" can take place telephonically or through other electronic means.

Proposed Rule 26.2 – The New Tiering System – AzAJ is concerned that this proposed tiering system is going to increase the number of disputes in tort cases regarding valuation and discovery. The tiers are likely not going to simplify the initial processing of tort cases, but will likely result in fights over which tier a case belongs in and how much discovery is going to be permitted. The proposed tiers are too vague, which will further invite dispute and argument. For example, "automobile tort" cases are included in the definition of Tier 1 cases. Does this include trucking cases? Wrongful death cases involving automobiles? What about medical malpractice cases - those are not mentioned? How are the tiers calculated? Inevitably, parties are going to bicker over the nuances of the rules so as to not prejudice their right to conduct the necessary discovery in each case. Thus, AzAJ suggests that the CCJR consider removing the tiering system altogether, or provide much more instruction of how it is to apply to the multitude of types of tort cases being filed.

In addition to the inevitable fights over what tier a case will be assigned to, AzAJ has concerns regarding how the discovery limitations will be applied and enforced once the proper tier is determined. For example, proposed Rule 26.2(e) (1) limits "fact witness depositions" to "5 total hours." What is a "fact witness?" Does that include the parties? The wrongful death beneficiaries? The eyewitnesses? Treating physicians? Rule 30(b)(6) witnesses? Does the cross examination by another party of a deponent you noticed count against your time? These questions could continue ad nauseum, but they indicate how the

new limitations will likely spark more, not less, discovery disputes amongst the parties which will require more, not less, judicial intervention.

Proposed Rule 26(f) – States that no discovery can be sought from any source before that party serves their initial disclosure statement. AzAJ does not understand the purpose of this rule. Many times after filing or appearing in a case, parties seek to use their subpoena power to obtain information that will ultimately end up in an initial disclosure statement. Other times discovery is sought prior to the initial disclosure to help clarify or eliminate the issues raised in the initial disclosure statement. With this new rule, will all parties truly not be allowed to serve a subpoena on a plaintiff's medical provider for records? Will parties be prohibited from sending interrogatories to another party so that they don't have to wait for a month after the initial disclosure to get information that may eliminate the need to do other discovery? Can a plaintiff serve an initial disclosure with the complaint and then serve discovery immediately? Again, without further explanation of the rule, or the intention of the rule, it is likely that disputes regarding when discovery is appropriate will be plentiful.

Proposed Rule 26.2(i) – This rule requires a report at the end of "fact discovery." If the new rules are intended to increase the efficiency and decrease the cost and expense of litigation, AzAJ does not understand why it is necessary for the parties to compile a report to the court outlining the "amount of discovery that was taken in their case..." First, the proposed rule states that this report should be sent to the court at the end of "fact discovery." This is an undefined term. Does it include all discovery, including expert witnesses? Is there now a cut-off time for fact discovery at which time expert discovery starts? Finally, who is going to track these reports and the data within them? The court is already heavily burdened and it appears to be a herculean task to compile the reports and date in usable form. AzAJ suggests that this proposed rule be abandoned.

Proposed Rule 26.1(d) – This rule outlines what needs to be disclosed with respect to each expert witness. This is one of AzAJ's biggest concerns as it will likely dramatically increase costs, encourage otherwise willing and competent experts to avoid litigation and will adversely impact any pro per who dares bring a tort claim. First, "expert" is not defined. Is it any witness who has expertise in any issue in a case, or only those who have been specifically retained for purpose of the litigation? Are treating medical providers "experts?" A party who has expertise? Many tort cases involve "experts" who do not do much forensic work. This includes many treating physicians, who are already hesitant to stick their nose into personal injury litigation. Typically personal injury parties can rely on the treating physician's medical records to outline the

scope of their testimony. In those instances where the records are not enough, a supplemental disclosure statement can be provided by the party. However, requiring treating physicians to provide a formal report, a list of any testimony offered in the last four years and a statement of compensation in addition to their medical records or a disclosure will likely result in that physician's refusal or cooperation to participate. It will also likely require increased compensation paid to the physicians for their time, which will increase the cost of the litigation. AzAJ suggests that the current rules allowing for the disclosure of expert testimony via disclosure statement, report or declaration be left in place.

CONCLUSION

The Arizona Association for Justice would like to thank the CCJR for its efforts and attention to this comment.

The Committee on Civil Justice Reform,
ARIZONA ASSOCIATION FOR JUSTICE

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