

Possible Responses to the ACTL/IAALS Report: The Arizona Experience

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The primary goal of the framers of the 1938 Federal Rules of Civil Procedure (“FRCP”) is neatly described in Rule 1 -- “to secure the just, speedy, and inexpensive determination of every action and proceeding.” At least two of the more notable proponents of the federal rules, however, also had an ambitious secondary agenda, hoping that the FRCP would also “properly be a model to all the states.”¹

Although much analysis has been devoted to whether and to what extent this secondary objective has been achieved,² there is little doubt that the original enactment of the FRCP and over seventy years of the amendment process have had a powerful influence on state rulemaking.³ The effect has been particularly profound in Arizona. Arizona adopted the 1938 federal model in its 1939 Code,⁴ and the Arizona Rules of Civil Procedure (“ARCP”) have been amended regularly

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¹ CHARLES E. CLARK & JAMES WM. MOORE, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387 (1935); *see also* CHARLES E. CLARK, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) (“The new federal reform is likely . . . to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of procedural reform throughout the country generally.”)

² *See, e.g.*, JOHN B. OAKLEY & ARTHUR F. COON, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); JOHN B. OAKLEY, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).

³ CHARLES E. CLARK, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 & n.2 (1958) (“[H]ardly a local jurisdiction remains unaffected”). Recognizing the important influence of the various federal rules on the states, the Advisory Committees for the federal civil, evidence, appellate, and criminal rules, as well as the Standing Committee, have long included state supreme court justices among their membership. E-mail from Heather Williams, Offices of Judges Program, Administrative Office of the United States Courts, to author, (Aug. 3, 2009, 10:34 PST) (on file with author).

⁴ ARIZ. CODE § 21-201 (1939) (effective January 1, 1940); *see* ARIZ. R. CIV. P. 1, Hist. Note (2009)

during the succeeding seventy years to reflect changes in their federal counterparts.⁵

The Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (“Final Report”) persuasively questions whether the core objectives of FRCP 1 are still being effectively served by the federal rules.⁶ Similar concerns were raised in Arizona over twenty years ago. In response, the Arizona Supreme Court in 1990 appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation.⁷ The result was the “Zlaket Rules,” a thorough revision of the ARCP adopted by the Supreme Court effective July 1, 1992. Those rules enacted a discovery regime that, in some respects, is still not reflected in the FRCP. In addition to the Zlaket Rules, Arizona has adopted a number of other procedural mechanisms worth considering as the Advisory Committee on the Federal Rules of Civil Procedure ponders the appropriate response to the Final Report. This paper reviews several of the more significant Arizona undertakings, in the hope of provoking discussion on the utility of such state procedural reforms.

I. The Zlaket Rules

A. Disclosure

⁵ For example, ARCP 34(b) was amended on September 5, 2007 to track the 2006 changes to FRCP 34(b) concerning electronically stored information.

⁶ AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (March 11, 2009), *available at* <http://www.du.edu/legalinstitute/form-CTL-Final-Report.html> [hereinafter *Final Report*]. The Final Report was preceded by an Interim Report which set forth the results of the 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers. *See* AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS (Sept. 9, 2008) [hereinafter *Interim Report*].

⁷ THOMAS A. ZLAKET, *Encouraging Litigators to Be Lawyers: Arizona’s New Civil Rules*, 25 ARIZ. ST. L.J. 1, 1-3 (1993).

In one of its more sweeping suggestions, the Final Report urges that “[n]otice pleading should be replaced by fact-based pleading.”⁸ The Supreme Court’s *Twombly* and *Iqbal* decisions, which require a claim for relief to demonstrate “plausibility,” have of course already signaled a significant change in the previous general understanding of the pleading requirements of FRCP 8(a).⁹ The Final Report takes somewhat different tack, arguing that pleadings should set forth “*all* material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense.”¹⁰

Although more precise than the *Twombly/Iqbal* “plausibility” standard, the Final Report’s approach could lead to increased Rule 12(b)(6) motion practice, in which the parties argue about whether the initial pleading -- and any amended pleading permitted thereafter under the liberal standard in FRCP 15(a) -- disclosed sufficient material facts.¹¹ It was precisely this kind of extended dilatory motion practice -- and concern over the length of pleadings -- that prompted the adoption of the “short and plain statement of the claim” standard in FRCP 8(a)(2) in the first place.¹²

The Arizona rules take a different approach, mandating disclosure of more information than the Final Report at a very early stage of the case, but outside the pleading process. This requirement is contained in the centerpiece of the Zlaket Rules, ARCP 26.1, entitled “Prompt Disclosure of Information.” The rule requires

⁸ *Final Report*, *supra* note 6, at 5.

⁹ *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007).

¹⁰ *Final Report*, *supra* note 6, at 6 (emphasis added).

¹¹ *But cf.* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 2, 20-24 (2010), available at http://www.du.edu/legalinstitute/pubs/civil_case.pdf (noting that, for specified case types, proportionately fewer motions to dismiss were filed in one Oregon state court under rules requiring pleading of “ultimate facts” than in cases governed by FRCP 8 filed in the United States District Court for the District of Oregon).

¹² *See, e.g., Knox v. First Sec. Bank*, 196 F.2d 112, 117 (10th Cir. 1952) (stating that the purpose of Rule 8(a)(2) was to dispense with “prolixity in pleading and to achieve brevity, simplicity, and clarity”).

a broad set of initial disclosures by all parties within forty days after a responsive pleading is filed to a complaint, counterclaim, cross-claim, or third party complaint.¹³ The duty of disclosure is continuing; each party must make additional or amended disclosures “whenever new or different information is revealed.”¹⁴ Each disclosure must be “under oath, signed by the party making the disclosure.”¹⁵

The scope of disclosure required under ARCP 26.1 is much broader than that provided under the later enacted (and subsequently amended) FRCP 26(a).¹⁶ ARCP 26.1 requires disclosure not only of “[t]he factual basis of the claim or defense,”¹⁷ but also “[t]he legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.”¹⁸ There are no counterparts to these requirements in the initial disclosure requirements of FRCP 26(a). The potential sanction for failure to disclose is severe – absent a showing of good cause, the offending party “shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion, the information or witness not disclosed.”¹⁹

¹³ ARIZ. R. CIV. P. 26.1 (b)(1).

¹⁴ *Id.* at (b)(2)

¹⁵ *Id.* at (d)

¹⁶ The 1993 version of FRCP 26(a) contained a local “opt out” provision to mandatory disclosure. The 2000 amendments to FRCP 26(a) eliminated the opt out provision, but narrowed the scope of disclosure. *See* FED. R. CIV. P. 26, Advisory Comm. Notes, 2000 Amendment, Note to Subdivision (a) (2007).

¹⁷ ARIZ. R. CIV. P. 26.1(a)(1).

¹⁸ *Id.* at 26.1(a)(2).

¹⁹ *Id.* at 37(c)(1); *see also id.*, State Bar Comm. Note to 1996 Amendment (stating that the amendment was intended to codify the holding of *Allstate Ins. Co. v. O’Toole*, 896 P.2d 254 (Ariz. 1995), which exempted harmless non-disclosure from the sanction of exclusion). Before the 1996 amendment, ARCP 26.1(c) provided that the trial court “shall exclude” non-disclosed evidence, except for “good cause shown.” *Id.* at 256. Some courts had interpreted this language as mandating exclusion in the absence of a showing of good cause for the non-disclosure, even if the opposing party was not prejudiced. *Id.* at 256-57.

Under the Arizona approach, trial courts are not required to adjudicate a series of Rule 12(b)(6) motions in which differing versions of the complaint are measured against an indefinite “plausibility” standard.²⁰ Neither are Arizona courts required to determine whether a pleading seeking relief discloses all “material” facts, nor speculate as to the legal theory asserted. Each party is provided with disclosures made under oath, and the disclosure can thus serve as a basis for a summary judgment motion if either the disclosed facts or the legal theory asserted is insufficient to support a claim or defense as a matter of law. The disclosure can also inform the court in considering a motion under ARCP 56(f) (the counterpart of FRCP 56(f)) to continue consideration of a summary judgment motion pending specified further discovery.

The Supreme Court’s recent FRCP 8 jurisprudence has been prompted in part by dissatisfaction with the notion that a bare bones complaint can force the parties to engage in expensive discovery to learn the relevant facts and legal theories.²¹ The Final Report reflects similar concerns. Even assuming the merits and longevity of the *Twombly* doctrine,²² broadened mandatory disclosure under FRCP 26(a) could alleviate the concerns expressed in the Final Report without returning us to the problems that originally led to the adoption of FRCP 8.

B. Depositions

The Final Report urges that “[p]roportionality should be the most important principle applied to all discovery,” and that only “limited additional discovery should be permitted” after initial disclosures.²³ Both the FRCP and the ARCP contain limits on the length of depositions; these differ in time, but not in

²⁰ Perhaps in part informed by the requirements of ARCP 26.1, the Arizona Supreme Court recently declined to adopt the *Twombly* doctrine. See *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 347 (Ariz. 2008).

²¹ See *Iqbal*, 129 S. Ct. at 1950 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

²² Sen. Specter has introduced the “Notice Pleading Restoration Act of 2009,” which would abrogate *Twombly* and *Iqbal*, and mandate application of the standards in *Conley v. Gibson*, 355 U.S. 41 (1957), to all motions under FRCP 12(b)(6). See S. Res. 1504, 111th Cong. (2009).

²³ *Final Report*, *supra* note 6, at 7, 9.

principle.²⁴ Both sets of rules limit the number of depositions, and here the difference is more substantive.

Under FRCP 30(a)(1), a party may “depose any person, including a party, without leave of court.” Absent stipulation or leave of court, however, the party is limited to no more than ten depositions.²⁵ Under ARCP 30, in contrast, only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission.

In less complicated cases, the Arizona approach forces the parties to agree upon whether a deposition is truly needed,²⁶ or, in the alternative, to convince the trial judge of the need. In such cases, the presumptive limit of ten depositions per side in the FRCP creates the need for judicial intervention when a party believes that fewer depositions would suffice. Although a protective order under the federal regime could produce the same result as the ARCP, the burden on the moving party – and the absence of a presumption that non-party, non-expert depositions must be justified – has the potential of unnecessarily increasing discovery costs.

C. Document Production

The Final Report suggests that “[s]hortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party’s claims, counterclaims or defenses.”²⁷

ARCP 26.1(a)(9) responds to these concerns. It requires identification in the disclosure not only of documents and electronically stored information, “whether or not in the party’s possession, custody or control,” that “may be relevant to the subject matter of the action,” but also of “all documents which appear reasonably

²⁴ See FED. R. CIV. P. 30(d)(1) (presumptive limit of one day of seven hours); Ariz. R. Civ. P. 30(d) (presumptive limit of 4 hours).

²⁵ *Id.* at (a)(2).

²⁶ “Refusal to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f).” ARIZ. R. CIV. P. 30(a), Comm. Comment to 1991 Amendment.

²⁷ *Final Report*, *supra* note 6, at 7.

calculated to lead to the discovery of admissible evidence.” Those documents must be produced with the disclosure, absent good cause; if production is not made, the party must indicate the name and address of the custodian. The scope of disclosure is thus broader than FRCP 26(a), which only requires identification of documents supportive of the disclosing party’s position.

D. Witnesses

FRCP 26(a)(1)(A)(i) mandates initial disclosure of all persons “likely to have discoverable information,” and FRCP 26(e) imposes a duty of supplementing such disclosures. The names of trial witnesses, however, are not required in the initial disclosure. Rather, they are treated under FRCP 26(a)(1)(D) as “Pretrial Disclosures,” to be made at least thirty days before trial absent contrary order of the court. The Final Report urges early identification of trial witnesses, subject to a continuing duty to update.²⁸

The ARCP directly respond to the Final Report’s recommendation. ARCP 26.1(a)(3) mandates initial disclosure of all witnesses “whom the disclosing party expects to call at trial,” along “with a fair description of each witness’ expected testimony.” In conjunction, ARCP 26.1(b)(2) imposes a continuing duty to make “additional or amended disclosures” within thirty days of the party learning about new or different information.” Thus, the Zlaket Rules ensure that the opposing party is provided with an up-to-date witness list well before trial. That duty is reinforced by the provision in ARCP 26.1(b)(2) preventing use of information disclosed within sixty days of trial without leave of court.

E. Expert Witnesses

The Final Report recommends that “[e]xcept in extraordinary cases, only one expert witness per party should be permitted for any given issue.”²⁹

ARCP 26(b)(4)(D) addresses this issue and goes further, providing that “each side shall be presumptively entitled to only one independent expert on an issue, except on a showing of good cause.” This rule also allows the trial court, if

²⁸ *Id.* at 9.

²⁹ *Id.* at 17.

multiple parties on a side cannot agree as to which independent expert will be called on an issue, to designate the expert to testify.³⁰

F. Reaction of the Bar and Bench to the Zlaket Rules

1. Early reactions.

The proposed Zlaket Rules received extensive public comment and were “test-driven” in four divisions of the Maricopa County Superior Court before adoption.³¹ In 1997, while serving as Chief Justice of the Arizona Supreme Court, their namesake admitted that he was “not sure I can get very good read on how the Rules are working,” noting that most of his information was anecdotal.³² He stated, however, that trial judges reported no problems with the disclosure rules, and the “restrictions we placed on discovery draw nothing but praise.”³³ An early article by an experienced Arizona civil litigator found results of the first five years of experience under the new regime “mixed,” noting the process worked well “when the parties and their counsel comply with the letter and spirit of the disclosure rules,” but lamenting that some counsel did not comply and some judges were less than strict in enforcing the rules.³⁴

2. The 2008 survey of the ACTL Fellows.

The survey of ACTL Fellows conducted in 2008 by the Institute for the Advancement of the American Legal System (“IAALS”) and the ACTL Task Force on Discovery, the results of which were presented in the Interim Report, suggests that, after some fifteen years of experience with the Zlaket Rules,

³⁰ ARIZ. R. CIV. P. 26(b)(4)(D).

³¹ See ZLAKET, *supra* note 7, at 8; ROBERT D. MYERS, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L. J. 11 (1993).

³² *Zlaket Takes Over as Chief Justice*, ARIZ. ATTORNEY, March 1997, at 37.

³³ *Id.* at 38.

³⁴ ANTHONY R. LUCIA, *The Creation and Evolution of Discovery in Arizona*, 16 REV. LITIG. 255, 268 (1997). In 2006, then retired Justice Zlaket reportedly expressed disappointment in the way the disclosure rules “have been implemented by lawyers.” Thomas A. Zlaket, 2006 Goldwater Lecture Series: Common Misperceptions about Judges and the Justice System in Arizona (July 30, 2006).

experienced Arizona trial lawyers prefer the state court procedural regime to the FRCP.³⁵ Seventy-eight percent of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court.³⁶ In contrast, only forty-three percent of the national respondents to the ACTL survey preferred litigation in state court over federal court.³⁷

Sixty-seven percent of the Arizona respondents indicated that cases were disposed of more quickly in state court; fifty-six percent believed that processing cases was less expensive in the state forum.³⁸ Almost half (forty-eight percent) cited the ARCP as an advantage to state court litigation; only four percent of the Arizona respondents cited the FRCP as an advantage of federal litigation.³⁹

3. The 2009 IAALS Arizona Rules Survey

In 2009, the IAALS conducted a comprehensive Arizona Rules Survey, to explore the opinions of the Arizona bench and bar about civil procedure in the State's superior courts.⁴⁰ The Survey was created by IAALS and the Butler Institute, an independent social science research organization at the University of Denver.⁴¹ The State Bar of Arizona (a mandatory membership organization) distributed the survey to its membership.⁴²

³⁵ The survey was sent to 3812 Fellows of the American College of Trial Lawyers ("ACTL"); the response rate was forty-two percent. *Interim Report, supra* note 6, at 2. Twenty-seven of the respondents identified Arizona as the state where their primary practice was located. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, BREAKDOWN OF RESPONSES TO ACTL SURVEY – ARIZONA ATTORNEYS 1 (Mar. 11, 2009) (on file with author) [hereinafter *2009 Memorandum*].

³⁶ *Id.* at 2.

³⁷ *Id.*

³⁸ *Id.* at 3.

³⁹ *Id.*

⁴⁰ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 1 (2010) [hereinafter *2009 Arizona Rules Survey*].

⁴¹ *Id.* at 6.

⁴² *Id.* at 6-7.

The survey produced 767 valid responses, a statistically valid sample.⁴³ Survey respondents had practiced law in Arizona for nineteen years on average.⁴⁴ Respondents were virtually evenly divided between those routinely representing plaintiffs and defendants in civil litigation.⁴⁵ Typical respondents had significant trial court experience.⁴⁶

The Survey showed significant preference among the Arizona Bar for litigating in state court.⁴⁷ Over seventy percent of respondents reported litigation experience in the United States District Court for the District of Arizona; those respondents preferred litigating in state court over federal court by a two-to-one ratio.⁴⁸ Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules.⁴⁹ Respondents favoring the state forum indicated that state court is faster and less costly.⁵⁰

In the aggregate, the Survey demonstrated that the Arizona Bar overwhelmingly believes that the innovative aspects of the ARCP are beneficial.⁵¹ Over half of the respondents reported superior court experience before the adoption of the Zlaket Rules.⁵² Those with pre-1992 experience favored state over federal court at a higher rate (fifty-five percent) than those with no such experience (forty

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.* at 8-9.

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 12.

⁴⁸ *Id.*

⁴⁹ *Id.* at 13.

⁵⁰ *Id.*

⁵¹ *Id.* at 14.

⁵² *Id.*

percent).⁵³ Among the group with pre-1992 experience, only a small minority viewed the 1992 amendments as a negative development.⁵⁴

a. ARCP 26.1 disclosures

There was strong consensus among Survey respondents that ARCP 26.1 disclosures “reveal the pertinent facts early in the case” (seventy-six percent) and “help narrow the issues early in the case” (seventy percent).⁵⁵ A majority (fifty-four percent) of respondents also believed that the disclosures facilitate agreement on the scope and timing of discovery.⁵⁶ Plaintiffs’ and defense counsel responded in the same way on these issues.⁵⁷ Similarly, respondents overwhelmingly disagreed with the notion that the Arizona disclosure rules either add to the cost of litigation (fifty-eight percent) or unduly front-load investment in a case (seventy-one percent).⁵⁸

Respondents also preferred the timing of ARCP 26.1 disclosures, which must occur within forty days after the pleadings are closed, to disclosure under FRCP 26(a), which does not occur until after an initial FRCP 26(f) conference.⁵⁹ A substantial majority (fifty-six percent) also preferred the content and scope of ARCP 26.1 disclosures to those under FRCP 26(a)—twenty-five percent expressed no preference.⁶⁰

Most criticisms centered on behavior of counsel and failure of trial judges to enforce the disclosure rules vigorously.⁶¹ A significant number of respondents also

⁵³ *Id.* at 15.

⁵⁴ *Id.* at 14.

⁵⁵ *Id.* at 19.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 19-20.

⁵⁹ *Id.* at 21.

⁶⁰ *Id.*

⁶¹ *Id.* at 23, 26.

questioned whether the disclosures themselves ultimately reduce the volume of discovery or the total time required to conduct discovery.⁶²

b. Presumptive Limits on Discovery.

The 2009 IAALS Arizona Rules Survey also demonstrated a favorable opinion among the Arizona bench and bar about the ARCP's presumptive limits on discovery. Over sixty percent of the respondents would not change the presumptive limit on depositions.⁶³ Among the most experienced lawyers (those with pre-1992 experience) who expressed an opinion, the percentage of those who would make no change increased to over sixty-five percent.⁶⁴ Similarly, some seventy-two percent of respondents would make no change in the four-hour presumptive deposition time limit.⁶⁵ That number increased to seventy-five percent among those with pre-1992 experience who expressed an opinion.⁶⁶ Among those expressing a preference, over fifty-five percent of respondents preferred the ARCP limitations on deposition discovery to those in the FRCP; that percentage increased to over sixty percent among the lawyers with most experience in civil litigation.⁶⁷

Almost two-thirds of respondents (sixty-four percent) would not change the presumptive limits on interrogatories; six percent would make the limits even lower.⁶⁸ The Survey produced similar responses with respect to requests for admission; some sixty-two percent of respondents would not modify the presumptive limits, and seven percent would lower the limits.⁶⁹

⁶² *Id.* at 19.

⁶³ *Id.* at 29

⁶⁴ *Id.*

⁶⁵ *Id.* at 31-32.

⁶⁶ *Id.*

⁶⁷ *Id.* at 32.

⁶⁸ *Id.* at 32-33.

⁶⁹ *Id.* at 35.

The Arizona Rules Survey found less consensus regarding production requests. A narrow plurality of surveyed attorneys (forty-seven percent) would either maintain or lower the current limits.⁷⁰ Forty-six percent, however, favored making the limit higher.⁷¹ Among those with pre-1992 experience who expressed an opinion, the percentage of those favoring retention of current limits increased to fifty-three percent.⁷²

c. Number of Expert Witnesses.

Over three-quarters of respondents to the 2009 Survey (seventy-seven percent) approved of the presumptive limit on expert witnesses.⁷³ The small minority of those who would raise the limits (twelve percent) were relatively equally divided between the plaintiffs' and defense bar.⁷⁴ By a three-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP regarding the number of expert witnesses.⁷⁵ Of respondents who expressed a preference, over seventy percent with pre-1992 experience prefer the ARCP.⁷⁶

d. The Presumptive Discovery Limits as a Whole

The 2009 Survey showed broad consensus that presumptive discovery limits force parties to “focus their discovery efforts to the disputed issues” (sixty-four percent) and reduce the total volume of discovery (fifty-eight percent agreed).⁷⁷ Over seventy percent of respondents reported frequent adherence to the limits on

⁷⁰ *Id.* at 34.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 27.

⁷⁴ *Id.* at 28.

⁷⁵ *Id.*

⁷⁶ *Id.* at 29.

⁷⁷ *Id.* at 37.

deposition time, number of requests for admission, and number of interrogatories.⁷⁸ Nearly sixty-five percent reported frequent adherence to the limitations on the number of expert witnesses.⁷⁹ A large majority (seventy-eight percent) disagreed with the notion that the presumptive limits force parties to go to trial with insufficient information.⁸⁰

The 2009 Survey did disclose, however, some areas of concern. Only a bare majority (fifty-two percent) reported frequent adherence to the limits on requests for production.⁸¹ When asked whether the limits reduce the total time for litigation, make costs more predictable, or reduce the use of discovery as a tool to force settlement, at least fifty-three percent of respondents answered in the negative.⁸² Respondents also reported that courts did not enforce presumptive discovery limits in many cases,⁸³ and at least seventy percent of respondents reported that sanctions for misconduct related to discovery and disclosure were either “almost never” or “occasionally” imposed by the trial bench.⁸⁴

II. “Different Strokes for Different Folks”⁸⁵

The Final Report argues against the “one size fits all’ approach of the current federal and most state rules,” suggesting “different sets of rules for certain types of cases.”⁸⁶ The existing FRCP largely rely on judicial management to

⁷⁸ *Id.* at 39.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 39-40.

⁸² *Id.* at 37.

⁸³ *Id.* at 41.

⁸⁴ *Id.* at 43.

⁸⁵ Sly and the Family Stone, *Everyday People, on Stand!* (Epic Records 1969).

⁸⁶ *Final Report, supra* note 6, at 4. The notion that the same procedural rules should apply regardless of the substance of the case has been referred to as the “trans-substantivity principle.” See, e.g., DAVID MARCUS, *The Past, Present and Future of Trans-Substantivity in Federal Civil*

differentiate cases, although FRCP 26(a)(1)(B) does exempt a small class of cases from initial disclosure requirements.

The ARCP, in contrast, set up distinct procedural regimes for medical malpractice litigation, claims involving less than \$65,000, and complex litigation.

A. Medical Malpractice

ARCP 26.2 was adopted in 1989 as a result of the report of a committee appointed by the Arizona Supreme Court to study malpractice procedure.⁸⁷ Together with ARCP 16(c), which governs comprehensive pretrial conferences in medical malpractice cases, ARCP 26.2 sets up a distinct procedural approach to such litigation, and adds subject matter-specific disclosure requirements to the general ones imposed by ARCP 26.1(a).

Within five days after all defendants have filed answers or motions responding to the complaint, the plaintiff must notify the court so that a comprehensive pretrial conference can be scheduled.⁸⁸ Within five days after this notice, the plaintiff must serve on all defendants “copies of all of plaintiff’s available medical records relevant to the condition which is the subject matter of the action.”⁸⁹ All defendants must do the same within ten days thereafter.⁹⁰ Before the comprehensive pretrial conference, the only interrogatory discovery permitted is the service of uniform interrogatories and ten additional non-uniform interrogatories.⁹¹ An appendix to the ARCP contains three sets of court-approved comprehensive uniform medical malpractice interrogatories, one designed for service by a plaintiff on an individual health care provider, another for plaintiff to

Procedure 59 DEPAUL L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1428992>.

⁸⁷ The Rule was originally adopted as part of the Uniform Rules of Practice for Medical Malpractice Cases, and incorporated into the ARCP in 2000. ARIZ. R. CIV. P. 26.2, State Bar Comm. Note, 2000 Amendment.

⁸⁸ ARIZ. R. CIV. P. 16(c).

⁸⁹ *Id.* at 26.2(a)(1).

⁹⁰ *Id.* at 26.2(a)(2).

⁹¹ *Id.* at 26(b).

serve on an institutional health care provider, and third to be directed by defendants to the plaintiff.⁹² Document discovery prior to the comprehensive pretrial conference is sharply limited, and depositions are limited to the parties and experts.⁹³

At the comprehensive pretrial conference, which must be held within sixty days after the plaintiff's ARCP 16(c) notice, the court determines the scope and scheduling of future discovery and sets up a schedule for disclosure of witnesses.⁹⁴ No motion for summary judgment for lack of expert testimony can be filed by the defendant before the time for disclosure of experts has passed.⁹⁵ In addition to the general presumption in ARCP 26(b)(4)(D) limiting each side to one expert per issue, the ARCP specifically deal with a frequent occurrence in medical malpractice cases -- the decision of a physician-defendant to present testimony in addition to that of an independent expert on the standard of care applicable to his conduct. Under such circumstances, absent court permission, the plaintiff is not entitled to call a second expert on that issue.⁹⁶

At the pretrial conference, the trial court also discusses alternative dispute resolution, sets a time for a mandatory settlement conference, sets a date for filing the final joint pretrial statement, and sets a trial date.⁹⁷ Thus, the ARCP contemplate not only specialized disclosure and discovery procedures in medical

⁹² *Id.* at 84, Form 4. In addition, the ARCP contain uniform personal injury, and contract interrogatories. *Id.* at 84, Forms 5 & 6. Absent stipulation or leave of court, plaintiffs in non-medical malpractice litigation are limited to serving forty interrogatories on any other party. *Id.* at 33.1(a). Each uniform interrogatory and its various subparts are counted as one interrogatory; in contrast, subparts to a non-uniform interrogatory are counted as separate interrogatories. *Id.* Uniform interrogatories need not be reproduced for service; they can be served by reference to number alone. *Id.* at 33.1(f); *see also* ARIZ. R. FAM. LAW P. 61, 97 Form 7 (governing interrogatories in family law cases).

⁹³ ARIZ. R. CIV. P. 26.2(b).

⁹⁴ *Id.* at 16(c) (1) – (3), (5).

⁹⁵ *Id.* at 16(c)(2). As to each expert, ARCP 26.1(a)(6) requires comprehensive disclosure of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, and a listing of the expert's qualifications.

⁹⁶ *Id.* at 26(b)(4)(D).

⁹⁷ *Id.* at 16(b)(14)-(16).

malpractice actions, but also mandate an early timetable toward a specific trial date.⁹⁸

B. Mandatory Arbitration

Since 1971, Arizona courts may require arbitration of claims in which the amount in controversy does not exceed a specified jurisdictional limit;⁹⁹ the current statute allows the trial court to set a jurisdictional limit not to exceed \$65,000.¹⁰⁰ Virtually every county has adopted such a program.¹⁰¹ ARCP 72 through 77 implement the compulsory arbitration program.

The program is triggered when the trial court judges in a county “provide for arbitration of claims and establish[] jurisdictional limits.”¹⁰² The court can mandate arbitration in cases falling under the chosen amount in controversy, which cannot exceed \$65,000.¹⁰³ At the time the complaint is filed, the plaintiff must file a separate certificate on compulsory arbitration; if the defendant disagrees as to arbitrability, the issue is determined by the court.¹⁰⁴ Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.¹⁰⁵ The arbitrator must set a hearing within sixty to one hundred and twenty days of appointment.¹⁰⁶ The arbitrator may not grant a motion to dismiss or

⁹⁸ There do not appear to have been any empirical studies of lawyer or judge satisfaction with the medical malpractice rules. One early article by a medical malpractice specialist, however, indicated satisfaction with the rules. JOJENE MILLS, *Practical Implications of the Zlaket Rules from a Plaintiff’s Lawyer’s Perspective*, 25 ARIZ. ST. L. J. 149, 149 (1993).

⁹⁹ 1971 Ariz. Sess. Laws., ch. 142, § 1 (codified at ARIZ. REV. STAT. § 12-133).

¹⁰⁰ ARIZ. REV. STAT. ANN. § 12-133(A)(1) (Supp. 2008-09).

¹⁰¹ See ROSELLE L. WISSLER & ROBERT DAUBER, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rules Changes*, 2007 J. DISP. RES. 65, 68-9, n. 18-22.

¹⁰² ARIZ. R. CIV. P. 72(a).

¹⁰³ ARIZ. REV. STAT. ANN. § 12-133 (A) (Supp. 2008-09).

¹⁰⁴ ARIZ. R. CIV. P. 72(e)(2)-(3).

¹⁰⁵ *Id.* at 73(b).

¹⁰⁶ *Id.* at 74(b).

rule on a case-dispositive motion for summary judgment,¹⁰⁷ but is otherwise authorized to make most interlocutory legal decisions, including rulings on discovery disputes.¹⁰⁸ Because “the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims,” the arbitrator is directed to limit discovery “whenever appropriate.”¹⁰⁹

In cases subject to mandatory arbitration, ARCP 26.1(a) initial disclosures must be made within thirty days of the filing of the answer.¹¹⁰ The parties must file a pre-hearing statement, in which they are encouraged to agree on facts and issues.¹¹¹ In general, the Arizona Rules of Evidence apply to arbitration hearings,¹¹² but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible.¹¹³ The arbitrator must issue a decision within ten days of the hearing.¹¹⁴

In the absence of an appeal to the court of the arbitrator’s decision, any party may obtain judgment on the award.¹¹⁵ If an appeal is filed, a trial de novo is held in trial court; any party entitled to a jury may demand one.¹¹⁶ An appeal is not

¹⁰⁷ If a motion for summary judgment is filed, it is assigned to the trial judge, who may impose sanctions if the filing was frivolous or for purposes of delaying the arbitration hearing. *Id.* at 74(d).

¹⁰⁸ *Id.* at 74(c)(1).

¹⁰⁹ *Id.* at 74(c)(3). Any discovery ruling requiring disclosure of documents alleged to be privileged is subject to prompt interlocutory review by the assigned superior court judge. *Id.* at 74(c)(4).

¹¹⁰ *Id.* at 75(b).

¹¹¹ *Id.* at 75(c).

¹¹² *Id.* at 75(d).

¹¹³ *Id.* at 75(e)(7).

¹¹⁴ *Id.* at 76(a).

¹¹⁵ *Id.* at 76(c).

¹¹⁶ *Id.* at 77(a), (c).

without risk, however. If the appellant fails to recover a judgment on appeal at least twenty-three percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.¹¹⁷

1. Previous Empirical Research on the Arbitration System.

In 2004, the Arizona Supreme Court commissioned a study to examine the efficiency and effectiveness of compulsory arbitration, as well as user satisfaction.¹¹⁸ The findings were considered by the Arizona Supreme Court Committee on Compulsory Arbitration, and adjustments were made to the governing rules in 2007 in light of the report. The study revealed some criticisms of the system (most often regarding the speed of adjudication or expertise of the arbitrator), and the amendments attempted to address those concerns.¹¹⁹ The study also revealed, however, that most lawyers who had recently represented a client in mandatory arbitration had "highly favorable assessments" of both the hearing and the eventual decision.¹²⁰ Sixty-four percent of lawyers with caseloads subject to arbitration favored continuation of the system.¹²¹ And, it is clear that the system reduced trial court workload. In most counties, an award was filed in less than half the cases assigned to arbitration, and a trial *de novo* was sought in less than a third of all cases in which an award was filed.¹²² This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing. Moreover, most appealed cases never proceeded to trial.¹²³ These initial reviews of the Arizona experiment strongly suggest that if small

¹¹⁷ *Id.* at 77(f).

¹¹⁸ WISSLER & DAUBER, *supra* note 100.

¹¹⁹ These amendments expanded the types of motions on which the arbitrator may not rule and allowed the clerk of the court to deliver the record to the arbitrator in electronic format. *See* ARIZ. R. CIV. P. 74(c), (e), State Bar Comm. Note, 2007 Amendments (2009).

¹²⁰ WISSLER & DAUBER, *supra* note 100, at 86.

¹²¹ *Id.* at 90.

¹²² *Id.* at 75.

¹²³ *Id.* at 76.

claims are subject to mandatory court-annexed arbitration, even if it is non-binding, a great majority of those claims can be diverted from the trial judge's docket.

2. The 2009 IAALS Arizona Rules Survey

Over sixty-five percent of all respondents to the 2009 Survey had a case in superior trial court qualifying for compulsory arbitration.¹²⁴ Approximately ninety percent of respondents with a qualifying case had a case proceed through the system.¹²⁵ In Maricopa County, sixty-eight percent of the respondents either would maintain or increase the number of cases that qualified for compulsory arbitration.¹²⁶ In comparing compulsory arbitration to litigation, large majorities of respondents agreed that arbitration reduces the time to disposition (sixty-two percent) and reduces costs (fifty-eight percent).¹²⁷ And, most respondents (sixty-five percent) either found the compulsory arbitration process at least as fair (fifty-seven percent), or more fair (eight percent), than conventional litigation.¹²⁸

Most criticism of the arbitration system centered on the appointment process, which selects arbitrators randomly among members of the Maricopa County bar, some of whom lack litigation experience or familiarity with the substantive subject matter at issue.¹²⁹ A majority of respondents also indicated that arbitrators infrequently limited discovery during the arbitration process.¹³⁰

C. Complex Case Courts

In 2001, the Arizona Supreme Court appointed a Committee to Study Complex Litigation, with membership drawn not only from the bar and bench, but

¹²⁴ 2009 Arizona Rules Survey, *supra* note 39, at 46.

¹²⁵ *Id.* at 49.

¹²⁶ *Id.*

¹²⁷ *Id.* at 49-50.

¹²⁸ *Id.*

¹²⁹ *Id.* at 50.

¹³⁰ *Id.*

also including policy experts, a court clerk, court administrators, and a state senator.¹³¹ The Committee issued its report in the following year, after studying complex and commercial case programs in other states.¹³² After receiving the report, the Arizona Supreme Court established a pilot program for complex litigation in the Maricopa County Superior Court.¹³³ The Arizona Supreme Court thereafter adopted, and has since amended, several rules of civil procedure to govern the program.¹³⁴

The Maricopa County program involves three judges with substantial experience in complex civil litigation.¹³⁵ Cases are eligible for assignment to the complex litigation court based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether “[t]he case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in [the] specific area of the law.”¹³⁶ When filing a complaint, a plaintiff must identify the action as complex if it meets the stated criteria.¹³⁷ A defendant may also designate a case as complex or contest the plaintiff’s designation; the presiding superior court judge, or a designee, then determines whether the case qualifies for the program.¹³⁸

¹³¹ See ARIZONA SUPREME COURT, COMMITTEE TO STUDY COMPLEX LITIGATION, FINAL REPORT 2-3 (September, 2002).

¹³² *Id.* at 3.

¹³³ Admin. Order No. 2002-107. The program has been extended several times since 2002. See Admin. Order No. 2004-27; Admin. Order No. 2006-123; Admin. Order No. 2009-11 (amended by Admin. Order No. 2009-30).

¹³⁴ See ARIZ. R. CIV. P. 8(h), 8(i), 16.3, 39.1.

¹³⁵ MARICOPA COUNTY SUPERIOR COURT, COMPLEX CIVIL LITIGATION COMMITTEE, JOINT REPORT TO THE ARIZONA SUPREME COURT 2 (December 2006), available at <http://www.supreme.state.az.us/courtserv/ComplexLit/JointRptFinal.pdf> [hereinafter *2006 Report*].

¹³⁶ ARIZ. R. CIV. P. 8(i)(2)(A)-(I).

¹³⁷ *Id.* at 8(h)(3).

¹³⁸ *Id.* at 8(i)(3) – (6).

The complex litigation court judges are assigned an experienced staff attorney, provided courtrooms equipped with up-to-date electronic technology, and are able to mandate e-filing well in advance of other civil trial court divisions.¹³⁹ A complex litigation case is governed by a separate set of pre-trial rules. An initial case management conference is scheduled at the “earliest practical date,” and a comprehensive case management order is issued after that conference.¹⁴⁰ That order establishes and schedules particular disclosure requirements; the general requirements in ARCP 26.1 do not apply, and no disclosure or discovery takes place before issuance of the order.¹⁴¹ The complex litigation court is authorized to segment the case into phases and to establish time limits for the completion of each phase.¹⁴²

As of 2006, more than 560 attorneys had experience with cases in complex litigation court.¹⁴³ A survey of this group revealed that ninety-six percent of respondents favored continuation of the pilot program.¹⁴⁴ The respondents gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.¹⁴⁵

The program remains a pilot, in part because of funding constraints, and in part because counties with substantially smaller case volumes and numbers of complex cases than Maricopa have not yet seen the need for expansion.¹⁴⁶ Nonetheless, the program suggests that specially-designated judges and special rules for the most complex cases is an approach worth considering in response to the concerns raised in the Final Report.

¹³⁹ 2006 Report, *supra* note 134, at 2-3. Virtually all Maricopa Superior Court civil divisions now have access to e-filing.

¹⁴⁰ ARIZ. R. CIV. P. 16.3(a).

¹⁴¹ *Id.* at 16.3(a)(12), (e).

¹⁴² *Id.* at 16.3(d).

¹⁴³ 2006 Report, *supra* note 134, at 4.

¹⁴⁴ *Id.* at 5. Eighty-three attorneys responded to the survey. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 6.

III. Conclusion

Arizona's willingness to deviate from the federal model is not unique. For example, Oregon's Rules of Civil Procedure differ substantially from the federal model both with respect to pleading and discovery.¹⁴⁷ It is not my purpose today to argue that Arizona – or any other state – has necessarily created a better mousetrap or that the FRCP should blindly adopt a particular approach. Rather, I suggest only that the states – even those whose civil rules are modeled on the FRCP – have long been engaged in experimentation and modification of existing rules in order to respond to the very concerns raised in the Final Report. The 2009 IAALS Arizona Rules Survey demonstrates that those rules experiments have garnered widespread support among the Arizona bench and bar. The Civil Rules Advisory Committee and Standing Committee should consider these state initiatives when considering the appropriate response to the Final Report. The FRCP can properly be a “model” to the nation not only through original innovation, but also by adopting proven mechanisms from the various states.

¹⁴⁷ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, A SUMMARY OF COMPARATIVE APPROACHES TO CIVIL PROCEDURE 1-2, 9, 21, 23-24, 27, 42, 44 (2009), available at <http://www.du.edu/legalinstitute/pubs/Synthesis%20FINAL.pdf>.