

CONSTRUCTION

ARIZONA RULES OF CIVIL PROCEDURE – MEET THE NEW RULES, [NOT THE] SAME AS THE OLD RULES.¹

by J. Gregory Cahill

While the Arizona Supreme Court typically “tweaks” the rules of civil procedure every couple of years, major substantive changes have now been made for two consecutive years. A discussion of each year’s major rule changes are discussed below.

2016²

- Service of Process – Two changes were made to Rule 4 regarding service. First, a summons and complaint must be served within 90 days of filing rather than 120 days. The change makes the timing of service consistent with the Federal Rules of Civil Procedure. Second, the rule now provides separate subsections for “waiver of service” and “acceptance of service.” Only the former extends the time to file a responsive pleading from 20 to 60 days.
- Electronic Filing of Documents – Rule 5.2(c) was changed to provide that electronically filed documents must be submitted in a text-searchable format (such as .pdf, .odt, or .docx), with .pdf the preferred format. The rule also encourages (but does not require) the use of hyperlinks and bookmarks.
- Time Computation – Two changes were made to Rule 6 regarding computation of time. Rules 6(a)(3) and (4) were changed to clarify when an act must occur on the “next day” when the last day of computation falls on a Saturday, Sunday, or legal holiday. After an event has occurred (e.g., a response to a motion has been filed), the next day is counted forward. For example, if a response date falls on a Saturday, it will be due the following Monday. On the other hand, before an event (e.g., before trial), the next day is counted backwards. For example, if the parties are to make a filing a certain number of days before trial and that date falls on a Saturday, the parties must make the filing the Friday before and not the following Monday. In addition, new Rule 6(d) was added to make clear that, if a party must take an action pursuant to a Court Order, the date for computation is the date of the Order’s filing by the clerk and not an earlier date of approving or signing by the judge.
- Form and Length of Motions – To be consistent with the local rules of the District of Arizona, and local Maricopa County and Pima County rules, Rule 7.1 now limits principal, response, and reply briefs to 17, 17, and 11 pages respectively. Rule 5.2 now provides that briefs must be in 13-point rather than 12-point type.
- Cooperation in Motion Practice – Several new rules were adopted placing an emphasis on the parties’ and counsel’s duty to cooperate. New Rule 7.1(h) provides that, when the rules require that a party file a “Good Faith Consultation Certificate,” the consultation must be made in person or on the telephone. Exchanged e-mails or letters are insufficient. The rule also permits certification by a party that they have attempted, in good faith, to confer when the other party avoids such consultation.
- Joint Filings – New Rule 7.4 addresses the preparation of joint filings and provides that a party must *make itself reasonably available* to prepare the joint document. The rule further provides that the Court may sanction an uncooperative party.
- Scope of Discovery – Rule 26(b)(1) was revised to be consistent with the federal rules and now provides a “proportionality” standard to the scope of permissible discovery. The rule lists the following proportionality factors: (1) importance of issues at stake, (2) amount in controversy, (3) parties’ relative access to relevant information, (4) parties’ resources, (5) importance of the proposed discovery in resolving matters at issue, and (6) whether the burden and expense of the proposed discovery outweighs its likely benefit.
- Written Discovery – The time for responding to all manner of written discovery was shortened to 30 (from 40) days.
- Depositions – New Rule 30(c)(3) includes a prohibition against “continuous and unwarranted” off-the-record conferences between a deponent and counsel (prior Rule 32(d)(3)(E)) and provides that such conferences may not occur while a question is pending unless necessary to preserve a privilege.
- Electronically Stored Information (ESI) – New Rule 26.1(b) provides that the parties are to cooperate in determining in what format and when ESI should be disclosed. The prior rule treated ESI the same way it treated the initial disclosure of hard-copy documents (40 days) which the court found to be infeasible in the typical case. The rule also provides an abbreviated procedure to address disputes over ESI disclosure. New Rule 37(g) clarifies the parties’ obligations to preserve ESI. A party has a duty to preserve ESI once it files an action, learns that an action has been filed against it, or “reasonably anticipates” that an action will be filed. The rule also sets forth factors to determine when a party reasonably anticipates litigation and whether a party has taken reasonable steps to preserve ESI. Lastly, the rule provides a tiered system of sanctions when a party fails to take such reasonable steps — which are available regardless of the failing party’s intent.
- Disclosure of Insurance-Related Information – Rule 26.1 was expanded to clarify what insurance information is required to be disclosed. The rule now requires disclosure of surety and guaranty agreements, in addition to more traditional insurance coverage. The rule also specifies what is required to be disclosed, including: (1) the insurance policy, (2) the existence and contents of any coverage denial or reservation of rights, and (3) the remaining dollar limit of coverage for fee/expense reducing policies.

2017³

• **Tiered Presumptive Discovery Limits** – In a continued effort to further the goal of proportionate, expeditious and cost-sensitive discovery, new Rule 26.2 divides all civil cases into three “tiers” and prescribes presumptive discovery limits and time frames for completion of discovery for each tier, as follows:

• **Tier 1** - Under \$50,000 in damages – 5 interrogatories, 5 production requests, and 5 hours of witness deposition time per side. Discovery must be completed within 120 days.

• **Tier 2** - \$50,000 - \$300,000 in damages or when non-monetary relief is sought – 10 interrogatories, 10 production requests, and 15 hours of witness deposition time per side. Discovery must be completed within 180 days.

• **Tier 3** - Over \$300,000 in damages – 20 interrogatories, 10 production requests, and 30 hours of witness deposition time per side. Discovery must be completed within 240 days.

The date from which the deadline to complete discovery is measured is the required Early Meeting. Rule 16(b) provides that the Early Meeting is to occur no later than 30 days after a party files an answer or Rule 12 motion or 120 days after the action is commenced - - whichever occurs first.

The amount of damages calculation includes principal damages only and does not include claims for punitive damages, interest, fees and costs.

The parties are required to meet and confer on tier assignment. While the parties may stipulate to assign the case to a specific tier, such stipulation is subject to the Court’s review and approval. If the parties cannot agree, the Court will decide the proper tier.

The parties may also stipulate to conduct discovery in excess of the presumptive limits or to extend the deadline for completing discovery. However, the Court may disallow such stipulations. Any additional discovery, to be approved, must still be proportional.

• **Expedited Resolution of Disclosure/Discovery Disputes** – New Rule 26(d) provides an expedited process for resolving discovery and disclosure disputes. No party will be able to file a motion to compel or a motion for protective order without leave of Court. Rather, the parties are to present the Court with a short joint statement regarding the dispute. Each side gets 1 ½ pages to set forth its position. A party can also request a hearing which, if granted, will be set at the Court’s earliest convenient time. The judge will either rule on the dispute based on the parties’ expedited written submissions or order further briefing. The judge’s rulings will be made via minute entry to provide a record for potential later appeal. Of note, parties may still call the Court during depositions to resolve deposition-related discovery disputes.

• **Subpoena Protection for Non-Parties** – Rule 45 expands the protections available to a non-party served with a subpoena for production of documents. While non-parties still have a duty to cooperate, a non-party may go directly to the Court to raise objections that the request imposes an undue burden. The Court may prohibit production of documents to which a party has alternative access. The Court may also condition production on the requesting party bearing some, or all, of the costs associated with production of the requested documents.

• **ESI Preservation and Production** – New Rule 45.2 will allow a party to go to Court for an order on the nature and extent of ESI required to be preserved in anticipation of litigation. As long as the party complies with the Order, it can avoid later claims of spoliation. Of note, there is no prejudice to a party who does not seek such an order. Rather, the issue will default to whether the party took reasonable steps to preserve evidence in anticipation of litigation. New Rule 26(e) lists the factors which are to be considered in determining what is “good cause” and “undue burden and expense” regarding disclosure or production of ESI.

• **No More “The Document Speaks for Itself”** – New Rule 8(c) prohibits the following answers to an allegation from an opponent: (1) “the document speaks for itself;” (2) “denies any allegation inconsistent with the document;” and (3) “states a legal conclusion.” Parties must directly answer the allegation.

The above rule changes are substantive and should be reviewed by any Arizona practitioner. The Order amending the rules for 2018 can be found at the following link.

<http://www.azcourts.gov/portals/20/2017%20rules/17-0010.pdf>

¹With credit to Pete Townsend and the Who.

²Effective January 1, 2017.

³Effective July 1, 2018.

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