2018 CHANGES IN THE CIVIL PROCEDURE RULES: PRACTICAL EFFECTS OF THE CHANGES

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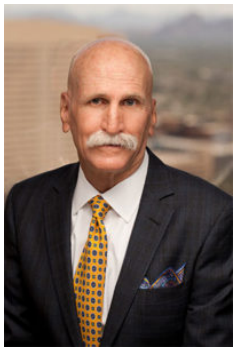
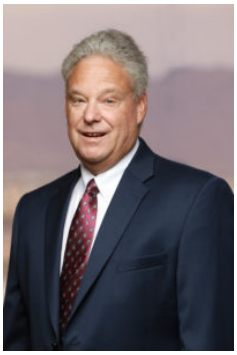

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The Arizona Supreme Court adopted revisions to the Arizona Rules of Civil Procedure, effective July 1, 2018, to streamline the judicial process and hopefully provide better access to justice. The touchstone of the new rules is the "proportionality" standard, which limits the discovery parties can undertake to that which is proportional to the size and value of the case. Here is a summary of some of the more dramatic changes, and how they might affect the way litigation is conducted, the costs of litigation, and the ability to settle cases.

The Tier System

One of the biggest changes is that from the beginning of the lawsuit, cases will be grouped into "Tiers" based on the size of the case/value of the damages at issue. The Tier level dictates the amount of discovery the parties are permitted to conduct: the higher the Tier, the more discovery allowed.

Tier 1 is for simple cases that can be tried in 1 to 2 days, such as "auto tort, intentional tort, premises liability, and insurance coverage claims." This Tier includes cases that require minimal documentary evidence and few witnesses, and claim up to $50,000 in damages. A Tier 1 case gets five total hours of fact witness depositions; five interrogatories, five requests to produce, ten requests for admissions, and 120 days within which to complete discovery.

Tier 2 cases are those of intermediate complexity that have more than minimal documentary evidence, more than a few witnesses, and might include expert witnesses. These cases will likely involve multiple theories of liability, counterclaims, or cross claims, and will involve claimed damages from $50,001 to $300,000. Most cases will fall into this category. A Tier 2 case gets 15 total hours of fact witness depositions; ten interrogatories, ten requests to produce, ten requests for admissions, and 180 days within which to complete discovery. The limit in the time allowed to prosecute these cases will require both parties to act more quickly to get the case litigated, and might result in the parties entering into more stipulations.

Tier 3 is for logistically or legally complex cases, class actions, antitrust, multi-party commercial or construction cases, securities, environmental torts, construction defect, medical malpractice, product liability, and mass torts. Commercial court cases and medical malpractice cases will be automatically assigned to Tier 3, unless the court decides otherwise after a scheduling conference. Tier 3 cases will likely require voluminous documentary evidence, numerous pretrial motions raising difficult or novel legal issues, or a large number of witnesses, and will involve claimed damages exceeding $300,000. A Tier 3 case gets 30 total hours of fact witness depositions, 20 interrogatories, ten requests to produce, 20 requests for admission, and 240 days within which to complete discovery.

There is a process by which parties can ask for more discovery than their Tier allows, including by stipulation or motion. New Rule 26(f) prohibits any party from seeking discovery from anyone – even non-parties – before that party has served its initial disclosure statement. *Question*: How can one determine the amount of damages at issue when the rules prohibit a plaintiff from specifying a dollar amount in the complaint (if he or she is not seeking a sum certain)? *Answer*: The plaintiff must plead that his or her damages "are such as to qualify for" one of the three Tiers. Additionally, the parties must meet and confer at the earliest practical time about the anticipated course of the case, including the Tier to which the case should belong, whether they can streamline and limit claims/defenses, the discovery to be taken and the motions to be filed. These requirements apply to all civil actions, except the most minor cases, which are outlined in Rule 16(C)(8)(b). Even parties to a compulsory arbitration case must meet and confer.

Practical Effects of the Tier System & Key Takeaways

The Tier system will impact parties on both sides of the table. For the defense, the Tier system significantly reduces the amount of time attorneys will have to prepare the case, in many cases by half. On the other hand, Plaintiffs' attorneys who file many cases per month, will have the added pressure to meet and confer with all defense counsel on their matters to agree on a Tier.

However, the net effect of this Tier system probably benefits plaintiffs more than the defense. The time limits will not affect plaintiffs as much because they are able to accomplish much of what they need to do pre-suit. The defense will be behind a good plaintiff's lawyer from the outset. And while this is true now, the added time limitations of the new rules will exacerbate things for the defense. Shorter discovery schedules will also require the defense to front-load costs associated with disclosures and the retention of experts. In addition, by agreeing on a Tier, both parties are essentially agreeing to a settlement range. This, combined with time limits on discovery and other evidence gathering actions, lends a distinct advantage to the plaintiff. Before agreeing to the designation of Tier 1 or 2 in particular, clients/carriers will need to be informed of and accept the limits within which the defense will need to work with respect to expert witnesses and discovery.

On a positive note, one of the most important changes in the rules is that pre-litigation discussions are encouraged and, in some instances required, promoting greater communication and, perhaps, opportunities to resolve claims earlier in the process.

Expedited Procedure for Resolving Discovery & Disclosure Disputes

Another welcome change in the rules is the new expedited procedure for resolving discovery and disclosure disputes, instead of the usual motion to compel or motion for protective order. The parties must file a joint motion, no longer than 3 pages, outlining the dispute, and attach a good faith consultation certificate. There is no briefing unless the court orders so. The parties jointly contact the court by phone to request a hearing. And the court resolves the dispute by minute entry.

Electronically Stored Information – ESI

New Rule 26.1 addresses ESI, how and when it is preserved, requested, and discovered. When the existence of ESI is discovered or disclosed, the parties must confer and attempt to agree on its disclosure and production. At their conference, each party must have a representative familiar with the systems containing ESI, and any disputes must be resolved through the expedited procedure. Rule 26(b)(2) states that a party is not entitled to obtain ESI for purposes unrelated to the case; to inspect an opponent's data sources or storage devices; or to discover ESI that would require restoration of data through forensic means unless the information is (a) relevant to a claim of fraud or intentional misconduct; or (b) restoration is reasonably required to address prejudice from spoliation or the opponent's failure to preserve evidence; or (c) other good cause. Rule 37(g) will require a party to take steps to prevent the application of a document retention policy from destroying ESI.

Rule 45, which addresses subpoenas, has also been changed in an attempt to lessen the burden and expense associated with ESI discovery. Section (c)(2)(D) allows a party to not provide ESI if doing so would be unduly burdensome or expensive. In a similar vein, Section (c)(6)(C) now requires parties to confer with each other before bringing any motion to compel, to quash, or for a protective order regarding compliance with a subpoena. A good faith consultation certificate must accompany any of these motions. These changes, which affect all three Tiers, reinforce the court's expectation that parties will try to resolve any subpoena or production issues before involving the court.

Rule 45.2 outlines the procedures for resolving disputes over preservation requests. A party or non-party receiving a preservation request may object on two bases: (1) no duty to preserve ESI; or (2) preservation would impose an undue burden or expense. Although a failure to object in writing does not waive the objection, the dispute resolution procedures in this rule only apply if a written objection is served on the requestor. A positive change for the defense is that Rule 45.2 and the Tiered system significantly limit the amount of preservation required, which historically was over broad and unduly burdensome to the defendant. ESI rules also prevent forensic examination of computer systems, absent extreme situations – such as where the claim directly involves the company's systems. The plaintiff bears the burden to show that information was destroyed, thereby disallowing any fishing expeditions by the plaintiff.

The rule contains two separate procedures for resolving disputes involving ESI preservation requests. The first pertains to preservation requests in a pending action. In such cases, parties can seek a resolution from the court and must follow the procedures outlined in Rule 26(d). A non-party may seek a protective order under Rule 26(c) with an accompanying good faith consultation certificate. The second procedure applies when there is no pending action. A person receiving a preservation request may petition the court to determine whether the non-party has a duty to preserve ESI. The petition must be served on the requestor as a summons and pleading would be served. The requesting party may file a response to the petitioner; the petitioner may then file a reply.

Rule 45 also limits a defendant from independently acquiring medical records produced by plaintiff, which opens up the possibility that the plaintiff could limit anything related to preexisting conditions. In practice, an explicit demand for medical records would need to be included in the subpoena.

This rule also states that any party or non-party who complies with a court's preservation order is considered to have taken reasonable steps to preserve within the meaning of Rule 37. However, a party who does not use the dispute resolution procedures in Rule 45.2 will be deemed to have failed to take reasonable steps within the meaning of Rule 37.

Rule 37(g) defines the duty to preserve and codifies existing law, placing on litigating parties the duty to preserve sooner rather than later. This provides a new mechanism for discussion with the plaintiff's attorney.

Disclosure of Expert Testimony

Beginning July 1, 2018, in Tier 3 cases, each party must provide an expert report for any expert witness. The court also may order a party to provide an expert report in other cases to help it determine if the expert's testimony meets the requirements for admissibility. If a report is required, Rule 26.1(d)(4) sets forth the required contents of such report. If no report is required, a party must disclose the expert's information, qualifications, substance of his or her testimony, the grounds for each opinion, the amount the expert is to be paid, and all other cases in which the witness testified in the last four years.

The report requirement for Tier 3 cases is similar to the federal rules regarding expert reports. The benefit of this rule is that expert reports confine an expert to his or her report and written opinions. The expert's reports often eliminate the need to depose an expert and, thus, avoid providing the expert an opportunity to remedy deficiencies in the report and his or her opinions.

Medical Malpractice Cases

The new rules require a medical malpractice plaintiff, within 5 days of the service of an answer, to serve on the answering defendant a medical records authorization and copies of all his or her medical records relevant to the condition described in the complaint. After that, defendant has 10 days to serve copies of the plaintiff's available medical records on all other parties. If a defendant obtains records from a medical records authorization, it must serve copies of non-duplicative records on all other parties at its sole expense. The parties may agree to limit the records produced. Though the parties might dispute which records are relevant to the condition described in the complaint, the requirement that plaintiff must provide a medical record authorization at the outset will hopefully expedite the process of obtaining medical records. Under the new rules, medical malpractice parties also must simultaneously disclose the identities and opinions of their standard of care and causation experts, unless the parties agree or the court orders otherwise for good cause. Simultaneous disclosures will make it more difficult to fully rebut the opinions contained in the report of the plaintiff's expert. But plaintiffs must still comply with A.R.S. §12-2603, which requires a plaintiff to provide a preliminary expert opinion affidavit with the initial disclosure statement.

Discovery Sanctions

Currently, Rule 37(c) provides that if a party fails to timely disclose information, the party cannot use that information at trial, unless such failure is harmless. The new rule substitutes the words "unless the court specifically finds that such failure caused no prejudice" instead of the word "harmless." The difference in language is supposed to prevent the courts from letting discovery slackers get away with violations by prohibiting the information's use at trial unless there is a specific finding of no prejudice. Whether the new language works this way or not is yet to be seen. But the new rule does authorize sanctions previously reserved for failures to preserve ESI. These sanctions include: presuming the information was unfavorable to the party, instructing the jury it must or may presume the information was unfavorable to the party, or dismissing the action or entering a default upon finding prejudice to the other party. Again, the inclusion of more sanction options is intended to encourage the courts to actually impose sanctions when parties violate the disclosure rules. Indeed, the comment to new Rule 26.2 states that the new rules are designed to keep discovery proportional on the understanding that "proportional discovery follows up on robust initial disclosure. "The 2018 amendments seek to make initial disclosure robust through a clearer mandate to impose sanctions under Rule 37 for failures to disclose relevant material and for abuses of discovery." In other words, the Supreme Court wants the trial judges to actually impose sanctions so parties will more willingly disclose at the outset, which will hopefully make the new Tiered discovery limits work. The comment to new Rule 37 is in accord. It says these rules "increase the power of the court to promote full compliance with discovery and disclosure rules, and thus to help the parties and the court fulfill the important goals in Rule 1." The comment concludes that the new rules "work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation."

The overall result of the Tiered system is to demand robust disclosure at the onset, front-load expenses, and require full and complete initial disclosure and early evaluation. Judges will likely become more interactive, allowing the defense an opportunity to discuss expanding discovery limitations. If judges strictly enforce the limitations of the Tiered system, extensions will be far more limited.

Making Litigation More Efficient

The new rules are designed to make litigating more efficient and less costly. For example, for cases filed on or after July 1, 2018, Rule 38.1 reduces the number of days between the filing of the complaint and placement of the case on the dismissal calendar from 270 to 210. The amendment omits the previous medical malpractice provisions, so the 210-day rule will apply to medical malpractice cases as well.

Rule 45 prohibits a party from subpoenaing materials that have already been produced or that are already available to the parties, unless there is good cause. A party who issues a subpoena seeking documents, ESI, tangible items, or an inspection of premises must pay the reasonable expenses that the subpoenaed person incurs. If a party, attorney, or person violates these rules, the court must impose an appropriate sanction, which can include lost earnings and reasonable attorney's fees.

Final Thoughts

Hopefully the new rules will cause parties to be more forthcoming with their disclosure material, and superior court judges to start imposing appropriate sanctions for discovery abuses, all of which will reduce the cost of litigation. Clients should consider retaining counsel before a complaint is filed to ensure compliance with these new rules, regardless of the Tier to which their matter may be assigned.

An easy-to-use tier chart is set forth below for your reference:

Tier	Value	Other Case Characteristics
1	0-50K	• Simple cases; can be tried in 1-2 days • Minimal documentary evidence and few witnesses • E.g., auto tort, intentional tort, premise liability, insurance coverage claims
2	50K-300K	• Intermediate complexity • More than minimal documentary evidence and more than a few witnesses • May include expert witnesses • E.g., multiple theories of liability, counterclaims, cross-claims, and/or request for injunctive relief
3	300K+	• Logistically or legally complex and/or with numerous pretrial motions raising difficult or novel legal issues • Voluminous documentary evidence, management of a large number of witnesses or separately represented parties, or require coordination with related pending actions • E.g., class actions, antitrust, multiparty commercials or construction cases, securities cases, environmental torts, construction defect, products liability, medial malpractice, mass torts