Agenda

Advisory Committee on Rules of Civil Procedure

April 26, 2017

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Jonathan Hafen
Updates on Rule 63, Logue Subcommittee, and Prisoner Mailbox Rule		Nancy Sylvester
Rules 7, 101: Filed vs. served and pro se litigants.	Tab 2	Nancy Sylvester
Arizona reforms (discussion only).	Tab 3	Lincoln Davies, Paul Stancil
Committee Queue discussion	Tab 4	Jonathan Hafen, Nancy Sylvester

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

May 24, 2017

September 27, 2017

October 25, 2017

November 15, 2017

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – March 22, 2017

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge John Baxter, Judge Laura Scott, Judge James Blanch, Paul Stancil, Rod Andreason, Leslie Slaugh, Terri McIntosh, Trystan Smith, Heather Sneddon, James Hunnicutt, Justin Toth, Sammi Anderson, Lincoln Davies, Judge Kent Holmberg

TELEPHONE: Dawn Hautamaki, Amber Mettler

EXCUSED: Barbara Townsend, Judge Kate Toomey

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Paul Barron, Clayson Quigley

(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee and introduced the new committee members, Judge Laura Scott and Justin Toth.

Rod Andreason moved to approve the minutes as amended by Jim Hunnicut in an email to Nancy Sylvester; Mr. Hunnicutt seconded. The motion passed unanimously.

(2) RULE 5: COURTS AND CERTIFICATES OF SERVICE

Nancy Sylvester summarized her memo on Rule 5 and certificates of service to the committee. Clayson Quigley followed up with additional information about the issue to be addressed. The committee discussed the proposed change, as well as whether certificates of service should be required at all anymore in light of electronic filing (at least as to e-filers). The committee also discussed issues with court notices not reaching the necessary personnel to ensure calendaring of hearings (i.e., legal assistants) because court notices are currently only sent to attorneys of record. Attorneys admitted *pro hac vice* or representing third parties (on subpoena issues, for example) are not receiving filing notifications or copies of filed documents through the e-filing system. Dawn Hautamaki noted that the proposed change was also intended to eliminate or reduce the number of emails to attorneys on the same activity. The committee discussed a concern that attorneys may interpret the proposed change as eliminating the requirement as to them to prepare a certificate of service—which is not the intent. The intent is to only eliminate the requirement that the court generate a certificate of service for documents prepared by the court. In lieu of the proposed change, the committee suggested the following changes to Rule 5:

(5)(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic service provider, if the person being served has an electronic filing account;

(5)(b)(5)(B) ~~an order or judgment~~ every paper prepared by the court will be served by the court.

(5)(d) Certificate of service. A paper required by this rule to be served other than a paper required to be served under paragraph (b)(5)(B), including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

Leslie Slaugh moved to send the foregoing proposal to the Utah Supreme Court for its approval as to circulating it for public comment; Judge John Baxter seconded. The motion passed unanimously.

(3) RULES 7, 101: FILED VS. SERVED AND PRO SE LITIGANTS

Ms. Sylvester provided some context on the status of this issue, which has been raised previously on a few occasions. The committee discussed the fact that Rule 101 is currently under consideration for modification by a separate subcommittee, the Domestic Case Process Improvements Study Committee. The committee discussed the proposal and its history. Ultimately, the proposed change to Rule 7 was tabled for further consideration and review of whether other rules have a similar issue with filed vs. served. The proposed change to Rule 101 was also tabled pending the study committee's recommendations.

(4) ARIZONA REFORMS (DISCUSSION ONLY)

This issue was tabled to circulate additional materials for consideration.

(5) RULE 63 AND URCRP 29: MOTIONS TO DISQUALIFY

Ms. Sylvester provided a brief summary of the impetus behind the proposed change to Rule 63. The Criminal Rules Committee recommended that the Civil Rules Committee match its Rule 29 language as to reviewing judges on motions to disqualify and the role of the presiding officer of the Judicial Council. The committee discussed the proposed changes and agreed with the recommendation.

Sammi Anderson moved to send the proposal to the Utah Supreme Court for approval to send out for public comment; Heather Sneddon seconded. The motion passed unanimously.

(6) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:30 pm. The next meeting will be held on April 26, 2017 at 4:00 pm at the Administrative Office of the Courts, Level 3.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: April 25, 2017
Re: Rules 7 and 101: "filed" versus "served"

At the March committee meeting, the discussion on the "filed" versus "served" language was tabled for further consideration and review of whether other rules have a similar issue. The proposed changes to Rule 101 were also tabled pending the Domestic Case Process Improvement study committee's recommendations.

As a reminder, both Mary Jane Ciccarello and Brent Johnson raised concerns about the "filed" versus "served" language in Rule 7. At the September meeting, Mary Jane addressed how the term "filed" unfairly impacts pro se litigants and requested that where it is used to calculate response time it should be changed to "served." She also raised the same concern with Rule 101, which uses the term, "filed and served." Using both terms, she said, is even more confusing. She requested uniformity between the two rules.

I did a search through our rules to determine how many times response time is calculated from filing. It appears that in addition to 7, Rules 37, 54, and 73 contain these sorts of provisions. But I'm not convinced that all of these rules should change from "filed" to "served" because of the "days are days" conversations we've had. For attorneys and the court, response time is more certain when things are filed. Plus, our IT department is working on rolling out a MyCase portal for pro se litigants that will give them access to filings and give notifications of when things are due. That may be a little ways down the road, but it's something to consider.

In lieu of amending Rule 7, I recommend instead amending Rule 6(c), which now reads, "When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire under paragraph (a)." I would amend it to add "or filing" as follows: "When a party may or must act within a specified time after service or filing and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire

under paragraph (a)." This seems like the cleanest way to deal with this issue. And you can see how this would work under the affected rules:

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(d) Name and content of memorandum opposing the motion.

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed.

- The nonmoving party would have 17 days to file a memorandum if served by mail.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion.

- The moving party would have 10 days to file a reply memorandum if served with the memo in opposition by mail.

(f) Objection to evidence in the reply memorandum; response. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is filed. If the reply memorandum includes evidence not previously set forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply memorandum is filed, and the moving party may file a response to the objection no later than 7 days after the objection is filed. The objection or response may not be more than 3 pages.

- 7 days would go to 10 days in each of the three places above if service on the responding party is done by mail.

Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

"**(a)(3) Objection length and content.** No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement."

- If the other party is served by mail, they may file an objection within 10 days.

Rule 54. Judgments; costs.

(e) Amending the judgment to add costs or attorney fees. If the court awards costs under paragraph (d) or attorney fees under Rule 73 after the judgment is entered, the prevailing party must file and serve an amended judgment including the costs or attorney fees. The court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

- If another party is served by mail, they may object to the amended judgment within 10 days.

Rule 73. Attorney fees.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

- A person being served with the affidavit and proposed order as to liability for fees has 10 days to object if they are served by mail.

Tab 3

A Call to Reform

The Committee on Civil Justice Reform's Report to the Arizona Judicial Council

October 2016

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EXECUTIVE SUMMARY

Arizona has long been a leader in civil justice reform. Twenty-five years ago, the Arizona Supreme Court enacted the path-breaking Zlaket Rules. Those 1992 reforms cut waste and inefficiency from pretrial procedures by requiring mandatory, relevance-based disclosures intended to scale back civil discovery. The Zlaket Rules changed the culture of civil justice in Arizona.

In 2009, the Institute for the Advancement of American Legal Systems ("IAALS") conducted a comprehensive survey to explore the opinions of Arizona judges and lawyers seventeen years after Arizona's 1992 reforms. Respondents with experience in both state and federal court in Arizona preferred litigating in state court over federal court by a two-to-one ratio. Respondents who favored the state court forum cited Arizona's disclosure and discovery rules and regarded state court as faster and less costly. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 1, 12-14 (2010) [BENCH AND BAR SURVEY] *available at* http://iaals.du.edu/sites/default/files/documents/publications/survey_arizona_bench_bar2010.pdf. Other surveys in the same period yielded similar results. *See* Andrew Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience* 43 ARIZ. ST. L.J. 461 (2011).

The wisdom of Arizona's early innovations has since been confirmed by follow-on developments in the federal rules, which now require some mandatory early disclosures. Other states have also followed Arizona by adopting relevance-based, mandatory disclosures of their own (Utah, Colorado, and Minnesota). More recently, federal courts have proposed a pilot program to test Arizona-style disclosures in five district courts.

Unmistakably influenced by Arizona's lead on these issues, a national movement has risen in the past decade to reform American courts. Working through organizations like the Conference of Chief Justices ("CCJ"), IAALS, the National Center for State Courts ("NCSC"), and the American College of Trial Lawyers ("ACTL"), leading judges, lawyers, and scholars have studied the duration and cost of civil discovery, the often prohibitive increase in costs to civil litigants, and the reality that cases burdened with too much costly discovery seldom reach trial. All national reform studies see the need to reform discovery.

Discovery is not the intended end or destination of civil justice. The intended destination is a fair trial or settlement, based on relevant evidence. Discovery should be a raft that helps litigants to reach the intended destination equipped with relevant evidence. But in today's litigation environment, the raft of discovery can sometimes seem the destination itself, particularly with the advent of electronically stored information. Today, in too many civil cases, parties can spend months or even years in discovery, churning for more and more evidence that never reaches trial. In such cases, the costs of discovery can quickly become disproportionate to the issues at stake, to the point of forcing a resolution driven by economics, not by the merits. After detailed study of these issues, national reformers have proposed new ways to make the civil justice system cheaper, faster, and easier to use by the wide variety of litigants who look to our courts for justice.

Against this backdrop of national reform proposals, the Arizona Supreme Court established this 24-member Committee on Civil Justice Reform in December 2015 ("Committee"). ARIZ. SUP. CT., ADMIN. ORDER, 2015-126 *available at* http://www.azcourts.gov/Portals/22/admorder/Orders15/2015-126.pdf. The Arizona Supreme Court appointed members from the public and private sectors with broad and differing perspectives on Arizona's civil justice system. Our Committee includes judges from around the state, drawn from the Superior Court, Court of Appeals, and Supreme Court, as well as a court clerk and a court administrator. Our Committee also includes lawyers from around the state, representing the plaintiffs' personal injury bar, consumer rights and public interest groups, defense attorneys, and law firms small, medium, and large. Our Committee also includes advocates for Arizona businesses and for the public at large.

The Arizona Supreme Court charged our Committee to review leading national reform proposals, including the 2016 National Conference of Chief Justices, Civil Justice Improvements Committee ("CCJ-CJI") report titled *Call to Action: Achieving Civil Justice for All*, the NCSC's accompanying *Landscape of Civil Litigation in State Courts* report, the 2015 IAALS/ACTL report titled *Reforming Our Civil Justice System: A Report on Progress and Promise*, and the December 2015 amendments to the Federal Rules of Civil Procedure. All of these sources recommend changes to American courts. The Arizona Supreme Court also directed our Committee to develop rules amendments and pilot projects, "informed by careful consideration of national efforts and studies," with the goal of reducing the time and cost of civil litigation in Arizona. ARIZ. SUP. CT. ADMIN. ORDER 2015-126, *supra*.

Our Committee believes that Arizona is ideally postured, once again, to lead in civil justice reform. We propose reforms that build on Arizona's unique legal culture of innovation, pragmatism, mandatory disclosure, and cooperation among opposing counsel. We believe that enacting these reforms will allow Arizona's already-innovative courts to better serve the goal neatly described in Rule 1—"to secure the just, speedy, and inexpensive determination of every action." We organize our proposed reforms into four broad categories.

In our first category, **case management reforms**, we follow the guiding principle of proportionality in discovery, as recently adopted by Arizona's Supreme Court. ARIZ. SUP. CT. ORDER R-16-0010 (Sept. 2, 2016), *available at* http://www.azcourts.gov/Portals/20/2016%20Rules/R-16-0010.pdf. We also propose a system of differentiated case management for Arizona courts with limits on discovery based on the issues in each case. We propose to resolve most discovery disputes without resort to costly formal motions. We propose to strengthen disclosure obligations under the rules by empowering judges under Rule 37[1] to shift litigation costs among parties where appropriate. We propose to strengthen Rule 11 and to enforce that rule where appropriate. And we propose to eliminate certain practices by which some litigants try to hide or hedge their positions.

In our second category, **discovery reforms**, we propose simplifying disputes over electronically stored information ("ESI"), whether before or after a lawsuit is filed. We propose a new Rule 45.2 that would protect parties and nonparties alike from unreasonably burdensome requests to preserve their ESI, and shifting costs to the requestor where appropriate. We believe the time has come to adopt the recent reforms to expert discovery in the Federal Rules of Civil

[1] Unless otherwise stated, all references are to the Arizona Rules of Civil Procedure.

Procedure, which can only save parties time and money. We propose clarifying the rights of nonparties to resist unduly burdensome subpoenas. We seek to enhance remedies for deposition abuse, and to minimize disputes over the recording of Rule 35 examinations.

In our third category, we propose **compulsory arbitration reforms** though a pilot program in Pima County that would offer the option of a short trial to give parties a true day in court before a Superior Court judge, or a jury of their peers.

Finally, we propose **court operations reforms** through enhanced judicial training and technology, while providing information that is more useful to the public about what to expect in civil court.

As the format for our final report, we first present a narrative description of our Committee's fifteen main proposals, followed by what we intend as useful conclusory observations and requested action by the Arizona Judicial Council, followed by appendices that detail our proposed rules changes and recommendations. We also provide redlined versions of our proposed rules changes against the Arizona Rules of Civil Procedure, effective January 1, 2017. See ARIZ. SUP. CT. ORDER R-16-0010, *supra*.

It has been an honor for each of us to serve on this important Committee. We express our gratitude to the Arizona Supreme Court for the opportunity. We also thank Jennifer Albright and Mark Meltzer, and their colleagues at the Administrative Office of the Courts, for their patient and sometimes-heroic support. We also thank Brittany Kauffman, Director of the IAALS Rule One Initiative, and Shelley Spacek Miller, Court Research Associate for the NCSC, for their generous attention and collaboration.

Members of the Committee on Civil Justice Reform

Committee Chair, Don Bivens
Snell & Wilmer, Phoenix

Chair, Court Operations Reform,
Roopali Desai
Coppersmith Brockleman, PLC, Phoenix

Chair, Discovery Reform,
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Chair, Compulsory Arbitration Reform,
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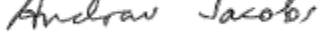

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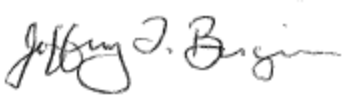

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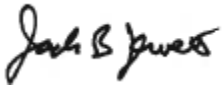

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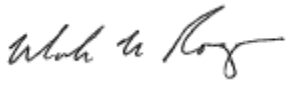

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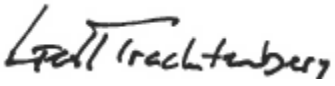

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CASE MANAGEMENT REFORMS: IMPROVING HOW COURTS MANAGE PARTIES

The Challenge of Undue Cost and Duration

A wide range of studies—including those the Arizona Supreme Court directed to our attention—confirm that for most parties civil litigation has become too expensive and too protracted. The NCSC's study, *The Landscape of Litigation in State Courts* ("Landscape Study"), examined roughly one million non-domestic cases resolved between mid-2012 and mid-2013. From the Landscape Study, the CCJ-CJI concluded that litigation costs routinely exceed the economic value of cases. NAT'L CTR. FOR ST. CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS, 9 (2015) [LANDSCAPE SURVEY] *available at* http://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

The Landscape Study also cites a variety of data supporting the conclusion that litigation costs are disproportionately high and unduly influence the outcome of cases. In addition, an IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% agreement that case outcomes are driven more by the costs of case than by the merits. ADVISORY COMM. ON FED. CIV. R., REPORT TO THE STANDING COMMITTEE 7 (May 2, 2014).

Likewise, surveys of the Litigation Section of the American Bar Association and the National Employment Lawyers Association found that "78% of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the [amount at issue in] small cases." *Id.* Unfortunately, these data are illustrative (though far from exhaustive) and broadly representative of other studies of litigation costs and their effects. The bottom line is that many private individuals and small businesses cannot afford to have their day in court.

Proportionality as a Guiding Principle

Given the burdens of contemporary litigation, our Committee believes that one answer to the problems of undue cost and time is to keep litigation proportional to what is at stake. While we were refining our final recommendations, the Arizona Supreme Court made an important change to the Arizona Rules of Civil Procedure, adopting the principle of proportionality in Rules 16 and 26, effective January 1, 2017. ARIZ. SUP. CT. ORDER R-16-0010 (Sept. 2, 2016) *available at* http://www.azcourts.gov/Portals/20/2016%20Rules/R-16-0010.pdf. That change aligns Arizona's civil rules with the December 2015 amendments to the Federal Rules of Civil Procedure, which also emphasize proportionality. Our Committee agrees with these changes by the Arizona Supreme Court, and finds strong support for these changes in the national reform studies the Arizona Supreme Court commended to our review.

The report *Reforming Our Civil Justice System: A Report on Progress and Promise* ("Progress and Promise") argues that "Proportionality should be the most important principle

applied to all discovery." AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISC. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS & PROMISE 17 (April 2015) [PROGRESS & PROMISE] *available at* http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf. The CCJ-CJI's second recommendation in its *Call to Action* report is that, "beginning at the time each civil case is filed, courts must match resources with the needs of the case." CONF. OF CHIEF JJ, C. J. IMPROV. COMM. & NAT'L. CTR FOR ST. CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 18 (2016) [CALL TO ACTION] *available at* http://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf. Stated differently, the courts need to right-size the costs of a case to the stakes of a case. To accomplish that, the CCJ-CJI's third recommendation is that courts "should use a mandatory pathway-assignment system to achieve right-sized case management." *Id.* at 19.

Similarly, the December 2015 amendments to the Federal Rules of Civil Procedure center on keeping discovery proportional to the needs of each case by adopting "proportionality" as the governing principle of discovery in revised Federal Rule 26(b)(1), Scope of Discovery. The 2015 amendments struck from the federal rules the now obsolete phrase "reasonably calculated to lead to the discovery of admissible evidence," which has for decades been the touchstone for the scope of permissible discovery.

Our Committee concluded that the *Progress and Promise* report, the *Call to Action* report, and the December 2015 revisions to the federal rules all recognize a common truth, discovery should be a *mean*s to the end of a fair trial or settlement of a dispute. Discovery is not the end of the civil rules, and discovery should not defeat the goals of Rule 1.

To keep the costs of discovery proportional to the stakes of each case, our Committee adopts the recommendation of the CCJ-CJI to create three differentiated and proportional case management paths for different types of cases: (1) a streamlined path for simpler cases, (2) a general path for most cases, and (3) a complex path for cases that justify more extensive case management and discovery. CALL TO ACTION, at 19-27.

Building Differentiated Case Management for Arizona

Our Committee examined a range of potential models for differentiated case management that might best fit Arizona's existing legal culture, which is a culture of mandatory disclosure and cooperation among counsel. First, we examined the model of Arizona's neighbor, Utah, which like Arizona has rules of civil procedure modeled on the federal rules. In 2011, the Utah courts enacted by rule a system of proportionality-driven, differentiated case management. UTAH R. CIV. P. 8, 26. Utah's system assigns cases to one of three tiers, each of which permits successively greater discovery. Utah's system is unique in tiering cases and thus in imposing limits on discovery driven strictly by the dollar amounts at issue. Utah's rules define discovery beyond the limits of an assigned tier as "extraordinary." Utah permits such extraordinary discovery only after the parties have completed all discovery permitted by the economic tier to which the case is assigned.

Our Committee approached tiering differently from Utah's strictly economic system. We agree with the recent 2015 amendments to the Federal Rules of Civil Procedure that economics are a significant factor, but should not be the only factor, in determining what type of discovery might be "proportional" to the needs of a particular case. Our views were reinforced by the Arizona Supreme Court's recent adoption of certain of the federal rules amendments.

Working from that point of view, we examined information from IAALS and the NCSC to consider how other, qualitative case factors could best be incorporated into a tiered case management system. Reform literature clarifies how different functional factors of civil cases can be used to group cases into case management tiers. For example, vehicular tort cases comprise a great proportion of the simpler cases, as do cases with relatively low amounts in controversy, such as debt collection cases. By contrast, multiparty cases, complex commercial disputes, and cases with scientific witnesses tend to be cases that require more discovery. Our Committee proposes a model for Arizona that begins with economic factors as a default, but which also looks to other qualitative factors. Our proposal encourages parties and courts early in each case to consider which of three case management tiers best suits the case. At the outset, the parties must state whether the amount in controversy is generally consistent with a streamlined discovery path, a general discovery path, or a complex discovery path—what our proposal calls Tiers 1, 2, or 3 in a proposed Rule 26.2. For example, if a party states an amount in controversy under $50,000, barring other factors, that case would presumptively be in Tier 1. If the amount in controversy is between $50,000 and $300,000, or there is a claim for nonmonetary relief, barring other factors, the case would presumptively be in Tier 2. If the amount in controversy exceeds $300,000, the case would presumptively be in Tier 3.

Further, we conclude that Utah's system, while a useful starting point, does not provide parties or their counsel with sufficient flexibility to move their case to another case management tier for non-monetary reasons particular to that case. Thus, under our proposal parties may request, or stipulate to, placement in higher tiers, subject to court approval. Also under our proposal, parties can ask for additional discovery beyond tier limits once the presumptive limits of discovery have been *requested*, which is a marked difference from Utah's practice of only permitting parties to seek over-limit discovery after all permitted discovery has been *completed.*

Empowering Courts to Manage Cases Actively

Our proposed reforms look to increase judicial management of civil cases. Of course, where the parties exchange mandatory disclosures as they should, the courts should have little to manage. But when discovery issues do arise, courts would be empowered to ensure that discovery remains proportional to what is at stake in the case. Our proposed reforms also encourage courts, where appropriate, to shift costs to those parties who seek over-limit or disproportional discovery. A greatly strengthened proposed Rule 37 encourages equitable cost shifting in discovery and disclosure, and a new Comment and enhanced sanction language make clear that trial courts have wide discretion to manage cases without fear of easy reversal by a higher court.

Likewise, our proposals would empower courts to cut through costly and time-consuming discovery disputes by first hearing from the parties informally before permitting any formal, written discovery motions. The many judges and lawyers who already follow this procedure in Arizona report that it saves time and money.

Proposal 1: Enact differentiated case management that makes discovery proportional to the needs of the case, determined both qualitatively and economically.

The centerpiece of our case management proposals is a new Rule 26.2 that sorts cases near the outset into one of three tiers, based on a combination of the case's qualitative factors that define Tiers 1, 2, and 3, including the amount in controversy. Under new Rule 26.2, when parties file a complaint or counterclaim, they will state the amount they are placing at issue (excluding duplicative claims), as required by a new Rule 8(g). The sum of those amounts results in a default assignment of the case to a particular case management tier. Cases with up to $50,000 in controversy are presumptively Tier 1, with lower discovery limits than present norms. Cases with $50,000 to $300,000 in controversy (and also cases seeking injunctive relief and in which no amount in controversy is pleaded) would as a default be assigned to Tier 2, with significantly higher discovery limits. Cases with more than $300,000 in controversy would presumptively be assigned to Tier 3, with discovery limits roughly consistent with the present Arizona Rules of Civil Procedure, except for an aggregate limit of 30 hours of fact witness deposition time per side.

But these default tier assignments are only presumptions. Proposed Rule 8(g) requires the parties to meet when the answer or responsive pleading is due and to discuss what tier they think the case should occupy. As a guide, our proposed Rule 26.2 provides the parties and the court with a set of qualitative case factors that roughly define typical Tier 1, Tier 2, and Tier 3 cases. After the parties' Rule 8(g) conference, either party can move the court to assign the case to a different tier if they think the case warrants more discovery. Following Utah, our Committee requires a party moving for additional discovery to attest to the court that they have told their client an estimated cost of the additional discovery, and that the client agrees to seek the additional discovery.

Moreover, even if neither party asks the court to reconsider the presumptive tier, the court retains the power, based on a required short report of counsel, to conduct its own examination of the pleadings and to assign the case to what the court considers the proper tier.

Proposal 2: Help courts enforce the disclosure rules, and help them shift costs to keep discovery proportional, by strengthening Rule 37.

Our Committee strongly urges a strengthened Rule 37. The cooperative exchange of robust disclosures between the parties, as contemplated by Rule 26.1, is essential to the effectiveness of any reforms that would reduce the cost of discovery. In short, by enforcing Rule 37 on its terms, courts can encourage the cooperative disclosure of relevant information and discourage the need for additional adversarial discovery. Research supports the need for action here.

The 2009 IAALS study of the Arizona bench and bar confirmed what our Committee continues to hear anecdotally from lawyers and judges alike—existing Rule 26.1 is seldom enforced by penalty for noncompliance under Rule 37. The 2009 survey reported that 58% of respondents believe that the rules are "occasionally" or "almost never" enforced. Only 4% think that the rules are "almost always" enforced. BENCH AND BAR SURVEY at 23, 26. This undeniable

cultural perception that Rule 26.1 is seldom enforced presents a striking problem, because one of IAALS' core principles of national civil justice reform is the mandatory early disclosure of relevant materials, just like Rule 26.1 requires. PROGRESS & PROMISE at 19 (Principal 15: Shortly after commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations). Thus, as IAALS recommends and as our Committee recognizes, Rule 26.1 remains the fulcrum for reform. For Arizona's justice system to reduce discovery costs, Rule 26.1 needs to work better, meaning it needs to be followed and enforced. This will require a cultural shift in Arizona's bench and bar.

To these ends, our Committee recommends a substantial revision of Rule 37. Our proposed revision would create broad-ranging authority in Rule 37(g) (modeled on Utah's Rule 37(g)) for a court to shift disclosure and discovery costs as the court deems just to secure compliance with Arizona's disclosure and discovery rules, and to keep the costs of discovery proportional to what is at stake. Thus, a court might permit parties who request higher levels of discovery to proceed, provided they bear the incremental fees and costs incurred by both sides. Likewise, obstreperous conduct by any party in the process of disclosure or discovery could more readily trigger the imposition of fees and costs.

There is an appetite for this reform. Our Committee heard from trial court judges that they would like to enforce Arizona's existing disclosure and discovery rules more actively, but they feel reluctant to do so, in part, because of the very real prospect of appellate review reversing the imposition of sanctions for nondisclosure. *See, e.g., Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 896 P.2d 254 (1995). In response, our Committee suggests a partial abrogation of *Allstate* by requiring, as a precondition to permitting the use of late disclosed evidence, an affirmative finding that the failure to disclose was not prejudicial. Our Committee adds language to Rule 37(d) that underscores the court's "discretion [to] impose any sanctions the court deems appropriate in the circumstances."

Finally, our Committee also adds a detailed Comment to proposed Rule 37 that (1) underscores the power of fee shifting as an integral part of the new system of proportionality-driven case management, and (2) stresses the expectation that courts will use such power to keep discovery costs proportional to what is at stake.

Proposal 3: Curtail satellite litigation over discovery disputes by use of an expedited process to resolve discovery disputes in place of formal briefing, unless the court directs otherwise for good cause.

One of the best opportunities to improve case management in Arizona courts would be for all courts to follow what is already a practice of many trial judges—to require parties to raise discovery disputes first in a short discussion with the court before the court permits any written discovery motions. In addition to being a current practice in many Arizona state and federal courts, this practice is recommended by IAALS in its 2014 report, *"Working Smarter, Not Harder: How Excellent Judges Manage Cases."* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISC. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., WORKING SMARTER, NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES 23 (January 2014) [WORKING SMARTER, NOT HARDER] *available at*

http://iaals.du.edu/sites/default/files/documents/publications/working_smarter_not_harder.pdf. Courts that currently follow this expedited practice find that most discovery disputes can be resolved without resort to formal motions. Given the substantial delay and costs required to resolve most formal discovery motions, our Committee strongly recommends incorporating this expedited practice into Arizona's civil rules to apply uniformly in all cases.

Our Committee's proposed Rule 26(d) would still safeguard the rights of parties in discovery disputes. Our proposal would require the parties to submit a short, written description of the discovery dispute before their oral discussion with the court. Then after the oral discussion, our proposal would require the court to issue an order resolving the dispute, so there is a judicial record of the dispute and how it was resolved. This approach avoids a potential disadvantage to the informal resolution of discovery disputes. If during this expedited process the court determines that further briefing is necessary, the court can always require the parties to proceed formally under Rules 26(c) and 37(a), which remain in place. And, if nonparties are subject to subpoenas, they also retain the right to file written motions if they wish, and thus avoid the expedited procedure should they choose do so.

Proposal 4: Cut down motions for relief under Rule 11, but make sanctions more likely for real abuses.

Arizona's Rule 11 practice has long been both over-extensive and under-extensive. It is over-extensive because parties file too many requests for Rule 11 relief. Happily, the Arizona Supreme Court recently addressed this issue by adopting some long-considered reforms designed to cut down on Rule 11 filings. These reforms include requiring movants to meet and confer before moving for sanctions under Rule 11, and to provide the non-movant with an advance writing that identifies the claimed Rule 11 violations. The Arizona Supreme Court's recent reforms also require the filing of a separate, freestanding motion for Rule 11 relief, rather than lumping a request for Rule 11 sanctions into a motion that deals primarily with other issues.

Yet even while Arizona's Supreme Court seeks to deter unwarranted Rule 11 filings, it remains true that Arizona's Rule 11 practice remains under-extensive, because courts too seldom impose sanctions when there have been genuine abuses of the civil rules. As a result, litigants with legitimate grounds for Rule 11 relief may hesitate to incur the expense associated with bringing a Rule 11 motion, believing that meaningful sanctions are unlikely to be imposed even if a violation is found. Thus, just as our Committee proposes to strengthen Rule 37 to promote active court management, our Committee proposes to further strengthen Rule 11, going beyond the Arizona Supreme Court's recent reforms, to realize more fully Rule 11's intent, which is to deter and curtail litigation over non-meritorious contentions.

To address criticisms that courts rarely impose Rule 11 sanctions, our Committee proposes to make sanctions mandatory ("must") once a violation is found, rather than permissive ("may"). Our proposal also specifies that when considering an appropriate sanction, the court "must" take into account that—under the Arizona Supreme Court's new amendments to Rule 11—an offending party has already had *two* opportunities to correct the violation. The combined intent of all these provisions is to encourage courts to impose Rule 11 sanctions where a party had fair warning and ample opportunity to cure the violation, but chose not to do so.

Finally, our proposed Rule 11 would strengthen the certifications a filer must make when signing court pleadings, a modest departure from the federal certifications the Arizona Supreme Court recently incorporated into its civil rules. The Arizona Supreme Court has now incorporated federal Rule 11's language requiring that factual contentions either "have evidentiary support" or "*will likely have evidentiary support*" after further discovery. Our Committee is concerned that the italicized portion of the federal standard—allowing parties to make claims without evidentiary support, to be shored up by future discovery—is difficult to apply or enforce, and may encourage the very discovery abuses that our Committee's other reforms seek to curb. Accordingly, we propose instead that filers certify that factual contentions, and the denials of those contentions, be "well-grounded in fact." The "well-grounded in fact" standard is taken from Arizona's current Rule 11 and is the subject of existing Arizona case law, thus providing predictability. *See Villa de Jardines Ass'n v. Flagstar Bank FSB,* 227 Ariz. 91, 253 P.3d 288 (App. 2011). Filers also would certify not only that their claims and contentions are "non-frivolous," but that they are "colorable." The term "colorable" is, again, rooted in existing Rule 11 case law in Arizona and, in our Committee's view, connotes a higher standard than "non-frivolous," though still not a standard that requires a claim or contention to succeed to avoid sanctions.

Proposal 5: Promote early and efficient identification of disputed issues by preventing parties from hiding behind unresponsive phrases like "the document speaks for itself."

Too often parties and lawyers hedge when they should be answering. Rules 8 and 36 both contemplate that in response to contentions, a party may deny, admit, deny in part explaining the basis for the denial, or deny based on a lack of knowledge preventing a party from admitting or denying. Despite the clarity of these rules, our Committee notes that too often pleadings and responses to requests for admission fail to follow the permitted options. In particular, parties often respond to contentions about a document that "the document speaks for itself," without bothering to say whether they are denying, admitting, denying in part while explaining, or denying for lack of information sufficient to permit admission or denial. The law does not permit such an evasive response. *See e.g.*, *FDIC v. Stovall*, 2014 WL 8251465 *11-12 (N.D. Ga. Oct. 2, 2014*); Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, 2015 WL 5730662 *1-3 (N.D. Ind. Sept. 30, 2015). *See also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1264 (3d ed. 2004). Accordingly, our Committee proposes writing prohibitions of such evasion into Rules 8 and 36, so parties can get to the bottom of their dispute quickly, as the Rules contemplate.

Details of our Committee's recommended rules amendments to implement our case management proposals 1 through 5 are included in Appendices 1A and 1B.

DISCOVERY REFORMS: IMPROVING HOW PARTIES AND NONPARTIES TAKE AND PROVIDE DISCOVERY

The case management reforms outlined above are only part of our Committee's proposals to make litigation faster and cheaper. There are other opportunities to improve efficiencies and fairness in the rules that govern how parties take discovery from each other, and from nonparties.

We offer proposals to address how the explosion in ESI has created a corresponding explosion in discovery costs for parties and nonparties alike. With the advent of ESI-driven discovery, long-established Rule 26 became insufficient to answer new questions, and a new body of law developed to explain new discovery burdens and responsibilities attendant to ESI. Our Committee proposes to make that body of new law simple and accessible by writing it directly into Rule 26. Additionally, where the rise in ESI has led to demands that parties and nonparties preserve massive amounts of information, we believe that fairness should sometimes require parties who demand such preservation to pay for the preservation they want. We propose a new Rule 45.2 to accomplish that.

We also propose other reforms to ease the burdens of overdiscovery and discovery abuse. We recommend reducing the expert discovery costs for all parties in expert-driven litigation by adopting the reasonable reforms to the federal civil rules that curtain satellite litigation over discovery of draft expert reports and experts' communications with counsel. We propose that parties subject to abusive conduct in depositions get extra time for questions, as recent amendments to the federal rules now guarantee. And we propose shifting nonparties' costs to prepare privilege logs to the requesting party, again where fairness requires.

Proposal 6: Improve dispute resolution, and impose other limits, regarding the discovery and disclosure of electronically stored information in Rules 26 and 26.1.

The rules governing discovery of documents have not kept pace with the proliferation of electronic data. The costs associated with preservation and discovery of ESI have skyrocketed, often exceeding all other components of litigation expense. To address these problems, our Committee proposes both procedural and substantive reforms to Rules 26 and 26.1.

First, we propose to make disputes over production of ESI easier for courts and litigants by providing standards for such disputes in Rule 26. In making this proposal, our Committee takes to heart the suggestion of many that rules work best, and are most accessible to users, when the rules set forth the legal standards required to use them. In this way, users are not forced to perform legal research to understand the practical application of a procedural rule. Thus, our Committee recommends including in Rule 26(e) a list of factors that (1) might constitute good cause to discover ESI, and (2) might make a request for ESI unduly burdensome and expensive. We also list types of costs that the court might order be shared or shifted.

Second, we propose to simplify disputes over disclosure of ESI under Rule 26.1 by requiring the parties to confer about a variety of considerations. These considerations include where the ESI is located, whether it should be produced in phases, which parts are less likely to contain discoverable information, how to search for what is discoverable within the whole, how it should be produced, and how costs should be allocated. All of this extends Arizona's traditional emphasis on cooperation among counsel into the realm of electronic production, to minimize delay and costs in service to the goals of Rule 1.

Finally, our Committee recommends several new limits to discovery of ESI. It is becoming more common for business organizations, which may have massive amounts of electronic data, to negotiate contract limits on their preservation and discovery obligations. *See* Jay Brudz & Jonathan M. Redgrave, *Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation*, 18 RICH. J.L. OF LAW & TECH. 13 (2012) *available at* http://scholarship.richmond.edu/jolt/vol18/iss4/3?utm_source=scholarship.richmond.edu%2Fjolt%2Fvol18%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages. To enhance predictability in this developing area of the law, we propose a new provision in Rule 26 that specifies Arizona courts must enforce such contracts when freely negotiated between business organizations. Similarly, our Committee proposes limits to ensure that ESI discovery relates only to the merits of the case. Our proposals thus provide that, absent good cause, a party may not image or inspect all of an opposing party's data sources or data storage devices, or require restoration by forensic means of data that has been lost.

Proposal 7: Protect parties and nonparties from unreasonably burdensome requests to preserve their electronic information.

With digital information expanding every day, nonparties often receive long, detailed letters demanding that they take extensive and expensive steps to preserve data for potential use in a dispute in which the nonparty has no stake. Our Committee understands that it is often necessary for litigants to obtain discovery from nonparties, and that seeking to preserve relevant evidence is the responsibility of litigants' counsel. But it is rarely fair to push disproportionate and asymmetric costs upon the neutral, preserving nonparty.

Our Committee addresses such potential unfairness by creating a procedure (to be located in proposed Rule 45.2) for the recipient of a preservation demand to place the demand before a court. This proposal will allow the recipient to object to the preservation demand (as is already true now), and also to seek a court order declaring the preservation to be unreasonably burdensome, or that the demanding party must pay for some or all of what it has demanded. This new provision, applicable to parties and nonparties, tracks the Superior Court's expanded authority under proposed Rule 37(g) to shift the costs of discovery and disclosure, to keep costs proportional, and to reward cooperative (and punish uncooperative) behavior.

Proposal 8: Make expert discovery more efficient.

Our Committee believes the time has come to adopt in Rule 26 the recent federal reforms to expert discovery and thus limit discovery of draft expert reports and related communications between experts and counsel. It is true that discovery of drafts and expert communications can be justified as consistent with Rule 26.1's mandate to produce everything relevant, and that such discovery can be used in examining an expert with effect. But, the challenge before Arizona's system of justice is to find fair ways to curtail the cost and duration of civil cases. Our Committee concludes that any usefulness in discovery of expert drafts and communications is more than offset by the time and money saved by eliminating fights over such materials, and by the benefits of increased efficiency in counsel's work with experts. Accordingly, we propose to incorporate the limitations on expert discovery in federal Rule 26.

Finally, our Committee proposes modest changes to Arizona's disclosure requirements for experts. Traditionally, Arizona's Rule 26.1 has not required expert reports, and allows relatively abbreviated expert disclosures. But in complex, generally higher-dollar (Tier 3) cases, and also in cases with a *Daubert* (*i.e.*, Rule of Evidence 702) hearing on the admissibility of expert testimony, we propose that it is more efficient for the court and the parties to require a full, federal-rules-compliant expert report. Thus, our Committee adds such requirements, but only for particularly complex matters, leaving all other cases subject to more relaxed expert disclosure requirements.

Proposal 9: Protect the rights of persons subject to burdensome subpoenas.

Our Committee concludes that the balance of power between parties and nonparties in Rule 45 merits adjustment, because nonparties are too frequently subject to burdensome participation in the discovery process. For that reason, our Committee recommends adding protections in Rule 45 against overdiscovery. For example, we propose that, absent good cause, a subpoena may not seek materials already available in the case. Further, in most situations, the party serving a subpoena for documents or ESI should pay the reasonable expenses the subpoenaed party incurs in responding to the subpoena. We also propose that a party seeking discovery from a nonparty must first serve the proposed subpoena on the other parties *before* serving the subpoena on the nonparty, to give the other parties a prior opportunity to object to the subpoena, if warranted. Under our proposed Rule 45(c), the party subpoenaing a nonparty would be required to pay the subpoenaed nonparty's reasonable expenses to prepare a privilege log. We also clarify that an objecting party is entitled to seek a protective order, a point commonly understood but not clearly expressed in current Rule 45.

Proposal 10: When limited deposition time is consumed by abuse, grant the abused party additional time for questions. .

Arizona has already led discovery reform by constraining most depositions to four hours. But parties and counsel can sometimes eat into that time by coordinated interference in the deposition, or by choreographing unresponsiveness by the witness. Our Committee recommends adopting the language in recently amended federal Rule 30(d), which creates a right in the taker of such a deposition to extra time, to redress abuses of that type. This proposal fits with the active case management and discovery reforms contemplated by our Committee's other proposals, in particular with the broad authorization of courts to shift costs in proposed Rule 37(g).

Proposal 11: Minimize disputes over recording of Rule 35 examinations.

Rule 35 presently requires a court order or stipulation for a physical or mental examination to be video-recorded, and also imposes limits on audio-recording. Practitioners and courts report that these limits are outdated and often spawn costly motion practice. We propose to presumptively allow any party to video record or audio record any Rule 35 examination, absent a showing the recording may adversely affect the examination's outcome.

Details of our Committee's recommended rules amendments to implement our discovery proposals 6 through 11 are included in Appendices 1A and 1B.

COMPULSORY ARBITRATION REFORMS: IMPROVING HOW COURTS HANDLE SMALLER CIVIL CASES

Arizona is already a leader among states in the arena of compulsory arbitration, having established in 1974 a court-related arbitration program, in which lower-dollar civil cases are heard by an arbitrator (member of the State Bar), pursuant to A.R.S. § 12-133. *See* Roselle L. Wissler and Bob Dauberg, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rule Changes,* 2007 J. DISP. RESOL. 65 n.1 (2007) (cataloguing eighteen states that have since adopted parallel arbitration programs for smaller cases, generally in the 1980s and 1990s, but noting no new programs had been adopted since 1997) *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1521&context=jdr.

Our Committee determined that Arizona's current system may resolve smaller disputes less expensively, but not necessarily more quickly, than is possible in full-fledged civil litigation. Discovery is generally reduced in such cases. So too the rules of evidence are relaxed to permit medical experts to provide written testimony without the need for cross-examination. Moreover, the cases arbitrated reduce the civil docket of the Superior Court, which, in turn permits the Superior Court more time to deal with remaining civil cases.

But our compulsory arbitration system comes with downsides. First, it diverts cases away from juries, when both the Arizona and federal constitutions guarantee the right to a jury trial. ARIZ. CONST. ART. II, § 23; U.S. CONST. AMEND. VII. Compulsory arbitration also diverts cases away from judges. This is problematic, because litigants generally lend more credence to, and express more satisfaction about, resolution of a case by a judge or jury, as opposed to resolution by a randomly assigned member of the State Bar. Juries and judges tend to make people feel that their case has been "heard" by the civil justice system.

Second, by diverting litigants away from trials, compulsory arbitration necessarily denigrates the historic constitutional and cultural roles of jury trials in our communities. CALL TO ACTION at 4, 7.

Third, by diverting lawyers away from trials, compulsory arbitration decreases the courtroom experience and competency of today's lawyers, and promotes a "vanishing trial" culture in which some lawyers may avoid trials because they lack trial experience.

Fourth, compulsory arbitration puts litigants before an involuntary arbitrator, who may have significantly less knowledge than a judge about the substantive area of the case, not to mention less practical experience in conducting an adversary proceeding, all of which negatively impact the quality of justice.

Fifth, arbitrations also have their own inefficiencies, laced with potential unfairness. Arbitration decisions are subject to *de novo* "appeals" which, in practice, are really complete retrials in Superior Court. To complicate things, such retrials are not always based on the same evidence that was presented at the arbitration hearing. Often, when defendants lose a personal injury case in compulsory arbitration, and then exercise their right to a *de novo* retrial, defendants

then retain expensive experts for the retrial who never appeared at the original arbitration that yielded the arbitration award in favor of the plaintiff. Having now hired costly experts, such defendants can and do serve offers of judgment that suddenly expose plaintiffs to thousands of dollars of defense costs if the plaintiff loses the *de novo* retrial, this time facing new evidence that the arbitrator never heard. *See* CALL TO ACTION at 20 (Recommendation 3.5 emphasizing that it is "imperative [ADR] not be an opportunity for additional cost and delay").

All of these factors work to discourage plaintiffs from participating in a trial *de novo,* and instead to settle for less than the award the arbitrator determined to be just and fair based on the evidence at the arbitration. Here again is a point in our court system in which the outcome of the case can be driven more by procedural costs and risks, than by the merits of the case.

Proposal 12: Implement a pilot program in Pima County under which plaintiffs can opt for a short trial in court instead of compulsory arbitration.

Our Committee believes the downsides of compulsory arbitration can be mitigated by permitting an alternative short trial in Superior Court. Under our proposal, plaintiffs would have the right to elect a short trial instead of compulsory arbitration. If plaintiffs elect the short trial, they would get a two-day-or-less trial in Superior Court, before a judge or a six-person jury. Substituting a trial for compulsory arbitration would permit litigants a true day in court before a qualified judge, or a jury of their peers.

The short-trial option would also promote more jury trials in our communities, which would underscore the important historic and cultural roles that juries play in the American system of justice. The short-trial option would also provide more opportunities for lawyers to gain experience in the art of trying civil cases. Short trials before a Superior Court judge or jury would also eliminate the prospect of an inefficient retrial *de novo* of the very same case. To further incentivize short trials, and to mitigate against the potential chilling prospect of expert cost shifting in a trial *de novo* with new evidence under Arizona's current system of compulsory arbitration, our proposal would preclude offers of judgment under Rule 68 for litigants in a short trial.

Different counties currently handle compulsory arbitration in different ways. Our Committee received input from different counties about how best to test drive our short trial proposal. Our conclusion is to recommend a pilot program in the Superior Court in Pima County. We understand that the presiding judge of Pima County is willing to host such a pilot program for three years and we regard Pima County as a good test venue. The number of compulsory arbitration cases in Pima County is large enough to permit meaningful study, but also small enough that, if a large percentage of plaintiffs opt for a short trial, the court can handle those short trials without straining court resources.

By way of illustration, in 2015, The Superior court in Pima County had 793 compulsory arbitration cases filed, while the Superior Court in Maricopa County had 14,624. Pima County had 220 arbitration awards filed in 2015, while Maricopa County had 1,135 in the last year for which data were available (2014). From these arbitration awards Pima County had 73 appeals for trials *de novo*, (9% of the total of all arbitration filings for the year), while Maricopa County had 329 appeals (a little over 2% of the total of all arbitration filings for the year). From these data, our Committee concludes that the Superior Court in Pima County already handles a considerably

higher percentage of trials *de novo* under the existing system of compulsory arbitration, at least as compared to Maricopa County. Therefore, Pima County seems in a good position to handle a pilot program that might produce more short trials, but which in turn would likely reduce the number of retrials *de novo* presently required by appeals from an arbitrator's award.

Details of our Committee's recommended rules amendments to implement our pilot program in proposal 12 are included in Appendix 2.

COURT OPERATIONS REFORMS: IMPROVING JUDICIAL TRAINING AND PUBLIC INFORMATION FOR CIVIL CASES

The Role of Court Operations in Meeting the Goals of Rule 1

Given the current, challenging environment for funding court improvements, meeting the goals of Rule 1 necessarily requires courts to optimize performance through smart training and resource management. CALL TO ACTION at 30-33. This includes management of judicial assignments, uniformity where warranted in administrative procedures, and best practices in using technology. To better understand these issues, our Committee met with Arizona judges and chief judges, we researched and obtained information about judicial training, we met with court technologists, and we met with leaders in access-to-justice issues, all with an eye to potential improvements.

Our Committee explored how trial court assignments are made in different counties, specifically the practice of judicial rotation. We note that a strict practice of rotating judges through different subject areas can inject additional delays and inefficiencies into civil cases, when judges who have become familiar with the parties and the issues in an ongoing case are suddenly replaced by a new judge with no background in the case, and sometimes no background in civil law. Abrupt judicial rotation requires a new learning curve for the new judge. Particularly in the context of more complex civil litigation, anything that requires the court to spend more time getting back up to speed usually requires the parties to invest more time and money, and likely slows things down in the process.

Of course, judicial rotation affects cases beyond the civil docket, such as criminal, family law, and juvenile cases, among others. And, not every judicial rotation injects costs and delays into every civil case. We note also that recent extended judicial assignments in Arizona's pilot Commercial Courts and Complex Courts may assuage rotation concerns in many civil cases. Ultimately, our Committee concluded that an in-depth study of the pros and cons of judicial rotation in Arizona was beyond the Arizona Supreme Court's direct charge to this Committee to focus on Civil Justice Reform. But we commend this issue to the Arizona Supreme Court's serious attention, and we suggest that this issue might benefit from further scrutiny by a future task force or committee.

Our Committee focused our efforts on improved judicial training in Superior Court, improved use of technology, improved access to judicial resources, and improved public access to information about judges, including, their standing orders and courtroom practices, all with a view to enhancing efficiency and public confidence in our courts.

Proposal 13: Provide judicial training specific to civil cases and leverage technology to make judicial resources more readily available to judges.

We start from the proposition that all judges who handle civil cases should be as informed and as prepared as possible. Judicial training in Arizona is governed by the Arizona Code of Judicial Administration ("ACJA"). A new judge receives some training on civil cases during new judge orientation or at the annual Arizona judicial conference. But depending on the county to which the new judge is assigned, the judge may never handle a civil case for a several years, and the judge's front-end training may stagnate.

Our Committee proposes that judges who rotate into a civil bench assignment long after initial training should have the benefit of re-training based on the most current information about civil court operations and case management. Our proposal aligns with the CCJ-CJI's recommendations 8 and 9. CALL TO ACTION at 29-30. Specifically, we recommend that judges receive AOC, Education Services Division approved, civil bench assignment training within 60 days before the judge starts a civil bench assignment.

The content of civil bench training should include substantive topics that commonly arise in civil cases, but should also be tailored by the presiding judge of each county to cover particular case management and court operations for that county. Our Committee recommends that such training should include our proposed changes to Arizona's Rules of Civil Procedure covered above in this report, as well as training on civil trial procedures, issues bearing on the award of attorneys' fees and sanctions, and uniform procedures for issuing orders, rulings, and final judgments. Judges should also be trained to understand how actions and orders of the court affect operations of the Clerk's Office for each court.

Proposal 14: Make the system better understood by litigants by posting of judicial profiles and preferences.

Our Committee also believes that civil litigation can be demystified for self-represented litigants (and improved for lawyers and their clients) by providing more transparent information about a judge's background, individual case management practices, and courtroom protocols and preferences. The Superior Court in Maricopa County devotes a page on its website to its judges. About half of these judges provide a link next to their names that explains their personal protocols.

Such protocols vary from judge to judge. The most useful protocols include information on motion practice, discovery disputes, trial scheduling, marking exhibits, jury selection, available courtroom equipment, and expectations concerning courtroom etiquette. Others provide only minimal information. Some judges provide no protocol information at all.

Especially in light of the hundreds of trial court judges now on the Arizona bench, and the practice of judicial rotation, our Committee recommends a central webpage where litigants and counsel can view the profile and preferences for every Superior Court judge. To that end, we propose a template for judges to use in posting relevant information.

We encourage each county to post judicial profiles and protocols on its website. Alternatively, the AOC is developing a new statewide website ("AZCourtHelp.gov") to assist self-

represented litigants in navigating the legal process and the courthouse. This statewide resource might also be an appropriate place to post information about judges and their protocols.

Our Committee further recommends standardization in the timely adoption and look of all judicial profiles. We recommend that a dedicated staff member assist judges in preparing an appropriate profile. Although judges should be able to modify the content of their posted profiles and protocols, uniformity in how such information appears on webpages will promote ease of use, transparency, and a better understanding of our justice system by litigants and the public.

Proposal 15: Create a user-friendly and current website where judicial training resources are readily accessible by judges.

Our Committee also proposes leveraging technology to help courts work smarter, as recommended by the Conference of Chief Justices. *See* CALL TO ACTION at 29, 31-32 (Recommendation 8: courts must provide judges and court staff with training that specifically supports and empowers right-sized case management; Recommendation 10: recommending wise use of technology as pillar of case management reform). The Arizona Judicial Branch's Wendell website, maintained by AOC, Education Services Division, seems a good place to house judicial training resources. But our Committee recommends that Wendell provide more "on demand" materials to judges to permit immediate access to substantive information and materials when needed.

We also recommend that the materials posted on the Wendell website be subject to continuous and robust review for currency. For example, our Committee found that at the time of its work, the civil jury instructions posted on the website were several years out of date.

Details of our Committee's recommended amendments to ACJA § 1-302(I)(4)(b), and our proposed template for judges to use in posting relevant profile and protocol information are included in Appendix 3A and 3B.

CONCLUSION: A CALL TO REFORM

The pace of technology in the 21st Century has outrun a good many traditional components of America's civil justice system, as confirmed by multiple national studies. Arizona's unique traditions of judicial innovation, mandatory disclosure, and cooperation of counsel have long kept Arizona courts at the forefront of fulfilling Rule 1's promise "to secure the just, speedy and inexpensive determination of every action." But in today's environment, many civil cases still cost too much and take too long, to the point that litigants conclude they cannot afford their day in court. We intend our Committee's final report as a call for reform to Arizona's courts, to best deliver "justice for all" in the 21st Century.

The reforms we propose are rooted in the recommendations of the Conference of Chief Justices, the Institute for the Advancement of the American Legal System, the National Center for State Courts, the 2015 amendments to the Federal Rules of Civil Procedure, and a host of other leading judges, lawyers, and scholars. But we have tailored our recommendations to best fit what we know to be Arizona's unique civil litigation culture.

Keeping Litigation Proportional. The principle of proportionality in discovery offers hope for real change. With case management reforms that maximize what is special about Rule 26.1, with real limits on discovery made possible by enforcement of disclosure rules, and with judges empowered to manage cases by shifting costs and avoiding wasteful discovery motions, Arizona's civil justice system can work faster, cheaper, and better.

Efficiency Through Cost-Shifting. We propose other reforms consistent with Arizona's history of innovation, which center on keeping discovery proportional to the issues at stake, with a view to making justice more efficient. Our proposed Rule 45.2 addresses one way in which ESI inflates costs for everyone by burdening nonparties to preserve ESI for litigation in which the nonparty has no stake. Such preservation costs can and should be shifted where fairness requires. Similarly, where nonparties are forced to make burdensome productions, we propose making it easier for courts to shift costs. Fairness requires these reforms, but they also serve efficiency. The same is true of our proposed reforms to Rule 11, which would shift the costs of making, and responding to, arguments that are not colorable back to the litigants who make such arguments.

A Real Day in Court. The Arizona and United States Constitutions both guarantee rights to a jury trial. ARIZ. CONST. ART. II, § 23; U.S. CONST. AMEND. VII. Most civil cases concern less than $50,000. Yet the economic burdens of litigation—even of cost-saving compulsory arbitration—increasingly keeps Arizonans from realizing their right to a real day in court. Only 3% of all cases go to trial, even though litigants report significantly greater satisfaction from having their cases being heard and resolved before judges. LANDSCAPE SURVEY at 25-28. To address these facts, we propose a fast-track, short trial that will allow plaintiffs in small cases under $50,000 to quickly resolve their case before a judge or a jury.

Working Smarter. Finally, appreciating that the backbone of our justice system is our corps of hard-working judges, we propose leveraging technology and training to help Arizona's

judges carry out these important reforms, in the difficult and resource-constrained environment they confront every day.

The Time Is Now. Historically, Arizona has led the nation in judicial innovation and in the evolution of legal culture required to mandate voluntarily disclosure of relevant information among adverse parties. In 1974, court-annexed, compulsory arbitration helped smaller cases get heard more quickly. Other jurisdictions followed. In 1992, Arizona led by instituting Rule 26.1. Other courts now follow.

Today, with national reform studies calling for additional case management and discovery reforms, both federally and in other states, Arizona has another opportunity to lead and to provide Arizonans with a truly cutting-edge system of justice. By putting common-sense reforms in place, Arizona can meet the challenges of undue costs and duration in civil litigation.

Going forward, our Committee stands ready to assist in any way to advance the 15 proposals of our final report. At present, we urge the Arizona Judicial Council to take the following actions:

1. Authorize the Committee to file a rule petition in January 2017 that requests new rules and amendments to existing rules in the Arizona Rules of Civil Procedure, which will enhance civil case management and civil discovery.

2. Recommend that the Arizona Supreme Court enter an administrative order adopting experimental rules for a short-trial pilot program, including amendments to existing Arizona Rules of Civil Procedure for compulsory arbitration and new rules for short trials; and authorizing the Superior Court of Arizona in Pima County to establish a three-year short-trial pilot program.

3. Recommend that the Superior Court of Arizona in Pima County enter a corresponding administrative order that actually establishes the short-trial pilot program.

4. Authorize the initiation of amendments to A.C.J.A. § 1-302 ("education and training") that include specific requirements for Superior Court judges assigned to a civil bench assignment.

5. Encourage each Superior Court in each county to post judicial profiles and protocols on the court's website, or authorize the AOC to create a webpage within the AZCourtHelp.gov website for such profiles and protocols.

6. Support the availability of more on-demand training on the Wendell website for civil judges.

7. Extend the Committee's term and the terms of its members for one year to implement and facilitate the proposals in this report.

MATERIALS CONSULTED

The Committee reviewed a considerable amount of material in formulating our recommendations. We provide a list of the materials upon which we based our work, which include those the Arizona Supreme Court recommended we review in Administrative Order 2015-124.

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Roselle L. Wissler and Bob Dauberg, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rule Changes*, 2007 J. DISP. RESOL. 65 n.1 (2007) *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1521&context=jdr.

The Sedona Conference, *Commentary on Proportionality in Electronic Discovery, a Project of the Sedona Conference Working Group on Electronic Document Retention and Production* 11 Sedona Conf. J. 289 (2010) *available at* http://www.discoverypilot.com/sites/default/files/Proportionality2010.pdf.

The Sedona Conference, *Commentary on Non-Party Production & Rule 45 Subpoenas*, 9 Sedona Conf. J. 197 (2008*) available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Non-Party%20Production%20%2526%20Rule%2045%20Subpoenas.

APPENDIX 1A: RULES OF CIVIL PROCEDURE AS PROPOSED BY OUR COMMITTEE—CLEAN VERSION

Rule 8. General Rules of Pleading

(a) Claim for Relief.

(1) ***Generally.*** A pleading that states a claim for relief must contain:

(A) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(B) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(C) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) If a Damages Amount Is Not Pled. A party who claims damages but does not plead an amount must plead that their damages are such as to qualify for a specified tier defined by Rule 26.2(b)(3). If a party alleges damages that qualify for Tier 1 or Tier 2 discovery under Rule 26.2(b)(3), that party 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. A party who receives permission under Rule 26.2(b)(1) to vary the tier to which the case would otherwise be assigned may not recover damages in an amount above the limit for the tier pleaded, unless the party amends the pleading under Rule 15.

(b) Defenses; Admissions and Denials.

(1) ***Generally.*** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) ***Denials—Responding to the Substance.*** A denial must fairly respond to the substance of the allegation. A denial does not fairly respond to the substance of an allegation if it answers an allegation by:

(A) stating that "the document speaks for itself";

(B) stating that the answering party "denies any allegations inconsistent with the language of a document"; or

(C) answering an allegation by claiming that it states a legal conclusion.

(3) ***General and Specific Denials.*** A party who intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial subject to the obligations provided in Rule 11(a). A party who does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) ***Denying Part of an Allegation.*** A party who intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) ***Lacking Knowledge or Information.*** A party who lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. A party thus cannot deny an allegation "on information and belief." Instead, it must either admit or deny an allegation if it has information sufficient to form a belief, or must instead state that it has insufficient information to form a belief about the truth of an allegation.

(6) ***Effect of Failing to Deny.*** An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) ***Generally.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

(A) accord and satisfaction;

(B) arbitration and award;

(C) assumption of risk;

(D) contributory negligence;

(E) duress;

(F) estoppel;

(G) failure of consideration;

(H) fraud;

(I) illegality;

(J) laches;

(K) license;

(L) payment;

(M) release;

(N) res judicata;

(O) statute of frauds;

(P) statute of limitations; and

(Q) waiver.

(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) ***Generally*.** Each allegation of a pleading must be simple, concise, and direct. No technical form is required.

(2) ***Alternative Statements of a Claim or Defense*.** A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

(f) Civil Cover Sheets.

(1) ***Generally.***

(A) When filing a civil action, a plaintiff must complete and submit a Civil Cover Sheet in a form approved by the Supreme Court. The public may obtain this form from the website of the Administrative Office of the Courts.

(B) The Civil Cover Sheet must contain:

(i) the plaintiff's correct name and mailing address;

(ii) the plaintiff's attorney's name and bar number;

(iii) the defendant's name(s);

(iv) the nature of the civil action or proceeding;

(v) the main case categories and subcategories designated by the Administrative Director;

(vi) the amount in controversy pleaded, or if that amount is not pled, the discovery tier to which the pleading alleges the case would belong; and

(vii) such other information as the Supreme Court may require.

(C) A superior court may require by local rule that additional information be provided in an Addendum to the Civil Cover Sheet.

(2) ***Writs of Garnishment.*** A writ of garnishment does not require a Civil Cover Sheet, but it must include, under the case number on the petition's or complaint's first page, one of the following notations, as applicable:

(A) federal exemption;

(B) enforce order of support;

(C) enforce order of bankruptcy;

(D) enforce collection of taxes; or

(E) non-earnings.

(g) Required Early Meeting About Expected Course of Case, Tiering.

(1) ***Timing; Purpose.*** At the earliest practicable time, but no later than 15 days after a party answers or files a motion directed at the complaint, that party and the plaintiff must meet and confer about the anticipated course of their case, including the tier to which it should be assigned under Rule 26.2(b)(3). The parties must discuss whether and how they can agree to streamline and limit claims and affirmative defenses to be asserted, discovery to be taken, and motions to be brought. The purpose of the conference is to plan cooperatively for the case, and to facilitate the case's placement in one of three tiers for discovery.

(2) ***Topics for Early Meeting.*** The parties should discuss at least:

(A) their anticipated disclosures concerning witnesses, including the number of fact witnesses, whether they will seek to use expert witnesses, and how much deposition testimony they expect will be necessary;

(B) their anticipated disclosures of documents, including any issues already known to them concerning electronically stored information;

(C) motions they expect to file, so that the parties can determine whether any of the motions can be avoided by stipulations, amendments, or other cooperative activity;

(D) any agreements that could aid in the just, speedy, and inexpensive resolution of the case; and

(E) the discovery tier to which the case should be assigned under Rule 26.2(b)(3), and whether the parties wish to stipulate—or any party wishes to move for—assignment to a tier other than that to which the case would be assigned given the amount in controversy.

(3) ***Report of Early Meeting.***

(A) *Timing.* Within 5 days, the parties must jointly report to the court that the early meeting has occurred, and the date(s) on which it occurred, in a document to be captioned Report of Early Meeting, which must attach a good faith consultation certificate under Rule 7.1(h).

(B) *Optional Summary; Contents, Length.* The parties are not required to describe their meeting in their Report of Early Meeting, but may do so. Any summary must describe the case with respect to the characteristics in Rule 26.2(b)(2) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. In the report, the parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue that the other party has taken unreasonable positions. Unless ordered by the court, a summary must not exceed 4 pages of text, which length must be split evenly between separate statements of the parties if they do not agree on the summary's contents.

(C) *Proposed Stipulation to Discovery Tier; Motions to Vary Tiering; Timing.* The parties may include in the Report of Early Meeting a proposed stipulation to a discovery tier, setting forth good cause for the requested tiering in compliance with Rule 26.2(b)(1)(A).

Any motion to vary the tier to which a case will be assigned under Rule 26.2(b)(3) must be made by the date on which the parties must file their joint Report of Early Meeting.

(h) Verification. Unless a rule or statute specifically states otherwise, a pleading need not be verified or supported by an affidavit. If a rule or statute requires a pleading to be verified, the pleading must be accompanied by an affidavit by the party—or a person acting on the party's behalf who is acquainted with the facts—attesting under oath that, to the best of the party's or person's knowledge, the facts set forth in the pleading are true and accurate.

(i) Compulsory Arbitration. A complaint and an answer must be accompanied by the certificate required by Rule 72(e) and any corresponding local rule.

Experimental Rule 8.1. Assignment and Management of Commercial Cases

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(e) Assignment of Cases to Commercial Courts.

(1) ***Plaintiff's Duties.*** If a case meets the definition of a "commercial case" as set forth above, and also meets the criteria of either Rule 8.1(b) or Rule 8.1(c), the plaintiff must include in the initial complaint's caption the words "eligible for commercial court." At the time of filing the initial complaint, the plaintiff must also complete a civil cover sheet that indicates the action is an eligible commercial case.

(2) ***Assignment to Commercial Court.*** The court administrator will review a complaint and civil cover sheet filed in accordance with Rule 8.1(e)(1) and will assign an eligible case to a commercial court judge.

(3) ***Motion to Reconsider Assignment to Commercial Court.*** After assignment of a case to the commercial court, a commercial court judge, upon motion of a party or on the judge's own initiative, may reconsider whether assignment of that case to the commercial court is appropriate under Rules 8.1(a) through 8.1(d). Any party filing a motion under this Rule must do so no later than 20 days after the defendant files an answer or a motion under Rule 12, or within 20 days after that party's appearance in the case. If a commercial court judge concludes that a case is not appropriate for assignment to the commercial court, that judge may reassign the case to a general civil court.

(4) ***Motion to Transfer to Commercial Court.*** On the court's own initiative, on motion of a party filed within 20 days after a defendant files an answer or a motion under Rule 12, or on motion of a party filed within 20 days of that party's appearance, a judge of a general civil court may order the transfer of a case to the commercial court if that judge determines that the matter meets the criteria of Rules 8.1(a) through 8.1(d).

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Rule 11. Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions; Assisting Filing by Self-Represented Person

(a) Signature.

(1) ***Generally.*** Every pleading, written motion, and other document filed with the court or served must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The court must strike an unsigned document unless the omission is promptly corrected after being called to the filer's attention.

(2) ***Electronic Filings.*** A person may sign an electronically filed document by placing the symbol "/s/" on the signature line above the person's name. An electronic signature has the same force and effect as a signature on a document that is not filed electronically. The court may treat a document that was filed using a person's electronic filing registration information as a filing that was made or authorized by that person.

(3) ***Filings by Multiple Parties.*** A person filing a document containing more than one place for a signature—such as a stipulation—may sign on behalf of another party only if the person has actual authority to do so. The person may indicate such authority either by attaching a document confirming that authority and containing the signatures of the other persons who have authority to consent for such parties, or, after obtaining a party's consent, by inserting "/s/ [the other party's or person's name] with permission" as any non-filing party's signature.

(b) Representations to the Court. By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the factual contentions are well grounded in fact;

(3) the denials of factual contentions are well grounded in fact or, if specifically so identified, are reasonably based on belief or a lack of information;

(4) the claims, defenses, and other legal contentions are warranted by existing law or by a colorable argument for extending, modifying, or reversing existing law or for establishing new law. A legal contention may be colorable even if it does not succeed on the merits.

(c) Sanctions.

(1) ***Generally.*** If a pleading, motion, or other document is signed in violation of this rule, or if a party fails to participate in good faith in the consultation required under Rule 11(c)(2), the court—on motion or on its own—must impose on the person who signed it, a represented party, or both, an appropriate sanction. The sanction may include an order to pay to the other party or parties the amount of the reasonable expenses incurred, including a reasonable attorney's fee, because of the filing of the document or because of the party's failure to participate in the required Rule 11(c)(2) consultation. In considering an appropriate sanction, the court must take into account the opportunities provided to the

person or party violating Rule 11 to withdraw or correct the alleged violation under Rule 11(c)(2).

(2) ***Consultation.*** Before filing a motion for sanctions under this rule, the moving party must:

(A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and

(B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

(3) ***Motion for Sanctions.*** A motion for sanctions under this rule must:

(A) be made separately from any other motion;

(B) describe the specific conduct that allegedly violates Rule 11(b);

(C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and

(D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).

(d) Assisting Filing by Self-Represented Person. An attorney may help draft a pleading, motion, or other document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or other document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts.

Rule 16. Scheduling and Management of Actions

(a) Objectives. In accordance with Rule 1, the court must manage a civil action with the following objectives:

(1) expediting a just disposition of the action;

(2) establishing early and continuing control so that the action will not be protracted because of lack of management;

(3) ensuring that discovery is proportional to the needs of the action, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of proposed discovery outweighs its likely benefit, and;

(**4)** discouraging wasteful, expensive, and duplicative pretrial activities;

(5) improving the quality of case resolution through more thorough and timely preparation;

(6) facilitating the appropriate use of alternative dispute resolution;

(7) conserving parties' resources;

(8) managing the court's calendar to eliminate unnecessary trial settings and continuances; and

(9) adhering to applicable standards for timely resolution of civil actions.

(b) Joint Report and Proposed Scheduling Order.

(1) ***Applicability.*** This Rule 16(b) applies to all civil actions except:

(A) medical malpractice actions;

(B) actions subject to compulsory arbitration under Rule 72(b); and

(C) actions seeking the following relief:

(i) change of name;

(ii) forcible entry and detainer;

(iii) enforcement, domestication, transcript, or renewal of a judgment;

(iv) an order pertaining to a subpoena sought under Rule 45.1(e)(2);

(v) restoration of civil rights;

(vi) injunction against harassment or workplace harassment;

(vii) delayed birth certificate;

(viii) amendment of birth certificate or marriage license;

(ix) civil forfeiture;

(x) distribution of excess proceeds;

(xi) review of a decision of an agency or a court of limited jurisdiction; and

(xii) declarations of factual innocence under Rule 57.1 or factual improper party status under Rule 57.2.

(2) ***Conference of the Parties.*** No later than 60 days after any defendant has filed an answer to the complaint or 180 days after the action commences—whichever occurs first—the parties must confer regarding the subjects set forth in Rule 16(d).

(3) ***Filing of Joint Report and Proposed Scheduling Order.*** No later than 14 days after the parties confer under Rule 16(b)(2), they must file a Joint Report and a Proposed Scheduling Order with the court stating—to the extent practicable—their positions on the subjects set forth in Rule 16(d) and proposing a Scheduling Order that specifies deadlines for the following by calendar date, month, and year:

(A) serving initial disclosures under Rule 26.1 if they have not already been served;

(B) identifying areas of expert testimony;

(C) identifying and disclosing expert witnesses and their opinions under Rule 26.1(d);

(D) propounding written discovery;

(E) disclosing nonexpert witnesses;

(F) completing depositions;

(G) completing all discovery other than depositions;

(H) final supplementation of Rule 26.1 disclosures;

(I) holding a Rule 16.1 settlement conference or private mediation;

(J) filing dispositive motions;

(K) a proposed trial date; and

(L) the anticipated number of days for trial.

(4) ***Requirements of Joint Report and Proposed Scheduling Order.*** Unless the court orders otherwise for good cause, the parties' Proposed Scheduling Order must set the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 15 months after the action commenced. The Joint Report must certify that the parties conferred regarding the subjects set forth in Rule 16(d). The attorneys of record and all unrepresented parties that have appeared in the action are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court.

(5) ***Forms.*** The parties must file the Joint Report and the Proposed Scheduling Order using the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13. They must use Forms 11(a) and (b) for Tier 1 cases, Forms 12(a) and (b) for Tier 2 cases, and Forms 13(a) and (b) for Tier 3 cases.

(c) Scheduling Orders.

(1) ***Timing.*** The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order under Rule 16(b) or after holding a Scheduling Conference.

(2) ***Contents.*** The Scheduling Order must include calendar deadlines specifying the month, date, and year for each of the items included in the Proposed Scheduling Order submitted under Rule 16(b). The Scheduling Order must also set either: (A) a trial date; or (B) a date for a Trial-Setting Conference under Rule 16(f) at which a trial date may be set. Absent leave of court, no trial may be set unless the parties certify that they engaged in a settlement conference or private mediation, or that they will do so by a date certain approved by the court. It also may address other appropriate matters.

(3) ***Modification of Dates Established by Scheduling Order.*** The parties may modify the dates established in a Scheduling Order that govern court filings or hearings only by court order for good cause. Once a trial date is set, the parties may modify that date only under Rule 38.1.

(d) Scheduling Conferences in Non-Medical Malpractice Actions. Except in medical malpractice actions, on a party's written request the court must—or on its own the court may—set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

(1) determine what additional disclosures, discovery and related activities will be undertaken and establish a schedule for those activities;

(2) discuss which form of Joint Report and Scheduling Order is appropriate under Rule 16(b)(3);

(3) determine whether the court should enter orders addressing one or more of the following:

(A) setting forth any requirements or limits for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced and, if appropriate, the sharing or shifting of costs incurred by the parties in producing the information;

(B) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and

(C) adopting any agreements the parties reach for asserting claims of privilege or of protection for work-product materials after production;

(4) determine a schedule for disclosing expert witnesses and whether the parties should be required to provide signed reports from retained or specially employed experts setting forth a complete statement of all opinions, the basis and reasons for the opinions, and the facts or data considered by the expert in forming the opinions;

(5) determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(F);

(6) determine a date for disclosing nonexpert witnesses and the order of their disclosure;

(7) determine a deadline for filing dispositive motions;

(8) resolve any discovery disputes;

(9) eliminate nonmeritorious claims or defenses;

(10) permit amendment of the pleadings;

(11) assist in identifying those issues of fact that are still contested;

(12) obtain stipulations for the foundation or admissibility of evidence;

(13) determine the desirability of special procedures for managing the action;

(14) consider alternative dispute resolution and determine a deadline for the parties to participate in a settlement conference or private mediation;

(15) determine whether any time limits or procedures set forth in these rules or local rules should be modified or suspended;

(16) determine whether the parties have complied with Rule 26.1;

(17) determine a date for filing the Joint Pretrial Statement required by Rule 16(g);

(18) set a trial date and determine the anticipated number of days needed for trial;

(19) discuss any time limits on trial proceedings, juror notebooks, brief pre-voir dire opening statements, and preliminary jury instructions, and the effective management of documents and exhibits;

(20) determine how a verbatim record of future proceedings in the action will be made; and

(21) discuss other matters and enter other orders that the court deems appropriate.

(c) Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Actions. This Rule 16(e) applies in medical malpractice actions. Within 5 days after receiving answers or motions from all served defendants, a plaintiff must notify the court so that it can set a Comprehensive Pretrial Conference. Within 60 days after receiving the notice, the court must conduct a Comprehensive Pretrial Conference. At that conference, the court and the parties must:

(1) determine the additional disclosures, discovery, and related activities to be undertaken and a schedule for those activities. The schedule must include the depositions to be taken, any medical examination that a defendant desires to be made of a plaintiff, and the additional documents, electronically stored information, and other materials to be exchanged. Except on the parties' stipulation or on motion showing good cause, only those depositions specifically authorized in the conference may be taken. On any defendant's request, the court must require an authorization to allow the parties to obtain copies of records previously produced under Rule 26.3(a)(2) or records ordered to be produced by the court. If records are obtained under such authorization, the party obtaining the records must furnish—at its sole expense—complete copies to all other parties;

(2) determine a schedule for disclosing standard-of-care and causation expert witnesses. Unless good cause is shown, such disclosure must be simultaneous and be made within 30 to 90 days after the Comprehensive Pretrial Conference, depending on the number and complexity of the issues. Unless good cause is shown, no motion for

summary judgment based on the lack of expert testimony may be filed until after the date set for the simultaneous disclosure of expert witnesses;

(3) determine the order of and dates for disclosing all other expert and nonexpert witnesses. The deadlines for disclosing all witnesses, expert and nonexpert, must be at least 45 days before the close of discovery. Unless extraordinary circumstances are shown, the court must preclude any untimely disclosed witness from testifying at trial;

(4) determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(F);

(5) determine whether additional nonuniform interrogatories and/or requests for admission or production are necessary and, if so, the number permitted;

(6) resolve any discovery disputes;

(7) discuss alternative dispute resolution, including mediation, and binding and nonbinding arbitration;

(8) assure compliance with A.R.S. § 12-570;

(9) set a date for a mandatory settlement conference;

(10) set a date for filing the Joint Pretrial Statement required by Rule 16(g);

(11) set a trial date and determine the anticipated number of days needed for trial;

(12) determine how a verbatim record of future proceedings in the action will be made; and

(13) discuss other matters and enter other orders that the court deems appropriate.

(f) Trial-Setting Conference.

(1) ***Generally.*** If the court has not already set a trial date in a Scheduling Order or otherwise, the court must hold a Trial-Setting Conference—as set by the Scheduling Order—for the purpose of setting a trial date. The Conference must be attended in person—or telephonically, as permitted by the court—by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties. If a trial date is not set at the Trial-Setting Conference, the court must schedule another Trial-Setting Conference as soon as practicable for the setting of a trial date.

(2) ***Subject Matter.*** In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:

(A) the status of discovery and any dispositive motions that have been or will be filed;

(B) a date for holding a Trial Management Conference under Rule 16(g);

(C) imposing time limits on trial proceedings;

(D) using juror questionnaires;

(E) using juror notebooks;

(F) giving brief pre-voir dire opening statements and preliminary jury instructions;

(G) effective management of documents and exhibits; and

(H) other matters that the court deems appropriate.

(g) Joint Pretrial Statement; Trial Management Conference.

(1) ***Preparation of Joint Pretrial Statement.*** Counsel or the unrepresented parties who will try the action and who are authorized to make binding stipulations must confer and prepare a written Joint Pretrial Statement, signed by each counsel or unrepresented party. The parties must file the Joint Pretrial Statement no later than 10 days before the date of the Trial Management Conference, or if no conference is scheduled, no later than 10 days before trial. A plaintiff must deliver its part of the Joint Pretrial Statement to all other parties no later than 20 days before the date the Statement must be filed. All other parties must deliver their part of the Joint Pretrial Statement to all other parties no later than 15 days before the date the Statement must be filed.

(2) ***Contents of Joint Pretrial Statement.*** The parties must prepare the Joint Pretrial Statement as a single document containing the following:

(A) stipulations of material fact and applicable law;

(B) contested issues of fact and law that the parties agree are material or applicable;

(C) a separate statement by each party of other issues of fact and law that the party believes are material;

(D) a list of witnesses each party intends to call to testify at trial, identifying those witnesses whose testimony will be presented solely by deposition. Each party must list any objection to a witness and the basis for that objection. Unless the court orders otherwise for good cause, no witness may testify at trial other than those listed;

(E) each party's final list of exhibits to be used at trial for any purpose, including impeachment. Each party must list any objection to an exhibit and the basis for that objection. Unless the court orders otherwise for good cause, no exhibit may be used at trial other than those listed. The parties should identify any exhibits that they stipulate can be admitted into evidence, with such stipulations being subject to court approval;

(F) a statement by each party identifying any proposed deposition summaries or designating parts of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. The parties must designate deposition testimony by transcript page and line numbers. The parties must file with the Joint Pretrial Statement a copy of any proposed deposition summary and the written transcript of designated deposition testimony. Each party must list any objection to the proposed deposition summaries and designated deposition testimony and the basis for that objection. Unless the court orders otherwise for good cause, no deposition testimony may be used at trial other than that designated or counter-designated in the Joint Pretrial Statement or that used solely for impeachment purposes;

(G) a brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party must submit a separate statement for the court's consideration;

(H) requested technical equipment;

(I) requested interpreters;

(J) if the trial is to a jury, the number of jurors and alternates, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(K) whether any party is invoking Arizona Rule of Evidence 615 regarding the exclusion of witnesses from the courtroom;

(L) a brief description of settlement efforts; and

(M) how a verbatim record of the trial will be made.

(3) ***Delivery of Exhibits.*** A plaintiff must deliver copies of all its exhibits to all other parties no later than 10 days before the date the Joint Pretrial Statement must be filed. All other parties must deliver copies of all their exhibits to all other parties no later than 5 days before the date the Joint Pretrial Statement must be filed. Any exhibit that cannot be reproduced must be made available for inspection to all other parties on or before these deadlines.

(4) ***Additional Documents to File if Trial Is to a Jury.*** If the trial is to a jury, the parties must—on the same day they file the Joint Pretrial Statement—file: (A) an agreed-on set of jury instructions, verdict forms, and voir dire questions; and (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed on.

(5) ***Juror Notebooks.*** A party intending to submit a notebook to the jurors must serve a copy of the notebook on all other parties no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.

(6) ***Trial Memoranda.*** A party must file any trial memorandum no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.

(7) ***Trial Management Conference.*** Any Trial Management Conference scheduled by the court should be held as close to the time of trial as is reasonable under the circumstances. The Conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by all unrepresented parties.

(8) ***Modifications.*** Rule 16(g)'s provisions may be modified by court order.

(h) Pretrial Orders. After any conference held under this rule, the court must enter an order reciting the action taken. This order controls the later course of the action unless modified by a later court order. The order entered after a Trial Management Conference under Rule 16(g) may be modified only to prevent manifest injustice.

(i) Sanctions.

(1) ***Generally.*** Except on a showing of good cause, the court—on motion or on its own—must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney:

(A) fails to obey a scheduling or pretrial order or fails to meet the deadlines set in the order;

(B) fails to appear at a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference;

(C) is substantially unprepared to participate in a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference;

(D) fails to participate in good faith in a Scheduling Conference, Comprehensive Pretrial Conference, Trial-Setting Conference, or Trial Management Conference; or

(E) fails to participate in good faith in the preparation of a Joint Report and Proposed Scheduling Order or a Joint Pretrial Statement.

(2) ***Award of Expenses.*** Unless the court finds the conduct substantially justified or that other circumstances make an award of expenses unjust, the court must—in addition to or in place of any other sanction—require the party, the attorney representing the party, or both, to pay:

(A) another party's reasonable expenses, including attorney's fees, incurred as a result of the conduct;

(B) an assessment to the clerk; or

(C) both.

(3) ***Trial Date.*** The fact that a trial date has not been set does not preclude sanctions under this rule, including the sanction of excluding from evidence untimely disclosed information.

(j) Alternative Dispute Resolution. On motion—or on its own after consulting with the parties—the court may direct the parties to submit the dispute that is the subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.

(k) Time Limits. The court may impose reasonable time limits on trial proceedings.

State Bar Committee Note
2008 Amendment to Rule 16(d) [Formerly Rule 16(b)]

[Rule 16(d) (formerly Rule 16(b))] was amended to clarify that a court has the power under Rule 16 to enter orders governing the disclosure and discovery of electronically stored information, the preservation of discoverable documents and electronically stored information, and the enforcement of party agreements regarding post-production assertions of privilege or work product protection. Because these issues typically arise at the beginning of a case, a court need not wait until the parties are ready to address other issues under Rule 16[d] before holding a hearing under this Rule on these and related subjects.

Orders regarding the disclosure or discovery of electronically stored information may specify the forms and manner in which such information shall be produced. The court also may enter orders limiting (or imposing conditions upon) the disclosure of such information, and may take into account the relative accessibility of the electronically stored information at issue, the costs and burdens on parties in making such information available, the probative value of such information, and the amount of damages (or the type of relief) at issue in the case. *See* CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 5

(approved August 2006) (noting that in determining discovery issues relating to electronically stored information, a court should consider these factors, among others).

Document retention and preservation issues are especially likely to arise with electronically stored information because the "ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information." Fed. R. Civ. P. 26(f), Advisory Committee Notes on 2006 Amendment. A court has the power under this Rule to incorporate into an order any agreement the parties might reach regarding preservation issues or, absent an agreement, to enter an order in appropriate circumstances imposing such requirements and limitations. In considering such an order, a court should take into account not only the need to preserve potentially relevant evidence, but also any adverse effects such an order may have on a party's on-going activities and computer operations. A preservation order entered over objections should be narrowly tailored to address specific evidentiary needs in a case, and ex parte preservation orders should issue only in exceptional circumstances. *Cf. id.* (stating that preservation orders should be narrowly tailored where objections are made and cautioning against "blanket" or ex parte preservation orders); CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 10 (approved August 2006) ("When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.").

If the amount of documents and electronic data to be disclosed is voluminous, an agreement among the parties minimizing the risks associated with the inadvertent production of privileged or otherwise protected material may be helpful in lessening discovery costs and expediting the litigation. As with its counterpart in the Federal Rules of Civil Procedure, this Rule does not provide the court with authority to enter such an order without party agreement, or limit the court's authority to act on motions to resolve privilege issues. *Cf.* Fed. R. Civ. P. 16(b), Advisory Committee Notes on 2006 Amendment (clarifying the rule's scope).

Comment

2014 Amendment to Rule 16(c)

A primary goal of civil case management is the creation of public confidence in a predictable court calendar. Courts should avoid overlapping trial settings that necessitate continuances when the court is unable to hold a trial on the date scheduled. Continuances of scheduled trial dates impose unnecessary costs and inconvenience when counsel, parties, witnesses, and courts are required to engage in redundant preparation. Although early trial settings may be appropriate, a court should employ a case management system that ensures it will be in a position to conduct each trial on the date it has been set.

Rule 26. General Provisions Governing Discovery

(a) Discovery Methods. A party may obtain discovery by any of the following methods:

(1) depositions by oral examination or written questions under Rules 30 and 31, respectively;

(2) written interrogatories under Rule 33;

(3) requests for production of documents or things or permission to enter onto land or other property for inspection and other purposes, under Rule 34;

(4) physical and mental examinations under Rule 35;

(5) requests for admission under Rule 36; and

(6) subpoenas for production of documentary evidence or for inspection of premises under Rule 45(c).

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* The court may alter the limits in these rules on depositions, interrogatories, and requests for admission consistent with the procedures in Rule 26.2.

(B) *Specific Limits on Discovery of Electronically Stored Information.*

(i) *Generally.* A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy. If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause, considering the limits of Rule 26(b)(2)(C). The court may specify conditions for the disclosure or discovery. Rule 26(e) applies in determining whether electronically stored information is not reasonably accessible as provided in this rule.

(ii) *Specific Limits.* A party is not entitled to obtain discovery of electronically stored information that is sought for purposes unrelated to the merits of the case. A party is not entitled to image or inspect an opposing party's data sources or data storage devices, or to discover electronically stored information that would require restoration of data through forensic means, unless the court finds: (1) that the information sought is relevant to a claim of fraud or other intentional misconduct; (2) that restoration is reasonably required to address prejudice arising from

spoliation of evidence or a party's failure to comply with its obligation to preserve evidence under Rule 37(g); or (3) other good cause.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(D) *Contractual Limits*. In determining the permissible scope of discovery, the court must enforce any mutually and freely negotiated contract between business organizations (as defined in Experimental Rule 8.1(a)(3)) limiting a party or person's obligation to preserve information, or to provide disclosure or discovery.

(3) ***Work Product and Witness Statements.***

(A) *Documents and Tangible Things Prepared in Anticipation of Litigation or for Trial*. Ordinarily, a party may not discover documents and tangible things that another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) prepared in anticipation of litigation or for trial. But, subject to Rule 26(b)(4), a party may discover those materials if:

(i) the materials are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure of Opinion Work Product.* If the court orders discovery of materials under Rule 26(b)(3)(A), it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Discovery of Own Statement.* On request and without the showing required under Rule 26(b)(3)(A), any party or other person may obtain his or her own previous statement about the action or its subject matter. If the request is refused, the party or other person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A statement discoverable under this rule is either:

(i) a written statement that the party or other person signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, video, audio, or other recording—or a transcription of it—that recites substantially verbatim the party's or other person's oral statement.

(4) ***Expert Discovery.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been disclosed as an expert witness under Rule 26.1(d)(1).

(B) *Trial Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26.1(d), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert witness regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. A party may discover such facts or opinions only:

(i) as provided in Rule 35(d); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D), including the time the expert spends testifying in a deposition; and

(ii) for discovery under Rule 26(b)(4)(D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including—in the court's discretion—the time the expert reasonably spends preparing for deposition.

(F) *Number of Experts Per Issue.*

(i) *Generally.* Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue. When there are multiple parties on a side and those parties cannot agree on which expert to call on an issue, the court may designate the expert to be called or, for good cause, allow more than one expert to be called.

(ii) *Standard-of-Care Experts in Medical Malpractice Actions.* Notwithstanding the limits of Rule 26(b)(4)(F)(i), a defendant in a medical malpractice action may—in addition to that defendant's standard-of-care expert witness—testify on the issue of that defendant's standard of care. In such an instance, the court is not required to allow the plaintiff an additional expert witness on the issue of the standard of care.

(5) ***Notice of Nonparty at Fault.*** No later than 150 days after filing its answer, a party must serve on all other parties—and should file with the court—a notice disclosing any person: (A) not currently or formerly named as a party in the action; and (B) whom the party alleges was wholly or partly at fault under A.R.S. § 12-2506(B). The notice must disclose the identity and location of the nonparty allegedly at fault, and the facts supporting the allegation of fault. A party who has served a notice of nonparty at fault must supplement or correct its notice if it learns that the notice was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties through the discovery process or in writing. A party must supplement or correct its notice of nonparty at fault under this rule in a timely manner, but in no event more than 30 days after it learns that the notice is materially incomplete or incorrect. The trier of fact may not allocate any percentage of fault to a nonparty who is not disclosed in accordance with this rule except on stipulation of all the parties or on motion showing good cause, reasonable diligence, and lack of unfair prejudice to all other parties.

(6) ***Claims of Privilege or Protection of Work-Product Materials*.**

(A) *Information, Documents, or Electronically Stored Information Withheld.*

(i) When a party withholds information, a document, or electronically stored information in response to a written discovery request on the claim that it is privileged or subject to protection as work product, the party must promptly identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that—without revealing information that is itself privileged or protected—will enable other parties to assess the claim.

(ii) The parties may stipulate to, or the court may order, alternate requirements to reduce the burden and expense of providing the information required by this rule, such as identification by category or excluding certain categories of documents.

(iii) A party seeking to modify the requirements of this rule must confer with the opposing party in an attempt to reach agreement. Disputes must be presented at the Rule 16(d) Scheduling Conference, or under Rule 26(d).

(B) *Inadvertent Production.* If a party contends that a document or electronically stored information subject to a claim of privilege or of protection as work-product material has been inadvertently produced in discovery, the party making the claim may notify any party who received the document or electronically stored information of the claim and the basis for it. After being notified, a party: (i) must promptly return, sequester, or destroy the specified document or electronically stored information and any copies it has; (ii) must not use or disclose the document or electronically stored information until the claim is resolved; (iii) must take reasonable steps to retrieve the document or electronically stored information if the party disclosed it before being notified; and (iv) may promptly present the document or electronically stored information to the court under seal for a determination of the claim. The producing party must preserve the document or electronically stored information until the claim is resolved.

(c) Protective Orders.

(1) ***Generally.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or alternatively, on matters relating to a deposition, the court in the county where the deposition will be taken. A person receiving a request to preserve electronically stored information may move for a protective order in the court in the county where the action is pending, as provided in Rule 45.2(d)(2). Subject to Rule 26(c)(4), the court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the discovery;

(B) specifying terms and conditions, including time and place, for the discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on terms that are just, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses on a motion for a protective order.

(4) ***Confidentiality Orders.***

(A) *Burden of Proof.* Before the court may enter an order that limits a party or person from disclosing information or materials produced in the action to a person who is not a party to the action and before the court may deny an intervenor's request for access to such discovery materials: (i) the party seeking confidentiality must show why a confidentiality order should be entered or continued; and (ii) the party or intervenor opposing confidentiality must show why a confidentiality order should be denied in whole or in part, modified, or vacated. The burden of showing good cause for an order remains with the party seeking confidentiality.

(B) *Findings of Fact.* When ruling on a motion for a confidentiality order, the court must make findings of fact concerning any relevant factors, including but not limited to: (i) any party's or person's need to maintain the confidentiality of such information or materials; (ii) any nonparty's or intervenor's need to obtain access to such information or materials; and (iii) any possible risk to the public health, safety, or financial welfare to which such information or materials may relate or reveal. No such findings of fact

are needed if the parties have stipulated to such an order or if a motion to intervene and to obtain access to materials subject to a confidentiality order is unopposed. A party moving for entry of a confidentiality order must submit with its motion a proposed order containing proposed findings of fact.

(C) *Least Restrictive Means.* An order restricting release of information or materials to nonparties or intervenors must use the least restrictive means necessary to maintain any needed confidentiality.

(d) Expedited Procedure for Resolving Discovery and Disclosure Disputes

(1) ***When Applicable.*** Unless the court orders otherwise, this procedure applies to all motions for protective order under Rule 26(c) and all motions to compel discovery or disclosure under Rule 37(a) between parties to the action.

(2) ***Joint Statement of Discovery or Disclosure Dispute.*** When the parties have a dispute concerning a discovery or disclosure issue, they must file with the court a joint statement of discovery or disclosure dispute. The joint statement must not exceed 3 pages of explanatory text, with each party entitled to submit one and one-half pages of that text, and the parties must also attach a good faith consultation certificate complying with Rule 7.1(h). The purposes of the joint statement are to notify the court of the dispute, and to make a record of the discovery or disclosure sought. Briefing on the dispute is permitted only if ordered by the court.

(3) ***Expedited Hearing by the Court.*** Unless the court orders otherwise, the parties may jointly contact the court by telephone to request a hearing on the joint statement of discovery dispute. The court should schedule the matter at the earliest convenient time, whether by telephone or in person.

(4) ***Resolution by Minute Entry.*** The court must issue a minute entry setting forth the resolution of the discovery dispute. After resolution, a party may file with the court those materials necessary to create a record of the discovery or disclosure the court permitted or denied.

(5) ***Depositions.*** Nothing in Rule 26(d) limits the ability of the parties to seek the intervention of the court by telephone during a deposition without the necessity of filing a written statement of discovery dispute.

(e) Determining Whether Electronically Stored Information Is Reasonably Accessible.

(1) ***Generally*****.** On any motion addressing whether sources of electronically stored information are not reasonably accessible as provided in Rule 26(b)(2)(B)(i), the court must determine:

(A) whether the information sought is within the permissible scope of discovery, considering the limits of Rule 26(b)(1) and 26(b)(2)(B)(ii);

(B) whether the party or person opposing the discovery has shown that it would incur undue burden or expense; and, if so,

(C) if good cause is shown for the requested discovery or disclosure.

(2) ***Affidavit of Burden or Expense.*** Except as otherwise allowed under Rule 26(d), a party or person contending that the disclosure or discovery of electronically stored information

should be disallowed or limited because of undue burden or expense must provide an affidavit describing the burden and estimating the expense that would be incurred.

(3) ***Burden or Expense—Factors*****.** In addition to the factors in Rule 26(b)(1), in determining whether the party or person opposing the discovery or disclosure would incur undue burden or expense, the court must consider:

(A) the estimated expense of the discovery or disclosure;

(B) the anticipated disruption of the responding party or person's normal business operations if the discovery or disclosure is ordered;

(C) any efforts required to obtain data in the custody of another;

(D) the difficulty and expense of any necessary review to separate confidential or privileged material;

(E) whether the difficulty or expense of accessing the requested information is attributable to any violation of Rule 37(g) or to other purposeful action by the responding party or person to shield information from discovery; and

(F) the party or person's interest in the action.

(4) ***Good Cause—Factors*****.** In addition to the factors in Rule 26(b)(1), in determining whether good cause is shown, the court may consider:

(A) the likelihood of finding relevant, responsive information that cannot be obtained from other, more accessible sources;

(B) the extent to which the request has been narrowly tailored to discover relevant information;

(C) the importance of the information to a fair resolution on the merits; and

(D) the parties' resources.

(5) ***Specifying Conditions.*** The court may impose conditions on the discovery or disclosure that include:

(A) issuing any appropriate orders under Rule 26(c);

(B) requiring the party seeking discovery to pay some or all of the reasonable expenses that the responding party will incur in complying with the requested discovery or disclosure, which may include the reasonable fees charged by counsel, consultants, and vendors; and

(C) reimbursing the responding party or person for disruption to the responding party's or person's normal business operations, to the extent such cost is quantifiable and reimbursement is warranted by the facts and circumstances.

(f) Sequence of Discovery. Unless the court orders otherwise for good cause:

(1) methods of discovery may be used in any sequence; and

(2) discovery by one party does not require any other party to delay its discovery, except that a party may not seek discovery from any source before that party serves its initial disclosure statement under Rule 26.1.

(g) Supplementing and Correcting Discovery Responses.

(1) ***Generally.*** A party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its response if it learns that the response was or has become materially incomplete or incorrect and if the additional or corrective information has not otherwise been disclosed to the other parties during the discovery process or in writing.

(2) ***Timing.*** A party must supplement or correct a discovery response under this rule in a timely manner, but in no event more than 30 days after it learns that the response is materially incomplete or incorrect.

(3) ***Reason for Deficiency in Prior Response.*** The party must state in the supplemental or corrected discovery response why the additional or correct information was not previously provided.

(h) Sanctions. The court may impose an appropriate sanction—including any order under Rule 16(i)—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with discovery.

(i) Discovery and Disclosure Motions. Any discovery or disclosure motion must attach a good faith consultation certificate complying with Rule 7.1(h).

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose; Disclosure Categories. Within the times set forth in Rule 26.1(f) or in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

(1) the factual basis of each of the disclosing party's claims or defenses;

(2) the legal theory on which each of the disclosing party's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities;

(3) the name, address, and telephone number of each witness whom the disclosing party expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony;

(4) the name and address of each person whom the disclosing party believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess;

(5) the name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements;

(6) the anticipated subject areas of expert testimony;

(7) a computation and measure of each category of damages alleged by the disclosing party, the documents and testimony on which such computation and measure are based, and the name, address, and telephone number of each witness whom the disclosing party expects to call at trial to testify on damages;

(8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;

(9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and

(10) for any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment: (A) a copy—or if no copy is available, the existence and substance—of the insurance policy, indemnity agreement, or suretyship agreement; (B) a copy—or if no copy is available, the existence and basis—of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement; and (C) the remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement. A party need only supplement its disclosure regarding the remaining dollar limits of coverage upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial. Within 10 days after such a request is served, a party must supplement its disclosure of the remaining dollar limits of coverage. For purposes of this rule, an insurance policy means a contract of or agreement for or effecting insurance, or the certificate memorializing it—by whatever name it is called—and includes all clauses,

riders, endorsements, and papers attached to, or a part of, it, but does not include an application for insurance. Information concerning an insurance policy, indemnity agreement, or suretyship agreement is not admissible in evidence merely because it is disclosed under this rule.

(b) Disclosure of Hard-Copy Documents. Subject to the limits of Rule 26(b)(2)(C) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

(c) Disclosure of Electronically Stored Information.

(1) ***Duty to Confer.*** When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, taking into account the limitations of Rule 26(b)(1) and (2). At the conference, each party must have at least one representative present who is reasonably familiar with the party's systems containing electronically stored information. The following topics should be addressed, as applicable:

(A) the location and types of systems that are reasonably likely to contain electronically stored information within the permissible scope of discovery;

(B) whether it is appropriate to conduct discovery of electronically stored information in phases or stages as a method of reducing costs and burden, and if so, what the parties will include in the first phase;

(C) sources of electronically stored information that are less likely to contain discoverable information, and from which the parties will postpone or avoid discovery;

(D) search protocols or methods that will be used to identify discoverable information and filter out information not subject to discovery;

(E) the form in which the information will be produced;

(F) sharing or shifting of costs incurred by the parties for disclosing and producing the information;

(G) agreements on the preservation of electronically stored information; and

(H) whether the parties will enter a stipulation or seek an order under Rule 502(d) of the Arizona Rules of Evidence to address inadvertent production of privileged information.

(2) ***Production of Electronically Stored Information.*** Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.

(3) ***Presumptive Form of Production.*** Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(4) *Limits on Disclosure of Electronically Stored Information.* Rule 26(b)(2) applies to the disclosure of electronically stored information.

(d) Disclosure of Expert Testimony.

(1) ***In General.*** In addition to the disclosures required by Rule 26.1(a), a party must disclose the identity of any witness it may use at trial to present evidence under Rules 702, 703, or 705.

(2) ***Form of Expert Disclosures.*** Unless the parties stipulate or the court orders otherwise, an expert report complying with Rule 26.1(d)(4) must be provided in actions assigned to Tier 3 or if a hearing is required to determine if the testimony satisfies the requirements of Ariz. R. Evid. 702. In all other cases, expert disclosures must comply with Rule 26.1(d)(3). Any party contending that an expert report should be required in connection with a Rule 702 hearing must raise the issue promptly after learning of the alleged need for the report. Disputes over

the form or sufficiency of expert disclosures must be presented at the Rule 16(d) Scheduling Conference, or under Rule 26(d).

(3) ***Expert Witnesses Who Do Not Provide a Written Report.*** If an expert witness is not required to provide a written report, the disclosure must state:

(A) the expert's name, address, and qualifications;

(B) the subject matter on which the expert is expected to testify;

(C) the substance of the facts and opinions to which the expert is expected to testify;

(D) a summary of the grounds for each opinion;

(E) a statement of the compensation to be paid for the expert's work and testimony in the case; and

(F) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.

(4) ***Expert Witnesses Who Must Provide a Written Report.*** If an expert is required to provide a signed written report, the report must contain:

(A) the expert's name, address, and qualifications, including a list of all publications authored in the previous 10 years;

(B) a complete statement of all opinions the expert will express and the basis and reasons for them;

(C) the facts or data considered by the expert in forming them;

(D) any exhibits that will be used to summarize or support them;

(E) identification of any publication within the scope of Ariz. R. Evid. 803(18) on which the expert intends to rely for any opinion;

(F) a statement of the compensation to be paid for the expert's work and testimony in the case; and

(G) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at a hearing or trial.

(e) Purpose; Scope.

(1) ***Purpose.*** The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) ***Scope.*** A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

(f) Time for Disclosure; Continuing Duty.

(1) ***Initial Disclosures.*** Unless the parties agree or the court orders otherwise, a party seeking affirmative relief must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 30 days after the filing of the first responsive

pleading to the complaint, counterclaim, crossclaim, or third-party complaint that sets forth the party's claim for affirmative relief. Unless the parties agree or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 30 days after it files its responsive pleading.

(2) ***Additional or Amended Disclosures.*** The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order—or in the absence of such a deadline, later than 60 days before trial—must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

(3) ***Explanation For Not Previously Disclosing Information*.** In each supplemental or amended disclosure, the party must state why the additional or correct information was not previously provided.

(g) Signature Under Oath. Each disclosure must be in writing and signed under oath by the disclosing party.

(h) Claims of Privilege or Protection of Work-Product Materials.

(1) ***Information Withheld*.** When a party withholds information, a document, or electronically stored information from disclosure on a claim that it is privileged or subject to protection as work product, the party must promptly comply with Rule 26(b)(6)(A).

(2) ***Inadvertent Production*.** If a party contends that a document or electronically stored information subject to a claim of privilege or protection as work-product material has been inadvertently disclosed, the producing and receiving parties must comply with Rule 26(b)(6)(B).

Rule 26.2. Tiered Limits to Discovery Based on Attributes of Cases

(a) Generally. This rule explains how much discovery a party may take in their case. The amount of discovery a party may take is limited by the tier to which their case is assigned. This rule explains how and when cases are assigned to one of three tiers, each of which has different limits.

(b) How Courts Assign Cases to Tiers. The tier to which a case is assigned must be determined either by: (1) stipulation or motion, for good cause shown; (2) an evaluation of the court based on the characteristics of the case; or (3) the sum of the relief sought in the complaint, and any counterclaims or crossclaims.

(1) ***By Stipulation of Parties or on Motion.***

(A) *Requirement of Good Cause.* All parties by stipulation or any party by motion may request that the court assign the case to a tier other than the one to which it would be assigned under Rule 26.2(b)(3), for good cause. A court must determine good cause to vary a tier with reference to the factors that define proportional discovery in Rule 26(b)(1). The court may reject any stipulation or joint motion requesting assignment under this rule.

(B) *Requirement of Assent to Placement in Higher Tier.* If a stipulation or motion asks the court to place a case in a tier higher than the tier to which it would be assigned under Rule 26.2(b)(3), that stipulation or motion must confirm that each party requesting that relief has:

(i) received a statement from its counsel setting forth the anticipated additional discovery expense if the case is placed in a higher tier; and

(ii) approved the stipulation.

(2) ***Placement by Court.*** The court may evaluate a case for assignment to a tier by its characteristics, consistent with the factors that define proportional discovery in Rule 26(b)(1). The following sets of characteristics are not exhaustive, and the court may exercise its judgment based on the circumstances of the case:

(A) *Tier 1: Case Characteristics.* These are simple cases that can be tried in one or two days. Automobile tort, intentional tort, premises liability, and insurance coverage claims arising from those types of claims generally should be placed in Tier 1, absent exceptional circumstances. Cases with minimal documentary evidence and few witnesses are likely Tier 1 cases.

(B) *Tier 2: Case Characteristics*. These are cases of intermediate complexity. They are likely to have more than minimal documentary evidence and more than a few witnesses. They are likely to include, but may not include, expert witnesses. They are likely to involve multiple theories of liability, and may involve counterclaims or cross-claims. Cases that do not easily fit within Tiers 1 and 3 belong here.

(C) *Tier 3: Case Characteristics.* These are the cases that are logistically or legally complex. Class actions, antitrust, multi-party commercial or construction cases, securities cases, environmental torts, construction defect cases, products liability cases, and mass torts are among those cases that generally should be placed in Tier 3, absent exceptional circumstances. Cases with voluminous documentary evidence, or with

numerous pretrial motions raising difficult or novel legal issues, are likely Tier 3 cases. Cases requiring management of a large number of witnesses or separately represented parties, or which require coordination with related actions pending in other courts, are likely Tier 3 cases.

(3) ***Monetary or Nonmonetary Relief Requested***. All cases not assigned a tier by the procedures in Rule 26.2(b)(1) or (2) must be assigned a tier based on the damages claimed in the action, as defined in Rule 26.2(d). Actions claiming $50,000 or less in damages are allowed the amount of standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Actions claiming nonmonetary relief alone or in conjunction with claims for damages under $300,000 are permitted standard discovery as described for Tier 2.

(c) When Courts Assign Cases to Tiers.

(1) ***By Monetary or Nonmonetary Relief Requested.*** Unless and until a court assigns a case to a different tier, the case is assigned to the tier to which it would be assigned based on its monetary or nonmonetary relief requested under Rule 26.2(b)(3).

(2) ***By the Court's Own Evaluation.*** If a court evaluates a case for tiering under Rule 26.2(b)(2), it must assign the case to a tier no later than 30 days after the parties file their Report of Early Meeting under Rule 8(g)(3).

(3) ***By Stipulation of Parties or Motion.*** If a court assigns a case a tier based on a stipulation or motion under Rule 26(b)(1), it should decide the motion at the earliest practicable time.

(d) Definition of Damages in Tiering. For purposes of determining the tier for standard discovery, the amount of damages claimed in an action includes all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(e) Limits on Standard Fact Discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is limited as stated below. The time to complete standard fact discovery runs from the date the first defendant's first Rule 26.1 disclosure is due.

(1) ***Tier 1*****.** Each side in a Tier 1 case is permitted 5 total hours of fact witness depositions, 5 Rule 33 interrogatories, 5 Rule 34 requests for production, 10 Rule 36 requests for admission, and 120 days in which to complete standard fact discovery.

(2) ***Tier 2*****.** Each side in a Tier 2 case is permitted 15 total hours of fact witness depositions, 10 Rule 33 interrogatories, 10 Rule 34 requests for production, 10 Rule 36 requests for admission, and 180 days in which to complete standard fact discovery.

(3) ***Tier 3*****.** Each side in a Tier 3 case is permitted 30 total hours of fact witness depositions, 20 Rule 33 interrogatories, 10 Rule 34 requests for production, 20 Rule 36 requests for admission, and 210 days in which to complete standard fact discovery.

(f) Obtaining Discovery Beyond Tier Limits.

(1) ***Generally.*** To obtain discovery beyond the limits established in Rule 26.2(e), a party must file either:

(A) a motion for discovery beyond tier limits setting forth why that discovery is necessary and proportional under Rule 26(b)(1), certifying that the party has reviewed its counsel's statement of the anticipated additional expense from the additional discovery and has approved the motion, and attaching a good faith consultation certificate complying with Rule 7.1(h); or

(B) an agreed statement that, for each category of discovery for which the limit of discovery has been requested, that discovery beyond tier limits is necessary and proportional under Rule 26(b)(1), and that each party has reviewed its counsel's statement of the anticipated additional expense from the additional discovery and has approved the request for the additional discovery.

(2) ***Timing.*** A motion or statement under (1) must be filed before the close of standard discovery and after serving a discovery request that reaches or exceeds the limit imposed by Rule 26.2(e) on any category of discovery.

(3) ***Effect of Notice of Agreement.*** A filed Notice of Agreement To Overlimit Discovery complying with this rule authorizes the taking of the agreed additional discovery without the necessity for a court order. The court retains the power to disapprove any such agreement.

(g) Circumstances Requiring Additional Deposition Time or Written Discovery. Despite the total limits on deposition hours set out in Rule 26.2(e)(1)-(3):

(1) a party is entitled to a total number of fact witness deposition hours equal to the number of witnesses that party is entitled to depose under Rule 30(a)(1)(A) or (C)—excepting fictitious defendants and nominal party-spouses who are included in the suit for reasons of community property law—multiplied by two hours;

(2) additional examination time ordered for the reasons set forth in Rule 30(d) does not count against the tier limits;

(3) where there are so many parties in a side under Rule 26.2(e) who are actively participating in depositions that an individual party is prevented from engaging in necessary examination, the court may in the interests of justice enlarge that party's examination time; and

(4) where the configuration of sides as defined in Rule 26.2(e) provides one group of parties with common interests more deposition time or written discovery than another group of parties with common interests, the court may for good cause adjust how Rule 26.2(e) allocates the totality of deposition time or written discovery it allows between those sides.

(h) Variations in Expert Discovery by Tier. Unless the parties agree or the court orders otherwise, expert disclosures in Tier 1 or Tier 2 cases are governed by Rule 26.1(a)(6), while expert disclosures in Tier 3 cases are governed by Rule 26.1(c)(2).

(i) Required Report at Close of Fact Discovery. At the conclusion of fact discovery, the parties must file a joint report on the amount of discovery that was taken in their case using Rule 84, Form 3 to permit the court to fashion such orders as may be appropriate under Rules 26(g) and 37(h).

Comment

2018 Comment on Rule 26.2

Rule 26.2 establishes a three-tiered system of case management to make discovery occur in a manner that is proportional under Rule 26(b)(1). If neither the parties nor the court seek to actively direct a case toward a tier, the case will receive a tier based upon the amount at issue in the case or requests for nonmonetary relief. However, parties can ask for a different tier, based on the proportionality factors in Rule 26(b)(1). And courts can actively manage cases and to assign a case to a tier at the start of the matter, on their own initiative or based upon their own review of the Report of Early Meeting under Rule 8(g)(3). Rule 26.2(b) provides many factors for courts to use in determining the tier to which a case is best suited.

However, making discovery proportional is not an end in itself. Rules 8, 26, 26.1, 26.2, and 37, as now revised, work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Amended Rule 26.2 emphasizes keeping discovery proportional based on the understanding that proportional discovery follows up on robust initial disclosure under Rule 26.1. 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.

Further, Rule 26.2(g) ensures that in cases with large numbers of parties, there is enough deposition time to assure that all parties can be deposed. It is anticipated that Rule 26.2(g) will prove useful in multiparty Tier 1 cases, which under Rule 26.2(e)(1) are presumptively limited to five hours of fact witness testimony.

The way Rule 26.2(g) works is this. If a plaintiff files a case in which there are three other parties and one document custodian, the plaintiff is entitled under Rule 30(a)(1)(A) and (C) to depose all three other parties and the document custodian. Under Rule 26.2(g), one multiplies the number of those depositions (here, four) by two hours to derive the presumptive limit on the plaintiff's total number of deposition hours in the case—here, eight. The plaintiff may allocate that time any way they wish consistent with the limit of four hours per deposition in Rule 30(d). Thus, the plaintiff could choose to depose two of the four witnesses for three hours, and two of the four witnesses for one hour.

If, in that same case, there are two additional nonparty fact witnesses who the parties agree may be deposed (or who the court orders to be deposed), the presumptive limit is still eight hours. Thus, the plaintiff would then have the right to allocate the eight hours among the six total witnesses—the three parties, the one document custodian, and the two third-party witnesses—in any way the plaintiff chooses, consistent with the four-hour limit in Rule 30(d).

Rule 26.3. Exchange of Records and Discovery Limits in Medical Malpractice Actions

(a) Exchange of Medical Records.

(1) ***By Plaintiff.*** Within 5 days after a plaintiff notifies the court under Rule 16(e) that all served defendants have either answered or filed motions, the plaintiff must serve on defendants copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(2) ***By Defendants.*** Within 10 days after the plaintiff serves medical records under Rule 26.3(a)(1), each defendant must serve on the plaintiff copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(3) ***By Request.*** In place of serving copies of the above-described medical records, counsel may—before the deadline for service of the records—inquire of opposing counsel concerning the records that opposing counsel wishes produced and may then serve by the deadline copies of only those records specifically requested.

(b) Discovery Limits Before Comprehensive Pretrial Conference.

(1) ***Generally.*** Unless the parties agree or the court orders otherwise for good cause, the parties are limited to the following discovery before the Comprehensive Pretrial Conference under Rule 16(e) is held, provided the discovery is also permitted by Rule 26.2(e):

(A) service of the uniform interrogatories set forth in Rule 84, Form 4;

(B) service of 10 additional nonuniform interrogatories under Rule 33, with any subpart to a nonuniform interrogatory counting as a separate interrogatory;

(C) service of a request for production of documents under Rule 34, limited to the following items:

(i) a party's wage information if relevant;

(ii) written or recorded statements by any party or witness, including reports or statements of experts;

(iii) any exhibits the party intends to use at trial; and

(iv) incident reports; and

(D) depositions of the parties and any known liability experts.

Rule 29. Stipulations Regarding Discovery Procedure. Unless the court orders otherwise, the parties may agree in writing to:

(a) take a deposition before any certified reporter, at any time or place, on any notice, and in any manner specified, in which event it may be used in the same way as any other deposition; and

(b) extend the time provided in Rules 33, 34, and 36 for responses to discovery, unless it interferes with a court-ordered deadline.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) ***Depositions Permitted.*** A party may depose: (A) any party; (B) any person disclosed as an expert witness under Rule 26.1(d)(1); and (C) any document custodian in order to secure production of documents and establish evidentiary foundation. Unless all parties agree or the court orders otherwise for good cause, a party may not depose any other person or depose a person who has already been deposed in the action.

(2) ***Depositions by Plaintiff Earlier Than 30 Days After Serving the Summons and Complaint.*** A plaintiff must obtain leave of court to take a deposition earlier than 30 days after serving the summons and complaint on any defendant unless: (A) a defendant has served a deposition notice or otherwise sought discovery under these rules; or (B) the plaintiff certifies in the deposition notice, with supporting facts, that the deponent is expected to leave Arizona and will be unavailable for deposition after expiration of the 30-day period. If a party shows that it was unable, despite diligent efforts, to obtain counsel to represent it at a deposition taken under this Rule 30(a)(2), the deposition may not be used against that party.

(3) ***Incarcerated Deponents.*** Subject to Rule 30(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.

(4) ***Compelling Attendance of Deponent.*** A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 45. A party noticing the deposition of a party—or an officer, director, or managing agent of a party—need not serve a subpoena under Rule 45.

(b) Notice of a Deposition; Method of Recording; Deposition by Remote Means; Deposition of an Entity; Other Formal Requirements.

(1) ***Notice Generally.*** Unless all parties agree or the court orders otherwise, a party who wants to depose a person by oral questions must serve written notice to every other party at least 10 days before the date of the deposition. The notice must state the date, time, and place of the deposition and, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) ***Producing Materials.*** If a subpoena for documents, electronically stored information, or tangible things has been or will be served on the deponent, the materials designated for production in the subpoena must be listed in the deposition notice or in an attachment to the notice. A deposition notice to a deponent who is a party to the action may be accompanied by a separate request under Rule 34 to produce documents, electronically stored information, or tangible things at the deposition. The procedures under Rule 34 apply to any such request.

(3) ***Method of Recording.***

(A) *Permitted Methods.* Unless all parties agree or the court orders otherwise, testimony must be recorded by a certified reporter and may also be recorded by audio or audiovisual means.

(B) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the parties agree or the court orders otherwise, the noticing party bears the recording costs.

(C) *Additional Method.* With at least two days prior written notice to the deponent and other parties, any other party may designate another method for recording the testimony in addition to that specified in the original notice. Unless the parties agree or the court orders otherwise, that party bears the expense of the additional recording.

(D) *Notice of Recording by Audiovisual Means.* Any notice of recording the testimony by audiovisual means must identify the placement of the camera(s).

(E) *Transcription*. Any party may request that the testimony be transcribed. If the testimony is transcribed, the party who originally noticed the deposition is responsible for the cost of the original transcript. Any other party may, at its expense, arrange to receive a certified copy of the transcript.

(4) ***By Remote Means.*** The parties may agree or the court may order that a deposition be taken by telephone or other remote means. For the purposes of this rule and Rules 28(a), 37(a)(2), 45(b)(3)(B), and 45(e), the deposition takes place where the deponent answers the questions. If the deponent is not in the officer's physical presence, the officer may nonetheless place the deponent under oath or affirmation with the same force and effect as if the deponent was in the officer's physical presence.

(5) ***Officer's Duties.***

(A) *Before Deposition.* Unless the parties agree otherwise under Rule 29, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with a statement or notation on the record that includes:

(i) the officer's name, certification number, if any, and business address;

(ii) the date, time, and place of the deposition;

(iii)the deponent's name;

(iv)the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded by audio or audiovisual means, the officer must repeat the items in Rule 30(b)(5)(A)(i) through (iii) at the beginning of each unit of the recording medium.

The deponent's and attorneys' appearance, voice, and demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of the deposition, the officer must state or note on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other relevant matters.

(6) ***Notice or Subpoena Directed to an Entity.*** In its deposition notice or subpoena, a party may name as the deponent a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity, and must then describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. If the entity designates more than one person to testify, it must set out the matters on which each designated person will testify. Each designated person must testify about information known or reasonably available to the entity. This Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Conferences Between Deponent and Counsel; Written Questions.

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Arizona Rules of Evidence, except for Rules 103 and 615. Any party not present within 30 minutes after the time specified in the notice of deposition waives any objection that the deposition was taken without its presence. After putting the deponent under oath or affirmation, the officer personally—or a person acting in the presence and under the direction of the officer—must record the testimony by the method(s) designated under Rule 30(b)(3).

(2) ***Objections.*** The officer must note on the record any objection made during the deposition—whether to evidence, to a party's, deponent's, or counsel's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition. An objection must be stated concisely, in a nonargumentative manner, and without suggesting an answer to the deponent. Unless requested by the person who asked the question, an objecting person must not specify the defect in the form of a question or answer. Counsel may instruct a deponent not to answer—or a deponent may refuse to answer—only when necessary to preserve a privilege, to enforce a limit ordered by the court, or to present a motion under Rule 30(d)(3). Otherwise, the deponent must answer, and the testimony is taken subject to any objection.

(3) ***Conferences Between Deponent and Counsel.*** The deponent and his or her counsel may not engage in continuous and unwarranted conferences off the record during the deposition. Unless necessary to preserve a privilege, the deponent and his or her counsel may not confer off the record while a question is pending.

(4) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party who

noticed the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanctions; Motion to Terminate or Limit.

(1) ***Duration.*** Unless the parties agree or the court orders otherwise, a deposition is limited to 4 hours and must be completed in a single day. Depositions of fact witnesses are further limited by the total amount of time permitted for fact witnesses by a case's tier assignment under Rule 26.2(e), which limit be extended except as provided in Rule 26.2(f). Despite all of those limits, the court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) ***Sanctions.*** The court may impose appropriate sanctions—including any order under Rule 16(i)—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with a deposition including an unreasonable refusal to agree to extend a deposition beyond 4 hours.

(3) ***Motion to Terminate or Limit.***

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit the deposition on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The deponent or party must file the motion in the court where the action is pending or the court where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or that its scope and manner be limited as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Deponent; Changes.

(1) ***Review; Statement of Changes.*** If requested by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign and deliver to the officer a statement listing the changes and the reasons for making them.

(2) ***Officer's Certificate to Attach Changes.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent made during the 30-day period.

(f) Officer's Certification and Delivery; Documents and Tangible Things; Copies of the Transcript or Recording.

(1) ***Certification and Delivery.*** The officer must certify in writing that the deponent was duly sworn by the officer and that the deposition accurately records the deponent's

testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly deliver it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) ***Documents and Tangible Things.***

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition—and any party may inspect and copy them—but if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* On motion, the court may order that the originals be attached to the deposition until final disposition of the action.

(3) ***Copies of the Transcript or Recording.*** Unless the parties agree or the court orders otherwise, the officer must retain the record of a deposition according to the applicable records retention and disposition schedules adopted by the Supreme Court. Upon payment of a reasonable charge, the officer must provide a copy of the transcript or recording to any party or to the deponent.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who attends a noticed deposition in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who did not attend as a result of the lack of service.

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) ***Depositions Permitted.*** A party may with leave of court, by written questions, depose: (A) any party; (B) any person disclosed as an expert witness under Rule 26.1(d)(1); and (C) any document custodian in order to secure production of documents and establish evidentiary foundation. Unless all parties agree or the court orders otherwise for good cause, a party may not, by written questions, depose any other person or depose a person who has already been deposed in the action.

(2) ***Service of Written Questions by Plaintiff Earlier Than 30 Days After Serving the Summons and Complaint.*** Unless a defendant has served a deposition notice or otherwise sought discovery under these rules, a plaintiff must obtain leave of court to serve written questions under Rule 31(b) earlier than 30 days after serving the summons and complaint on that defendant.

(3) ***Incarcerated Deponents.*** Subject to Rule 31(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.

(4) ***Compelling Attendance of Deponent.*** A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 45. A party noticing the deposition of a party—or an officer, director, or managing agent of a party—need not serve a subpoena under Rule 45.

(b) Notice; Service of Questions and Objections; Questions Directed to an Entity.

(1) ***Service of Written Questions; Required Notice.*** A party who wants to depose a person by written questions must serve them on all parties, with a notice stating, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(2) ***Service of Additional Questions.*** Unless the parties agree or the court orders otherwise, any additional questions to the deponent must be served on all parties as follows: cross-questions, within 15 days after being served with the notice and direct questions; redirect questions, within 5 days after being served with cross-questions; and recross-questions, within 5 days after being served with redirect questions.

(3) ***Service of Objections.*** A party who objects to the form of a written question served under Rule 31(b)(1) or (2) must serve the objection in writing on all parties within the time allowed for serving the succeeding cross-, redirect, or recross-questions, or, if to a recross-question, within 5 days after service of the recross-questions.

(4) ***Questions Directed to an Entity.*** In accordance with Rule 30(b)(6), a party may depose by written questions a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity.

(c) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer designated in the notice a copy of the notice and copies of all the questions and

objections served under Rule 31(b). The officer must promptly proceed in the manner provided in Rule 30(b), (c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) deliver it to the party who noticed the deposition, attaching a copy of the notice, the questions, and the objections.

Rule 33. Interrogatories to Parties

(a) Generally.

(1) ***Definition.*** Interrogatories are written questions served by a party on another party.

(2) ***Number.*** During standard discovery, any party may serve on any other party interrogatories, subject to the numeric limits in Rule 26.2(e) and the procedures in Rule 26.2(f) for obtaining permission to serve more discovery. Each subpart of an interrogatory counts as one interrogatory, except that a uniform interrogatory and its subparts count as one interrogatory.

(3) ***Scope.*** An interrogatory may ask about any matter allowed under Rule 26(b). An interrogatory is not improper merely because it asks for an opinion. An interrogatory may ask for a party's contention about facts or the application of law to facts, but the court may, on motion, order that such a contention interrogatory need not be answered until a later time.

(4) ***Uniform Interrogatories.*** Rule 84, Forms 4, 5, and 6, contain uniform interrogatories that a party may use under this rule. A party may use a uniform interrogatory when it is appropriate to the legal or factual issues of the particular action, regardless of how the action or claims are designated. A party propounding a uniform interrogatory may do so by serving a notice that identifies the uniform interrogatory by form and number. A party may limit the scope of a uniform interrogatory—such as by requesting a response only as to particular persons, events, or issues—without converting it into a nonuniform interrogatory.

(b) Answers and Objections.

(1) ***Time to Respond.*** Unless the parties agree or the court orders otherwise, the responding party must serve its answers and any objections within 30 days after being served with the interrogatories. But a defendant may serve its answers and any objections within 60 days after service—or execution of a waiver of service—of the summons and complaint on that defendant.

(2) ***Answers Under Oath.*** Subject to Rule 33(b)(3), an answering party must answer each interrogatory separately and fully in writing under oath. In answering an interrogatory, a party—including a public or private entity—must furnish the information available to it. It must also reproduce the text of an interrogatory immediately above its answer to that interrogatory.

(3) ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. If a party states an objection, it must still answer the interrogatory to the extent that it is not objectionable.

(4) ***Signature.*** The party who answers the interrogatories must sign them under oath. If the answering party is a public or private entity, an authorized representative with knowledge of the information contained in the answers, obtained after reasonable inquiry, must sign them under oath. An attorney who objects to any interrogatories must sign the objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Arizona Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of determining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

State Bar Committee Note

1970 Amendment to Rule 33(d)
[Formerly Rule 33(c)]

[Rule 33(d) (formerly Rule 33(c))] is a new subdivision, adapted from Calif. Code Civ. Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision still has the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invoke the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

State Bar Committee Note

1983 Amendment to Rule 33(d)
[Formerly Rule 33(c)]

A party who is permitted by the terms of [Rule 33(d) (formerly Rule 33(c))] to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party. If the information sought exists in the form of compilations, abstracts or summaries then available to the responding party, those should be made available to the interrogating party. The final sentence of Rule 33[d] is added to make it clear that a responding party has the duty to specify by category and location, the records from which answers to interrogatories
can be derived or ascertained.

Committee Comment

2009 Amendment to Rule 33(a)(4) (Uniform Interrogatories)
[Formerly Rule 33.1]

The uniform interrogatories stated in the Appendix of Forms under Rule 84 are for use in any litigation brought under the civil rules, and the category heading for each Form is suggestive in nature and not restrictive; no uniform interrogatory is limited by the nature of the cause of action. Further, in light of Rules 26.1 and 26.2 and their comments, use of the uniform interrogatories is presumptively deemed to not be harassing or overly broad, and their language is presumptively not vague or ambiguous. Disputes arising from the use of the interrogatories should be considered in light of the standard stated in Rule 26(b)(1).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

(a) Generally. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Number.*** During standard discovery, any party may serve on any other party requests for items or distinct categories of items, subject to the numeric limits in Rule 26.2(e) and the procedures in Rule 26.2(f) for obtaining permission to serve more discovery.

(2) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or distinct category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(3) ***Responses and Objections.***

(A) *Time to Respond.* Unless the parties agree or the court orders otherwise, the party to whom the request is directed must respond in writing within 30 days after being served. But a defendant may serve its responses and any objections within 60 days after service—or execution of a waiver of service—of the summons and complaint on that defendant.

(B) *Responding to Each Item.* For each item or distinct category of items, the response must either state that inspection and related activities will be permitted as requested or state the grounds for objecting with specificity, including the reasons.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. A party objecting to part of a request must specify the objectionable part and permit inspection of the other requested materials.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use, which must be native form or another reasonably usable form that will enable the requesting party to have the same ability to access, search, and display the information as the responding party.

(E) *Producing the Documents or Electronically Stored Information.* Unless the parties agree or the court orders otherwise, these procedures apply to producing documents or electronically stored information:

(i) a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) if a request does not specify a form for producing electronically stored information, a party must produce it in native form or in another reasonably usable form that will enable the requesting party to have the same ability to access, search, and display the information as the responding party; and

(iii) absent good cause, a party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

Supplemental Note

Rule 34 provides for the inspection and, if desired, copying of discoverable documents. The costs of copying should be borne by the party that requests that copies be made. If a party designates documents to be copied after a permitted inspection, or specifies in the request that copies of documents may be provided in response, that party should be responsible for any copying costs involved. If a party, in response to a request made under this rule, elects to furnish copies in lieu of permitting an inspection, that party should bear any copying or related costs incurred. Reference should be made to A.R.S. § 12-351 (costs of compliance with subpoena for production of documentary evidence; payment by requesting party; definitions) for guidelines as to what constitutes reasonable copying charges.

Rule 35. Physical and Mental Examinations

(a) Examination on Order.

(1) ***Generally.*** The court where the action is pending may order a party whose physical or mental condition is in controversy to submit to a physical or mental examination by a physician or psychologist. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) ***Motion and Notice; Contents of the Order.*** An order under Rule 35(a)(1):

(A) may be entered only on motion for good cause and on notice to all parties and the person to be examined;

(B) must specify the time, place, manner, conditions, and scope of the examination; and

(C) must specify the person or persons who will perform the examination.

(b) Examination on Notice; Motion Objecting to Examiner; Failure to Appear.

(1) ***Notice.*** When the parties agree that an examination is appropriate but do not agree on the examiner, the party seeking the examination may proceed by giving reasonable—and not fewer than 30 days—written notice to all other parties. The notice must:

(A) identify the party or person to be examined;

(B) specify the time, place, and scope of the examination; and

(C) identify the examiner(s).

(2) ***Motion Objecting to Examiner.*** After being served with a proper notice under Rule 35(b)(1), a party who objects to the examiner(s) identified in the notice may file a motion in the court where the action is pending. For good cause, the court may order that the examination be conducted by a physician or psychologist other than the one specified in the notice.

(3) ***Failure to Appear.*** Unless the party has filed a motion under Rule 26(c), the party must appear—or produce the person in the party's custody or legal control—for the noticed examination. If the party fails to do so, the court where the action is pending may, on motion, make such orders concerning the failure as are just, including those under Rule 37(f).

(c) Attendance of Representative; Recording.

(1) ***Attendance of Representative.*** Unless his or her presence may adversely affect the examination's outcome, the person to be examined has the right to have a representative present during the examination.

(2) ***Recording*****.**

(A) *Audio or Video Recording*. The person to be examined or the party requesting the examination may audio-record or video-record any examination. On a showing that such recording may adversely affect the examination's outcome, the court may limit the recording, using the least restrictive means possible.

(B) *Copy of Recording*. A copy of a recording made of an examination must be provided to any party upon request.

(d) Examiner's Report; Other Like Reports of Same Condition; Waiver of Privilege.

(1) ***Contents.*** The examiner's report must be in writing and set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(2) ***Request by the Party or Person Examined.*** The party who is examined—or who produces the person examined—may request the examiner's report, like reports of the same condition, and written or recorded notes from the examination. If such a request is made, the party who moved for or noticed the examination must, within 20 days of the examination or request—whichever is later—deliver to the requestor copies of:

(A) the examiner's report;

(B) like reports of all earlier examinations of the same condition; and

(C) all written or recorded notes made by the examiner and the person examined at the time of the examination, and must provide access to the original written or recorded notes for purposes of comparing them with the copies.

(3) ***Request by the Examining Party.*** After delivering the materials required by Rule 35(d)(2), the party who moved for or noticed the examination is entitled, on its request, to receive from the party who was examined—or who produced the person examined—like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony by any other person who has examined or who later examines the same condition.

(5) ***Failure to Deliver a Report as Ordered.*** On motion, the court may order—on terms that are just—that a party deliver a report of an examination. If the report is not delivered as ordered, the court may exclude the examiner's testimony at trial.

(6) ***Scope.*** This Rule 35(d) applies to examinations conducted by agreement of the parties, unless the agreement states otherwise. This rule does not preclude a party from obtaining an examiner's report, or deposing an examiner, under other rules.

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) ***Number.*** During standard discovery, any party may serve on any other party requests for admission, subject to the numeric limits in Rule 26.2(e) and the procedures in Rule 26.2(f) for obtaining permission to serve more discovery.

(4) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. But a defendant may serve its answers and any objections within 60 days after service—or execution of a waiver of service—of the summons and complaint on that defendant. A shorter or longer time for responding may be agreed to by the parties or ordered by the court.

(5) ***Answer.***

(A) *Generally.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.

(B) *Fairly Respond.* A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. An answer does not fairly respond to a request if it:

(i) responds to a request about a document by stating that "the document speaks for itself";

(ii) responds to a request about a document by stating that one "denies any allegations inconsistent with the language of a document"; or

(iii) responds to a request by claiming that it states a legal conclusion.

(C) *Lack of Knowledge or Information.* The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(6) ***Objections.*** The grounds for objecting to a request must be stated. A party may not object solely on the ground that the request presents a genuine issue for trial.

(7) ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. If the court finds that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(e) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16, the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery.

(1) ***Generally.*** A party may move for an order compelling disclosure or discovery. The party must serve the motion on all other parties and affected persons and must attach a good faith consultation certificate complying with Rule 7.1(h).

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court in the county where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26.1, any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(b)(4);

(iii) a party fails to answer an interrogatory served under Rule 33;

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34; or

(v) a person fails to produce materials requested in a subpoena served under Rule 45.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order to compel an answer.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this rule, the court may treat an evasive or incomplete disclosure, answer, or response as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court may, after giving an opportunity to be heard, require the party or person whose conduct necessitated the motion, the party or attorney advising that conduct, or both, to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court may not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both, to pay the party or person who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court may not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may—after giving an opportunity to be heard—apportion the reasonable expenses, including attorney's fees, for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions by the Court in the County Where the Deposition Is Taken.*** If the court in the county where the deposition is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) ***Sanctions by the Court Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(b)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 35 or 37(a), the court where the action is pending may enter further just orders. They may include the following:

(i) directing that the matters described in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment, in whole or in part, against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court

may issue any of the orders listed in Rule 37(b)(2)(A)(i) through (vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court may order the disobedient party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Timely Disclose; Inaccurate or Incomplete Disclosure; Disclosure After Deadline or During Trial.

(1) ***Failure to Timely Disclose.*** Unless the court orders otherwise for good cause, a party who fails to timely disclose information, a witness, or a document required by Rule 26.1 may not, unless the court specifically finds that such failure is harmless, use the information, witness, or document as evidence at trial, at a hearing, or with respect to a motion.

(2) ***Inaccurate or Incomplete Disclosure.*** On motion, the court may order a party or attorney who makes a disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure.

(3) ***Other Available Sanctions.*** In addition to or instead of the sanctions under Rule 37(c)(1) and (2), the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i) through (vi).

(4) ***Use of Information, Witness, or Document Disclosed After Scheduling Order or Case Management Order Deadline or Later Than 60 Days Before Trial.*** A party seeking to use information, a witness, or a document that it first disclosed later than the deadline set in a Scheduling Order or a Case Management Order, or—in the absence of such a deadline—60 days before trial, must obtain leave of court by motion. The motion must be supported by affidavit and must show that:

(A) the information, witness, or document would be allowed under the standards of Rule 37(c)(1); and

(B) the party disclosed the information, witness, or document as soon as practicable after its discovery.

(5) ***Use of Information, Witness, or Document Disclosed During Trial.*** A party seeking to use information, a witness, or a document that it first disclosed during trial must obtain leave of court by motion. The motion must be supported by affidavit and must show that:

(A) the party, acting with due diligence, could not have earlier discovered and disclosed the information, witness, or document; and

(B) the party disclosed the information, witness, or document immediately upon its discovery.

(d) Failure to Timely Disclose Unfavorable Information. If a party or attorney knowingly fails to make a timely disclosure of damaging or unfavorable information required under Rule 26.1, the court may in its discretion impose any sanctions the court deems appropriate in the circumstances. The court's discretion extends to imposing serious sanctions, up to and including dismissal of the action in whole or in part, or rendering a default judgment.

(e) Expenses on Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves the matter true—including the genuineness of a document—the requesting party may move that the non-admitting party pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(1) the request was held objectionable under Rule 36(a);

(2) the admission sought was of no substantial importance;

(f) Party's Failure to Attend Its Own Deposition or to Respond to Interrogatories or Requests for Production.

(1) ***Generally.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(b)(4)—fails, after being served with proper notice, to appear for his or her deposition; or

(ii) a party—after being properly served with interrogatories under Rule 33 or requests for production under Rule 34—fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must attach a good faith consultation certificate complying with Rule 7.1(h).

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(f)(1)(A) is not excused or mitigated on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i) through (vi). Instead of or in addition to these sanctions, the court may require the party failing to act, the attorney advising that party, or both, to pay the reasonable expenses—including attorney's fees—caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(g) Failure to Preserve Electronically Stored Information.

(1) ***Duty to Preserve.***

(A) *Generally.* A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) *Reasonable Anticipation.* A person reasonably anticipates an action's commencement if:

(i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or

(ii) it seriously contemplates commencing an action or takes specific steps to do so.

(C) *Reasonable Steps to Preserve.*

(i) A party must take reasonable steps to prevent the routine operation of an electronic information system or application of a document retention policy from destroying information that should be preserved.

(ii) Factors that a court should consider in determining whether a party took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy, the timeliness of the party's actions, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the parties' resources and technical sophistication, and the amount in controversy.

(2) ***Remedies and Sanctions.*** If electronically stored information that should have been preserved is lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, a court may order additional discovery to restore or replace it, including, if appropriate, an order under Rule 26(b)(2). If the information cannot be restored or replaced through additional discovery, the court:

(A) upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or

(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:

(i) presume that the lost information was unfavorable to the party;

(ii) instruct the jury that it may or must presume the information was unfavorable to the party; or

(iii) upon also finding prejudice to another party, dismiss the action or enter a default judgment.

(h) Orders to Achieve Proportionality. Timely and full compliance with Rules 26, 26.1, and 26.2 being essential to the discovery process, achieving proportionality, and trial preparation, the court may make any order to require or prohibit disclosure or discovery to achieve proportionality under Rule 26(b)(1), including without limitation that:

(1) the discovery not be had;

(2) the discovery may be had only on specified terms and conditions, including a designation of the time and place;

(3) the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; and

(5) the costs, expenses, and attorney fees of discovery or disclosure be allocated among the parties as justice requires.

Comment

2018 Amendment to Rule 37

Rule 37 is amended in several ways, to 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.

First, Rule 37 adds a new provision, Rule 37(h), that empowers the court to allocate "the costs, expenses, and attorney fees of discovery or disclosure … among the parties as justice requires." This amendment is meant to encourage courts to make sure the parties are making prompt and compliant disclosures under Rule 26.1. While it is expected that courts have a window into discovery and disclosure compliance in case management, amended Rule 37(h) works hand-in-glove with other 2018 amendments that provide the court with more information to enable it to supervise compliance. Amended Rule 26.2(i) now requires the parties to report after discovery how much discovery they actually took, permitting the court to reallocate fees if a party has taken more discovery than it was entitled to take under the discovery tier to which it was assigned under amended Rule 26.2(b). And amended Rules 26(f) and 26.1(f)(3) require late-producing or late-disclosing parties to explain to each other in writing why they did not timely produce or disclose documents or information.

Second, the authority of the court to sanction is reinforced and broadened by a set of revisions to various subparts of Rule 37. Amended Rule 37(c)(1) requires that a court specifically determine that an untimely disclosure was harmless before permitting use of the untimely-disclosed information. Amended Rule 37(d) contains language underscoring the court's discretion to impose any sanctions it deems appropriate in the circumstances, which in turn reinforces that the issuance of such sanctions is subject to review for abuse of discretion. Amended Rule 37(f)(2) explains that a failure to respond to discovery is neither mitigated nor excused by claims that the discovery sought was objectionable.

The 2018 revisions to Rules 8, 26, 26.1, 26.2, and 37 work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Amended Rule 26.2 emphasizes keeping discovery proportional based on the

understanding that discovery must be a followup to robust initial disclosure under Rule 26.1. These amendments seek to achieve robust initial disclosure through a stronger and clearer mandate to impose sanctions under Rule 37 where in the court's discretion it is warranted, both for failures to disclose relevant material and for abuses of discovery.

Rule 45. Subpoena

(a) Generally.

(1) ***Requirements—Generally.*** Every subpoena must:

(A) state the name of the Arizona court from which it issued;

(B) state the title of the action, the name of the court in which it is pending, and its civil action number;

(C) command each person to whom it is directed to do the following at a specified time and place:

(i) attend and testify at a deposition, hearing, or trial;

(ii) produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or

(iii) permit the inspection of premises; and

(D) be substantially in the form set forth in Rule 84, Form 9.

(2) ***Issuance by Clerk.*** The clerk must issue a signed but otherwise blank subpoena to a party requesting it. That party must complete the subpoena before service. The State Bar of Arizona may also issue signed subpoenas on behalf of the clerk through an online subpoena issuance service approved by the Supreme Court.

(b) Subpoena for Deposition, Hearing, or Trial; Duties; Objections.

(1) ***Issuing Court.*** A subpoena commanding attendance at a hearing or trial must issue from the superior court in the county where the hearing or trial is to be held. Except as otherwise provided in Rule 45.1, a subpoena commanding attendance at a deposition must issue from the superior court in the county where the action is pending.

(2) ***Combining or Separating a Command to Produce or to Permit Inspection.*** A command to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

(3) ***Place of Appearance.***

(A) *Trial Subpoena.* Subject to Rule 45(e)(2)(B)(iii), a subpoena commanding attendance at a trial may require the subpoenaed person to travel from anywhere within the state.

(B) *Deposition or Hearing Subpoena.* A subpoena commanding a person who is neither a party nor a party's officer to attend a deposition or hearing may not require the subpoenaed person to travel to a place other than:

(i) the county where the person resides or transacts business in person;

(ii) the county where the person is served with a subpoena, or within 40 miles from the place of service; or

(iii) such other convenient place fixed by a court order.

(4) ***Command to Attend a Deposition—Notice of Recording Method.*** A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(5) ***Objections; Appearance Required.*** Objections to a subpoena commanding attendance at a deposition, hearing, or trial, must be made by timely motion under Rule 45(e)(2). Unless excused from doing so by the party or attorney serving a subpoena, by a court order, or by any other provision of this Rule 45, a person who is properly served with a subpoena must attend and testify at the date, time, and place specified in the subpoena.

(c) Subpoena to Produce Materials or to Permit Inspection; Duties; Objections.

(1) ***Issuing Court.*** If separate from a subpoena commanding attendance at a deposition, hearing, or trial, a subpoena commanding a person to produce designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, must issue from the superior court in the county where the production or inspection is to be made.

(2) ***Electronically Stored Information.***

(A) *Specifying the Form for Electronically Stored Information.* A subpoena may specify the form or forms in which electronically stored information is to be produced.

(B) *Form for Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding may produce it in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy. Any such objection must be made in the time and manner provided in Rule 45(c)(6). On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery. Rule 26(e) applies to any motion to quash, motion for protective order, or motion to compel concerning an objection that electronically stored information is not reasonably accessible.

(3) ***Appearance Not Required.*** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless the subpoena also commands attendance at a deposition, hearing, or trial.

(4) ***Documents*.** A person responding to a subpoena to produce documents must produce them as they are kept in the usual course of business, or organize and label them to correspond with the categories in the demand.

(5) ***Claiming Privilege or Protection.***

(A) A person withholding subpoenaed information under a claim that it is privileged or subject to protection as work-product material must promptly comply with Rule 26(b)(6)(A), unless a timely objection is made under Rule 45(c)(6)(A) that providing the information required by Rule 26(b)(6)(A) would impose an undue burden or expense. Unless the court orders otherwise for good cause, a subpoenaing party requesting a privilege log must pay the subpoenaed person's reasonable expenses in preparing the log.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as work-product material, the person making the claim and the receiving parties must comply with Rule 26(b)(6)(A) or, if applicable, Rule 26(b)(6)(B).

(6) ***Objection Procedures; Duty to Confer.***

(A) *Form and Time for Objection.*

(i) A person commanded to produce documents, electronically stored information, or tangible things, or to permit inspection, may serve a written objection to producing, inspecting, copying, testing, or sampling any or all of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested or from sources that are not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy. The objection must state the basis for the objection, and must include the name, address, and telephone number of the person, or the person's attorney, serving the objection.

(ii) The objection must be served on the party or attorney serving the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.

(iii) A person served with a subpoena that combines a command to produce materials or to permit inspection, with a command to attend a deposition, hearing, or trial, may object to any part of the subpoena. A person objecting to the part of a combined subpoena that commands attendance at a deposition, hearing, or trial must attend and testify at the date, time, and place specified in the subpoena, unless excused as provided in Rule 45(b)(5).

(B) *Procedure After Objecting.*

(i) A person objecting to a subpoena to produce materials or to permit inspection need not comply with those parts of the subpoena that are the subject of the objection, unless ordered to do so by the issuing court. The objecting person also may move for a protective order or to modify or quash the subpoena.

(ii) The party serving the subpoena may move under Rule 37(a) to compel compliance with the subpoena. The motion must comply with Rule 37(a)(1), and must be served on the subpoenaed person and all other parties under Rule 5(c).

(iii) Any order to compel entered by the court must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(C) *Duty to Confer.* Before bringing any motion to compel, motion to quash, or motion for protective order regarding compliance with a subpoena, the movant must attempt to resolve the dispute by good faith consultation with the opposing party or person. Any motion regarding compliance with a subpoena must be accompanied by a good faith consultation certificate under Rule 7.1(h).

(7) ***Production to Other Parties.*** Unless otherwise stipulated by the parties or ordered by the court, a party receiving documents, electronically stored information, or tangible things in response to a subpoena must promptly make such materials available to all other parties for inspection and copying, along with any other disclosures required by Rule 26.1.

(d) Service.

(1) ***General Requirements; Tendering Fees.*** A subpoena may be served by any person who is not a party and is at least 18 years old. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law.

(2) ***Exceptions to Tendering Fees.*** Fees and mileage need not be tendered when the subpoena commands attendance at a trial or hearing or is issued on behalf of the State of Arizona or any of its officers or agencies.

(3) ***Notice to, and Service on Other Parties.*** A copy of every subpoena and any proof of service must be served on every other party in accordance with Rule 5(c). If the subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party at least 5 days before it is served on the person to whom it is directed.

(4) ***Service Within the State.*** A subpoena may be served anywhere within the state.

(5) ***Proof of Service.*** Proof of service may not be filed except as allowed by Rule 5.1(c)(2)(A). Any such filing must be with the court clerk for the county where the action is pending and must include the server's certificate stating the date and manner of service and the names of the persons served.

(e) Protecting a Person Subject to a Subpoena; Motion to Quash or Modify.

(1) ***Avoiding Undue Burden or Expense; Sanctions.***

(A) *Generally.* A party or an attorney responsible for serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Absent good cause, a subpoena may not seek production of materials that have already been produced in the action or that are available from parties to the action.

(B) *Subpoena to Produce Materials or to Inspect Premises.* Unless otherwise ordered by the court for good cause, the party seeking discovery must pay the reasonable expenses incurred by the subpoenaed party in responding to a subpoena seeking the production of documents, electronically stored information, tangible things, or an inspection of premises. If a person served with a subpoena expects to incur expenses other than routine clerical and per-page copying costs as allowed by statute, an advance estimate of those costs must be provided to the subpoenaing party before they are incurred. The court may order payment of costs in advance.

(C) *Sanctions.* The issuing court must impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party, attorney, or person who fails to comply with Rule 45(e)(1)(A) or (B).

(2) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court in the county where the case is pending or from which a subpoena was issued must quash or modify a subpoena if it:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel to a location other than the places specified in Rule 45(b)(3)(B);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden or expense.

(B) *When Permitted.* On timely motion, the superior court in the county where the case is pending or from which a subpoena was issued may quash or modify a subpoena if:

(i) it requires disclosing a trade secret or other confidential research, development, or commercial information;

(ii) it requires disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party;

(iii) it requires a person who is neither a party nor a party's officer to incur substantial travel expense; or

(iv) justice so requires.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(e)(2)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions, including any conditions and limits set forth in Rule 26(c), as the court deems appropriate:

(i) if the party or attorney serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and

(ii) if the person's travel expenses or the expenses resulting from the production are at issue, the party or attorney serving the subpoena assures that the subpoenaed person will be reasonably compensated for those expenses.

(D) *Time for Motion.* A motion to quash or modify a subpoena must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier.

(E) *Service of Motion.* Any motion to quash or modify a subpoena must be served on the party or the attorney serving the subpoena. The party or attorney who served the subpoena must serve a copy of any such motion on all other parties.

(f) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it. A failure to obey must be excused if the subpoena purports to require a person who is neither a party nor a party's officer to attend or produce at a location other than the places specified in Rule 45(b)(3)(B).

Comment

2017 Amendment

A.R.S. § 12-351 also addresses recoverable costs in connection with the production of documents in response to a subpoena. Additional costs are allowed under Rule 45(d)(1) for a subpoena that compels testimony. The court may specify additional conditions on the production of electronically stored information to guard against undue burden or expense, as allowed by Rule 45(c)(2)(D).

Rule 45.2. Dispute Resolution Procedures Regarding Preservation Requests

(a) Generally; Scope. This rule governs the resolution of disputes concerning the scope of a party's or nonparty's duty to preserve electronically stored information.

(b) Definitions. For purposes of this rule:

(1) A "preservation request" is a written notice to a party or nonparty requesting that the nonparty preserve electronically stored information for possible use in pending or anticipated litigation.

(2) A "nonparty" is a person who receives a preservation request under this rule and is not a party to a pending action in which the request is made. The preservation request may, but need not, relate to anticipated litigation against the nonparty.

(3) A "requestor" is a person who makes a preservation request.

(4) A "petitioner" is a nonparty who files a petition under Rule 45.2(e).

(5) A "respondent" is a requestor who has been identified as a person expected to oppose a petition filed under Rule 45.2(e).

(c) Objections. A party or nonparty receiving a preservation request may serve a written objection on the requestor. Grounds for objection may include that there is no duty to preserve electronically stored information under Rule 37(g)(1), or that the requested preservation would impose an undue burden or expense. A party or nonparty does not waive an objection to a preservation request by failing to object in writing under this rule, but the dispute resolution procedures in Rule 45.2(d) and (e) apply only if a written objection is served.

(d) Dispute Resolution Procedures—Pending Action.

(1) ***Parties.*** If the parties to a pending action are unable to satisfactorily resolve any dispute regarding the preservation of electronically stored information and seek a resolution from the court, they must follow the procedures in Rule 26(d).

(2) ***Nonparties.*** If a preservation request is made to a nonparty in connection with an action pending in superior court, the nonparty may move for a Rule 26(c) protective order in the action. The motion must be accompanied by a Rule 7.1(h) good faith consultation certificate.

(e) Dispute Resolution Procedures—No Pending Action.

(1) ***Content of Petition.*** A nonparty may file a verified petition, asking the court to determine the existence or scope of any duty to preserve electronically stored information. The petition must be titled "Verified Rule 45.2 Petition." Any petition must:

(A) be accompanied by a Rule 7.1(h) good faith consultation certificate;

(B) identify, by name and address, the respondent expected to oppose the petition;

(C) identify—in separately numbered paragraphs—each issue on which the petitioner and the respondent were unable to reach agreement, and state the petitioner's position on each issue;

(D) if the petitioner contends that a preservation request imposes an undue burden or expense, describe the burden and provide an estimate of the expense likely to be incurred; and

(E) state the specific relief requested.

(2) ***Service of Petition; Response; Reply.*** The petition must be served on the respondent in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable. The petition must be accompanied by a notice in the form set forth in Rule 84, Form 7. Proof of service must be made as provided in Rule 4(g). The requestor must serve and file any response within 20 days after service is complete, if service is made in the State of Arizona, or within 30 days after service is complete, if service is made outside the State of Arizona. The response may be in the form of a memorandum. The petitioner may file a reply memorandum within 5 days after service of any response. The page limitations of Rule 7.1(a)(3) apply to any response or reply filed under this rule.

(3) ***Applicable Procedures; Hearing.*** The petition will be decided under the Rule 7.1 procedures governing motions. Unless the court orders otherwise for good cause, no discovery is permitted. Unless the petitioner and the respondent stipulate otherwise, the court must hold a hearing on the relief the petition seeks.

(f) Determination. The court may issue orders limiting a party or nonparty's preservation obligation based on the factors set forth in Rule 26(b)(1) and 37(g). If the court finds that preservation would impose an undue burden or expense on the petitioner, preservation may be ordered only on such conditions as are just, which may include requiring the requestor to pay some or all of the reasonable costs of preservation. Reasonable expenses incurred in connection with a proceeding under this rule, including attorney's fees, may be awarded as allowed by Rule 37(a)(5).

(g) Effect of Order. A party or nonparty who complies with a preservation order obtained under this rule is deemed to have taken reasonable steps to preserve electronically stored information under Rule 37(g).

Rule 84. Forms

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity these rules contemplate.

Comment

2017 Amendment

Consistent with 1946 Advisory Committee Note accompanying Rule 84 of the Federal Rules of Civil Procedure, the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules from which they are drawn, and, in that event, the practitioner using them may rely on them. A practitioner is not required, however, to use such forms.

Form 3. Joint Report of Discovery Conducted.

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report of Discovery Conducted**
Defendants	)	*(Tier ___ Case)*
	)	Assigned to:

The parties signing below certify that this is a complete and accurate report of the discovery conducted in this matter. With regard to any issues upon which the parties could not agree, they have set forth their positions separately in item 6 below.

1. Brief explanation of the case's Tier assigned under Rule 26.2 and any changes to the Tier during the course of the case:

2. Standard Fact Discovery: Under Rule 26.2(e), this case was limited to the following discovery:

- Total hours of fact witness deposition: _____
- Number of Rule 33 interrogatories: _____
- Number of Rule 34 requests for production: _____
- Number of Rule 36 requests for admission: _____
- Number of days to complete fact discovery: _____

3. Conducted Fact Discovery: The following discovery was conducted in this case:

- Total hours of fact witness deposition: _____
- Number of Rule 33 interrogatories: _____
- Number of Rule 34 requests for production: _____
- Number of Rule 36 requests for admission: _____
- Number of days to complete fact discovery: _____

4. Discovery Beyond Tier Limits: This case included additional discovery conducted beyond its Tier limits obtained pursuant to Rule 26.2(f) in the following category(ies) and for the following reason(s):

Total hours of fact witness deposition: _____

Number of Rule 33 interrogatories: _____

Number of Rule 34 requests for production: _____

Number of Rule 36 requests for admission: _____

Number of days to complete fact discovery: _____

Reason(s) for Discovery Listed Above Beyond Tier Limits:

_____

_____

5. Variations in Expert Discovery: This case varied from the procedures for expert discovery described in Rule 26.2(h) for the following reason:

_____

_____

6. Special Considerations: The parties request the court to consider at this time the following information concerning discovery in this case, including the reason(s) for any differences between standard fact discovery and the fact discovery actually conducted:

7. Items Upon Which the Parties Do Not Agree: The parties were unable in good faith to agree upon the following items in this report, and the position of each party as to each item is as follows:

Dated this ___ day of _____, 20 ___.

_____ _____

For Plaintiff For Defendant

_____ _____

For: For:

Form 7. Notice of Petition: Preservation of Electronically Stored Information.

Notice of Verified Petition:

Preservation of Electronically Stored Information

THIS IS AN IMPORTANT NOTICE REGARDING YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY. IF YOU DO NOT UNDERSTAND IT, YOU MAY WISH TO CONTACT A LAWYER.

Nature of Proceeding. You have been served with a Petition under Rule 45.2 of the Arizona Rules of Civil Procedure. The Petition asks the court to decide issues concerning the petitioner's obligation to preserve electronically stored information for possible use in pending or anticipated litigation. You have been served with the Petition and this Notice because you are a person who requested that the petitioner preserve electronically stored information, and the petitioner has identified you as a respondent who may oppose the Petition.

Your Obligation to Respond to the Petition. You are required to file a written response to the Petition with the court, and to mail or hand-deliver a copy of your response to the petitioner, within the time required by Rule 45.2 of the Arizona Rules of Civil Procedure. IF YOU ARE SERVED WITHIN THE STATE OF ARIZONA, YOUR RESPONSE MUST BE FILED WITHIN 20 DAYS AFTER YOU ARE SERVED, NOT COUNTING THE DAY OF SERVICE. IF YOU ARE SERVED OUTSIDE THE STATE OF ARIZONA, YOUR RESPONSE MUST BE FILED WITHIN 30 DAYS AFTER YOU ARE SERVED, NOT COUNTING THE DAY OF SERVICE. WITHIN THE SAME TIME PERIOD, YOU MUST ALSO MAIL OR HAND-DELIVER A COPY OF YOUR RESPONSE TO THE PETITIONER AT THE ADDRESS INDICATED IN THE UPPER LEFT-HAND CORNER OF THE VERIFIED PETITION.

Effect of Failing to Respond. If you do not respond to the Petition within the time required, the court may issue orders and grant relief in your absence. Any such orders or relief granted by the court in connection with the Petition may impact your legal rights. Examples of the types of orders that the court may issue in ruling on the Verified Petition are described below.

Court's Orders on Petition. In ruling on the Petition, the court may make orders as allowed by Rule 45.2 of the Arizona Rules of Civil Procedure, including:

(a) determining the existence and scope of the petitioner's obligation to preserve electronically stored information, including limiting the scope of the petitioner's obligation or finding that the petitioner has no obligation to preserve electronically stored information;

(b) determining that the preservation of the electronically stored information at issue would impose an undue burden or expense on the petitioner;

(c) imposing limits or conditions on any obligation of the petitioner to preserve electronically stored information, which may include requiring you (the respondent), to pay some or all of the petitioner's reasonable costs of preserving the information; and

(d) awarding reasonable expenses as allowed by Rule 45.2(f) of the Arizona Rules of Civil Procedure, which may include an award of attorney's fees, to the party who prevails in connection with the Verified Petition.

Effect of Preservation Order. A preservation order issued in connection with a Petition may impact your legal rights. A petitioner complying with a preservation order obtained in this proceeding is deemed to have taken reasonable steps to preserve electronically stored information as required by Arizona Rule of Civil Procedure 37(g). *See* Rule 45.2(g) of the Arizona Rules of Civil Procedure.

Form 9. Form of Subpoena

Name:

Address:

City:

State:

Phone:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF _____

_____	)	
Plaintiff	)	Case No.:
	)	
vs.	)	**SUBPOENA IN A CIVIL CASE**
	)	
_____	)	
Defendant	)	
	)	
	)	

TO: _____
(Name of Recipient)

[Select one or more of the following, as appropriate:]

[ ] **For Attendance of Witnesses at Hearing or Trial**

YOU ARE COMMANDED to appear in the Superior Court of the State of Arizona, in and for the County of _____, at the place, date and time specified below to testify at [ ] a hearing [ ] trial in the above cause:

Judicial Officer:

Courtroom:

Address:

Date:

Time:

[ ] **For Taking of Depositions**

YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above cause:

Place of Deposition:

Address:

Date:

Time:

Method of Recording:

[ ] **For Production of Documentary Evidence or Inspection of Premises**

YOU ARE COMMANDED, to produce and permit inspection, copying, testing, or sampling of the following designated documents, electronically stored information or tangible things, or to permit the inspection of premises:

[designation of documents, electronically stored information or tangible things, or the location of the premises to be inspected]

at the place, date, and time specified below:

Place of Production or Inspection:

Address:

Date:

Time:

[The following text must be included in every subpoena:]

Your Duties in Responding To This Subpoena

***Attendance at a Trial*.** If this subpoena commands you to appear at a trial, you must appear at the place, date and time designated in the subpoena unless you file a timely motion with the court and the court quashes or modifies the subpoena. *See* Rule 45(b)(5) and Rule 45(e)(2) of the Arizona Rules of Civil Procedure. *See also* "Your Right To Object To This Subpoena" section below. Unless a court orders otherwise, you are required to travel to any part of the state to attend and give testimony at a trial. *See* Rule 45(b)(3)(A) of the Arizona Rules of Civil Procedure.

***Attendance at a Hearing or Deposition*.** If this subpoena commands you to appear at a hearing or deposition, you must appear at the place, date and time designated in this subpoena unless either: (1) you file a timely motion with the court and the court quashes or modifies the subpoena; or (2) you are not a party or a party's officer and this subpoena commands you to travel to a place other than: (a) the county where you reside or you transact business in person; or (b) the county where you were served with the subpoena or within forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order. *See* Rule 45(b)(3)(B) and Rule 45(e)(2)(A)(ii) of the Arizona Rules of Civil Procedure. *See also* "Your Right To Object To This Subpoena" section below.

***Production of Documentary Evidence*.** If this subpoena commands you to produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored

information, or tangible things, you must make the items available at the place, date, and time designated in this subpoena, and in the case of electronically stored information, in the form or forms requested, unless you provide a good faith written objection to the party or attorney who served the subpoena. You may object to the production of electronically stored information from sources that you identify as not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy. *See* Rule 45(c)(2)(D) of the Arizona Rules of Civil Procedure. Other grounds for objection are described in the "Your Right To Object To This Subpoena" section below. If this subpoena does not specify a form for producing electronically stored information, you may produce it in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the responding person, but you need not produce the same electronically stored information in more than one form. *See* Rule 45(c)(2)(B) and (C) of the Arizona Rules of Civil Procedure.

If the subpoena commands you to produce documents, you have the duty to produce the designated documents as they are kept by you in the usual course of business, or you may organize the documents and label them to correspond with the categories set forth in the subpoena. *See* Rule 45(c)(4) of the Arizona Rules of Civil Procedure.

Inspection of Premises. If the subpoena commands you to make certain premises available for inspection, you must make the designated premises available for inspection on the date and time designated in this subpoena unless you provide a good faith written objection to the party or attorney who served the subpoena. *See* Rule 45(c)(6) of the Arizona Rules of Civil Procedure. *See also* "Your Right to Object to This Subpoena" section below.

Combined Subpoena. You should note that a command to produce certain designated materials, or to permit the inspection of premises, *may* be combined with a command to appear at a trial, hearing, or deposition. *See* Rule 45(b)(2) of the Arizona Rules of Civil Procedure. You do not, however, need to appear in person at the place of production or inspection unless the subpoena *also* states that you must appear for and give testimony at a hearing, trial or deposition. *See* Rule 45(c)(3) of the Arizona Rules of Civil Procedure.

Your Right To Object To This Subpoena

Generally. If you have concerns or questions about this subpoena, you should first contact the party or attorney who served the subpoena. The party or attorney serving the subpoena has a duty to take reasonable steps to avoid imposing an undue burden or expense on you. The superior court enforces this duty and may impose sanctions upon the party or attorney serving the subpoena if this duty is breached. *See* Rule 45(e)(1) of the Arizona Rules of Civil Procedure. Unless otherwise ordered by the court for good cause, the party seeking discovery from you must pay your reasonable expenses incurred in responding to a subpoena seeking the production of documents, electronically stored information, tangible things, or an inspection of premises. If you expect to incur costs other than routine clerical and per-page copying costs as allowed by A.R.S. § 12-351, you must provide an advance estimate of those expenses to the subpoenaing party before they are incurred. The court may order the party seeking discovery from you to pay costs in advance. *See* Rule 45(e)(1)(B).

Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition. If you wish to object to a subpoena commanding your appearance at a hearing, trial or deposition,

you must file a motion to quash or modify the subpoena with the court to obtain a court order excusing you from complying with this subpoena. *See* Rules 45(b)(5) and 45(e)(2) of the Arizona Rules of Civil Procedure. The motion must be filed in the superior court of the county in which the case is pending or in the superior court of the county from which the subpoena was issued. *See* Rule 45(e)(2)(A) and (B) of the Arizona Rules of Civil Procedure. The motion must be filed before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(e)(2)(D) of the Arizona Rules of Civil Procedure. You must send a copy of any motion to quash or modify the subpoena to the party or attorney who served the subpoena. *See* Rule 45(e)(2)(E) of the Arizona Rules of Civil Procedure. Even if you file such a motion, you must still attend and testify at the date, time, and place specified in the subpoena, unless excused from doing so—by the party or attorney serving the subpoena or by a court order—before the date and time specified for your appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

The court *must* quash or modify a subpoena:

(1) if the subpoena does not provide a reasonable time for compliance;

(2) unless the subpoena commands your attendance at a trial, if you are not a party or a party's officer and if the subpoena commands you to travel to a place other than: (a) the county where you reside or transact business in person; (b) the county where you were served with a subpoena, or within forty (40) miles from the place of service; or (c) such other convenient place fixed by a court order; or

(3) if the subpoena requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(4) if the subpoena subjects you to undue burden.

See Rule 45(e)(2)(A) of the Arizona Rules of Civil Procedure.

The court *may* quash or modify a subpoena:

(1) if the subpoena requires you to disclose a trade secret or other confidential research, development or commercial information;

(2) if you are an unretained expert and the subpoena requires you to disclose your opinion or information resulting from your study that you have not been requested by any party to give on matters that are specific to the dispute;

(3) if you are not a party or a party's officer and the subpoena would require you to incur substantial travel expense; or

(4) if the court determines that justice requires the subpoena to be quashed or modified.

See Rule 45(e)(2)(B) of the Arizona Rules of Civil Procedure.

In these last four circumstances, a court may, instead of quashing or modifying a subpoena, order your appearance or order the production of material under specified conditions if: (1) the serving party or attorney shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (2) if your travel expenses or the expenses resulting from the production are at issue, the court ensures that you will be reasonably compensated. *See* Rule 45(e)(2)(C) of the Arizona Rules of Civil Procedure.

***Procedure for Objecting to Subpoena for Production of Documentary Evidence*.** If you wish to object to a subpoena commanding you to produce documents, electronically stored information or tangible items, or to permit the inspection of premises, you may send a good faith written objection to the party or attorney serving the subpoena that objects to: (1) producing, inspecting, copying, testing, or sampling any or all of the materials designated in the subpoena; (2) inspecting the premises; or (3) producing electronically stored information in the form or forms requested or from sources that are not reasonably accessible because of undue burden or expense, the good-faith routine operation of an electronic information system, or the good-faith and consistent application of a document retention policy. You also may object on the ground that the subpoena seeks the production of materials that that have already been produced in the action or that are available from parties to the action. *See* Rule 45(e)(1)(A). You must send your written objection to the party or attorney who served the subpoena before the time specified for compliance or within 14 days after the subpoena is served, whichever is earlier. *See* Rule 45(c)(6)(A)(i) and (ii) of the Arizona Rules of Civil Procedure.

If you object because you claim the information requested is privileged, protected, or subject to protection as trial preparation material, you must express the objection clearly, and identify in writing the information, document, or electronically stored information withheld and describe the nature of that information, document, or electronically stored information in a manner that—without revealing information that is itself privileged or protected—will enable the demanding party to assess the claim. *See* Rules 26(b)(6)(A) and 45(c)(5)(A) of the Arizona Rules of Civil Procedure. You may object to providing the information required by Rule 26(b)(6)(A) if providing the information would impose an undue burden or expense.

If you object to the subpoena in writing, you do not need to comply with the subpoena until a court orders you to do so. It will be up to the party or attorney serving the subpoena to first personally consult with you and engage in good faith efforts to resolve your objection and, if the objection cannot be resolved, to seek an order from the court to compel you to provide the documents or inspection requested, after providing notice to you. *See* Rule 45(c)(6)(B) and (C) of the Arizona Rules of Civil Procedure.

If you are not a party to the litigation, or a party's officer, the court will issue an order to protect you from any significant expense resulting from the inspection and copying commanded. *See* Rule 45(c)(6)(B) of the Arizona Rules of Civil Procedure.

Instead of sending a written objection to the party or attorney who served the subpoena, you also have the option of raising your objections in a motion to quash or modify the subpoena, or through a motion for protective order. *See* Rule 45(c)(6)(B) and (e)(2) of the Arizona Rules for Civil Procedure. The procedure and grounds for doing so are described in the section above entitled "Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition."

If the subpoena *also* commands your attendance at a hearing, trial or deposition, sending a written objection to the party or attorney who served the subpoena does not suspend or modify your obligation to attend and give testimony at the date, time and place specified in the subpoena. *See* Rule 45(c)(6)(A)(iii) of the Arizona Rules of Civil Procedure. If you wish to object to the portion of this subpoena requiring your attendance at a hearing, trial or deposition, you must file a motion to quash or modify the subpoena as described in the section above entitled "Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition." *See* Rule 45(b)(5) and 45(c)(6)(A)(iii) of the Arizona Rules of Civil Procedure. Even if you file such a motion, you must

still attend and testify at the date, time, and place specified in the subpoena, unless excused from doing so—by the party or attorney serving the subpoena or by a court order—before the date and time specified for your appearance. *See* Rule 45(b)(5) of the Arizona Rules of Civil Procedure.

ADA Notification

Requests for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding.

[Optional: this form may include the provisions of Rule 64.1(c)(2) of the Arizona Rules of Civil Procedure].

SIGNED AND SEALED this date _____

_____, CLERK

By: _____
Deputy Clerk

Certificate of service:

Form 11(a). Joint Report: Tier 1 Case

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report**
Defendants	)	*(Tier 1 case)*
	)	Assigned to:

The parties signing below certify that they have conferred about the matters contained in Rule 16(d).

With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 12 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. Brief description of the case:_____
_____.

- If a claimant is seeking other than monetary damages, specify the relief sought:

_____.

2. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

- The parties will be ready for a settlement conference or a private mediation by _____.
- If the parties will not engage in a settlement conference or a private mediation, state the reason(s): _____.

3. Readiness: This case will be ready for trial by _____.

4. Jury: A trial by jury is demanded. yes no

5. Length of trial: The estimated length of trial is ___ days.

6. Summary jury: The parties agree to a summary jury trial. yes no

7. Short cause: A non-jury trial will not exceed one hour. yes no

8. Preference: This case is entitled to preference for trial under this statute or rule:

_____.

9. Special requirements: At a pretrial conference or at trial, a party will require

disability accommodations (specify) _____

an interpreter (specify language) _____

10. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no

If requested, the reasons for having a conference are: _____

_____.

11. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case:

_____.

12. Items upon which the parties do not agree: The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

_____.

Dated this ___ day of _____, 20 ___.

_____ _____

For Plaintiff For Defendant

Form 11(b). Proposed Scheduling Order: Tier 1 Case

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Proposed Scheduling Order**
Defendants	)	*(Tier 1 case)*
	)	Assigned to:

Upon consideration of the parties' Joint Report, the court orders as follows:

1. Initial disclosure: The parties have provided their initial disclosure statements, or will provide them no later than _____.

2. Witness disclosure: The parties will disclose lay witnesses by _____. The parties will identify any expert witnesses and the experts' areas of testimony, and will simultaneously disclose the opinions of those expert witnesses, by _____. (Alternative: Plaintiff will disclose an expert's identity, area of testimony, and opinions by _____, and Defendant will disclose an expert's identity, area of testimony, and opinions by _____.) The parties will simultaneously disclose the experts' rebuttal opinions.

3. Final supplemental disclosure: Each party shall provide final supplemental disclosure by _____. This order does not replace the parties' obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial if not disclosed in a timely manner, except for good cause shown or upon a written or an on-the-record agreement of the parties.

4. Discovery deadlines: The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by _____. The parties will complete the depositions of parties and lay witnesses by _____, and will complete the depositions of expert witnesses by _____. The parties will complete all other discovery by _____. ("Complete discovery" includes conclusion of all depositions and submission of full and final responses to written discovery.)

5. Settlement conference or private mediation: [choose one]:

Referral to ADR for a settlement conference: The clerk or the court will issue a referral to ADR by a separate minute entry.

Private mediation: The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by _____.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in

good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

No settlement conference or mediation: A settlement conference or private mediation is not ordered.

6. Dispositive motions: The parties shall file all dispositive motions by _____.

7. Trial setting conference: On _____ [the court will provide this date], the court will conduct a telephonic trial setting conference. Participants shall have their calendars available for the conference.

Plaintiff Defendant will initiate the conference call by arranging for the presence of all other attorneys and self-represented parties, and by calling this division at _____ [division's telephone number] at the scheduled time.

8. Firm dates: No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

9. Further orders: The court further orders as follows: _____.

_____ _____

Date Judge of the Superior Court

Form 12(a). Joint Report: Tier 2 Case

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report**
Defendants	)	*(Tier 2 case)*
	)	Assigned to:

The parties signing below certify that they have conferred about the matters set forth in Rule 16(d), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. Brief description of the case: _____

- If a claimant is seeking other than monetary damages, specify the relief sought

_____.

2. Current case status: Every defendant has been served or dismissed. yes no

- Every party who has not been defaulted has filed a responsive pleading. yes no
- Explanation of a "no" response to either of the above statements: _____

_____.

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by _____.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s):_____.

5. Readiness: This case will be ready for trial by _____.

6. Jury: A trial by jury is demanded. yes no

7. Length of trial: The estimated length of trial is ___ days.

8. Summary jury: The parties agree to a summary jury trial. yes no

9. Preference: This case is entitled to a preference for trial pursuant to the following statute or rule:

_____.

10. Special requirements: At a pretrial conference or at trial, a party will require

disability accommodations (specify) _____

an interpreter (specify language) _____

11. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no If requested, the reasons for having a conference are

_____.

12. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case:

_____.

13. Items upon which the parties do not agree: The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

_____.

Dated this ___ day of _____, 20 ___.

_____ _____

For Plaintiff For Defendant

Form 12(b). Proposed Scheduling Order: Tier 2 Case

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Proposed Scheduling Order**
Defendants	)	*(Tier 2 case)*
	)	Assigned to:

Upon consideration of the parties' Joint Report, the court orders as follows:

1. Initial disclosure: The parties have exchanged their initial disclosure statements, or will exchange them no later than _____.

2. Expert witness disclosure: The parties shall simultaneously disclose areas of expert testimony by _____. (Alternative: Plaintiff shall disclose areas of expert testimony by _____, and Defendant shall disclose areas of expert testimony by _____.)

The parties shall simultaneously disclose the identity and opinions of experts by _____. (Alternative: Plaintiff shall disclose the identity and opinions of experts by _____, and Defendant shall disclose the identity and opinions of experts by _____.)

The parties shall simultaneously disclose their rebuttal expert opinions by _____.

3. Lay (non-expert) witness disclosure: The parties shall disclose all lay witnesses by _____. (Alternative: The parties shall disclose lay witnesses in the following order, and by the following dates: _____.)

4. Final supplemental disclosure: Each party shall provide final supplemental disclosure by _____. This order does not replace the parties' obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.

5. Discovery deadlines: The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by _____. The parties will complete the depositions of parties and lay witnesses by _____, and will complete the depositions of expert witnesses by _____. The parties will complete all other discovery by _____. ("Complete discovery" includes conclusion of all depositions and submission of full and final responses to written discovery.)

6. Settlement conference or private mediation: [choose one]:

Referral to ADR for a settlement conference: The clerk or the court will issue a referral to ADR by a separate minute entry.

Private mediation: The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by _____.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

No settlement conference or mediation: A settlement conference or private mediation is not ordered.

7. Dispositive motions: The parties shall file all dispositive motions by _____.

8. Trial setting conference: On _____ [the court will provide this date], the court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference.

Plaintiff Defendant will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at _____ [division's telephone number] at the scheduled time.

9. Firm dates: No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

10. Further orders: The court further orders as follows: _____

_____

_____ _____

Date Judge of the Superior Court

Form 13(a). Joint Report: Tier 3 Case

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report**
Defendants	)	*(Tier 3 case)*
	)	Assigned to:

The parties signing below certify that they have conferred about the following matters. With regard to issues upon which the parties could not agree, they have set forth their positions separately in item 4 below.

1. Brief description of the case:

2. Participants: The total number of parties (including third parties) in this case is _____:

- Number of counsel appearing: _____
- Number of self-represented litigants appearing: _____
- Number of parties not yet served: _____

3. Pleadings: This case includes [check if applicable]:

A counterclaim(s)

A cross claim(s)

A third party complaint(s)

A request for class action certification

Consolidated cases

4. Items upon which the parties do not agree: The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

Dated this ___ day of _____, 20 ___.

_____ _____

For Plaintiff For Defendant

_____ _____

For: For:

Form 13(b). Proposed Scheduling Order: Tier 3 Case

In the Superior Court of Arizona
_____ County

Plaintiffs	)	Case number _____
v	)	**Proposed Scheduling Order**
Defendants	)	*(Tier 3 case)*
	)	Assigned to:

Upon consideration of the parties' Joint Report, the court orders as follows:

1. Initial disclosure: The parties have exchanged their initial disclosure statements, or will exchange them no later than _____.

2. Expert witness disclosure: The parties shall simultaneously disclose areas of expert testimony by _____. (Alternative: Plaintiff shall disclose areas of expert testimony by _____, and Defendant shall disclose areas of expert testimony by _____.)

The parties shall simultaneously disclose the identity and opinions of experts by _____. (Alternative: Plaintiff shall disclose the identity and opinions of experts by _____, and Defendant shall disclose the identity and opinions of experts by _____.)

The parties shall simultaneously disclose their rebuttal expert opinions by _____.

3. Lay (non-expert) witness disclosure: The parties shall disclose all lay witnesses by _____. (Alternative: The parties shall disclose lay witnesses in the following order, and by the following dates: _____.)

4. Final supplemental disclosure: Each party shall provide final supplemental disclosure by _____. This order does not replace the parties' obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.

5. Discovery deadlines: The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by _____. The parties will complete the depositions of parties and lay witnesses by _____, and will complete the depositions of expert witnesses by _____. The parties will complete all other discovery by _____. ("Complete discovery" includes conclusion of all depositions and submission of full and final responses to written discovery.)

6. Settlement conference or private mediation: [choose one]:

Referral to ADR for a settlement conference: The clerk or the court will issue a referral to ADR by a separate minute entry.

Private mediation: The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by _____.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

No settlement conference or mediation: A settlement conference or private mediation is not ordered.

7. Dispositive motions: The parties shall file all dispositive motions by _____.

8. Trial setting conference: On _____ [the court will provide this date], the court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference.

Plaintiff Defendant will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at _____ [division's telephone number] at the scheduled time.

9. Firm dates: No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

10. Further orders: The court further orders as follows: _____

_____

_____ _____

Date Judge of the Superior Court

APPENDIX 1B: REDLINE OF RULES OF CIVIL PROCEDURE AS PROPOSED BY OUR COMMITTEE; OVERLAY ON ARIZONA RULES OF CIVIL PROCEDURE, EFFECTIVE JANUARY 1, 2017

In the interest of reducing the length of the printed version of our Committee's report, the redline version of our Committee's proposed Rules of Civil Procedure are provided via the internet at this link: http://www.azcourts.gov/cscommittees/Committee-on-Civil-Justice-Reform.

APPENDIX 2: PROPOSED RULES OF CIVIL PROCEDURE FOR COMPULSORY ARBITRATION/SHORT TRACK PILOT PROGRAM; OVERLAY ON ARIZONA RULES OF CIVIL PROCEDURE, EFFECTIVE JANUARY 1, 2017

IX. COMPULSORY ARBITRATION

Rule 72. Suitability for Arbitration

(a) Decision to Require Compulsory Arbitration. Rules 72 through 77 apply if the superior court in a county, by a majority vote of the judges in that county, decides to require arbitration of certain claims and establishes jurisdictional limits by local rule under A.R.S. § 12-133. Such a decision must be incorporated into a superior court order that is filed with the Supreme Court clerk, with a copy filed with the clerk in that county. Except when a rule is inconsistent with a specific provision in Rules 72 through 77, the Arizona Rules of Civil Procedure apply to all actions in arbitration.

(b) Compulsory Arbitration.

(1) ***Generally.*** Civil actions, except appeals from municipal or justice courts, must be submitted to arbitration in accordance with A.R.S. § 12-133 if:

(A) No party seeks affirmative relief other than a money judgment; and

(B) No party seeks an award in excess of the jurisdictional limit for arbitration set by applicable local rule of the superior court.

(2) ***Definitions.*** For this rule's purposes, "award" and "affirmative relief" include punitive damages, but do not include interest, attorney's fees, or costs.

(3) ***Exception.*** The court may waive the arbitration requirement if all parties stipulate to the waiver and show good cause for not arbitrating the action.

(c) Arbitration by Agreement of Reference. Whether or not an action is filed, any claim may be referred to arbitration at any time by an Agreement of Reference signed by all parties or their counsel. If an action has not been filed, the Agreement of Reference must define the issues involved for determination in the arbitration proceedings and may contain stipulations with respect to agreed facts, issues, or defenses. In such instances, the Agreement of Reference takes the place of the pleadings in the action and must be filed and assigned a civil case number. Filing an Agreement of Reference does not relieve any party from paying a required filing fee. Filing of an Agreement of Reference has the same effect on the running of the statute of limitations as the filing of a civil complaint.

(d) Alternative Dispute Resolution. Before a hearing is held under Rule 75, the parties or their counsel may confer regarding the feasibility of resolving their dispute through another form of alternative dispute resolution, including private mediation or binding arbitration. The court may waive the arbitration requirement if the parties file a written stipulation to participate in good faith in an alternative dispute resolution proceeding, and the court approves the method selected by the parties. The stipulation must identify the specific method selected for alternative dispute resolution. If the alternative dispute resolution method selected under this rule fails, the action will proceed under the case management rules in Rule 16 and will not be subject to compulsory arbitration.

(e) Procedure for Determining Suitability for Arbitration.

(1) ***Certificate on Compulsory Arbitration.*** When a complaint is filed, the plaintiff must also file with the clerk a separate certificate on compulsory arbitration in substantially the following form:

"The undersigned certifies that he or she knows the dollar limits and any other limitations set forth by the local rules of practice for the applicable superior court, and further certifies that this action [is] [is not] subject to compulsory arbitration, as provided in Rules 72 through 77 of the Arizona Rules of Civil Procedure."

The certificate must be served on the defendant when the complaint is served.

(2) ***Controverting Certificate.*** If the defendant disagrees with the plaintiff's assertion as to arbitrability, the defendant must file a controverting certificate that specifies the particular reason for the defendant's disagreement. The defendant's controverting certificate must be filed with the defendant's answer and a copy must be served under Rule 5(c) on the plaintiff and all other parties who have appeared in the action.

(3) ***Signing and Certification.*** The certificate and controverting certificate must be signed by the party or its counsel, and constitutes a certification by the signer that:

(A) the signer has considered the applicability of the local rules governing arbitration and Rules 72 through 77;

(B) the signer has read the certificate or controverting certificate on compulsory arbitration;

(C) after reasonable inquiry, the statements in the certificate or controverting certificate are accurate to the best of the signer's knowledge, information, and belief; and

(D) the allegation as to arbitrability is not set forth for any improper purpose.

(4) ***Conflicting Certificates*.** If conflicting certificates are filed, the matter must be referred to the judge assigned to the action to decide whether the action is subject to compulsory arbitration.

(5) ***Amendment of Certificate.*** A party and its counsel are under a duty to seasonably amend a prior certificate or controverting certificate on compulsory arbitration if the party or counsel obtains information that establishes that the certificate was incorrect when filed or is no longer accurate.

(6) ***Motions.*** At any time after the close of the pleadings, the court may, on its own or on motion, determine that an action is subject to compulsory arbitration and may order that it proceed to arbitration as provided in these rules.

(7) ***Sanctions.*** If the court, on motion or on its own, finds that a party or its counsel has made an allegation as to arbitrability that was not made in good faith or failed to seasonably amend a prior certificate on compulsory arbitration, the court may make such orders regarding such conduct as are just, including an order under Rule 11(c).

(f) Waivers. A plaintiff who chooses under Rule 73.1(b) to proceed by compulsory arbitration rather than by short trial waives these rights:

(1) to trial by jury or otherwise;
(2) to a Rule 77 appeal of the arbitration award; and
(3) to appeal a judgment on the arbitration award.

A plaintiff who chooses to proceed by compulsory arbitration must acknowledge a knowing and voluntary waiver of these rights in plaintiff's Rule 73.1(b) statement.

Rule 73. Appointment of Arbitrator

(a) Mutually Agreed Arbitrator. If the parties agree on a person to serve as the arbitrator and the proposed arbitrator consents, the clerk or court administrator must assign the action to that person upon the filing of a written stipulation requesting the person's appointment. The stipulation must include the written consent of the proposed arbitrator, and a conformed copy must be delivered to the court administrator.

(b) Appointment of Arbitrator. Unless the parties stipulate to the assignment of an arbitrator under Rule 73(a), the clerk or court administrator must appoint the arbitrator from a list of eligible arbitrators as provided in local rule. The clerk or court administrator must randomly select and then assign to each action one arbitrator from the list.

(c) List of Eligible Arbitrators. The clerk or court administrator, under the supervision of the presiding superior court judge in the county or that judge's designee, must prepare a list of arbitrators who may be designated by their area of concentration, specialty, or expertise. The list of eligible persons must include the following:

(1) all county residents who have been active members of the State Bar of Arizona for at least 4 years;

(2) all other members of the State Bar of Arizona residing in other counties who have agreed to serve as arbitrators in the county where the court is located; and

(3) all members of any other federal court or state bar who have agreed to serve as arbitrators in the county where the court is located.

On written motion showing good cause, the presiding judge or that judge's designee may excuse a lawyer from the list of arbitrators. <u>The clerk or court administrator should endeavor to select and assign an arbitrator with experience in the subject matter of the action, but if such an arbitrator is unavailable, the clerk or court administrator may select an arbitrator randomly or by another method.</u>

(d) Timing of Appointment. The clerk or court administrator must appoint an arbitrator to an action no later than 120 days after an answer is filed.

(e) Notice of Appointment. The clerk or court administrator must promptly distribute written notice of the arbitrator's appointment to the parties and the arbitrator. The written notice must advise the parties of the deadline specified in Rule 38.1(d) for placing an action on the Dismissal Calendar.

(f) Change of Arbitrator as of Right. In any action, each side is entitled as of right to a change of one arbitrator. Each action, even if consolidated with another action, must be treated as having only two sides. A party waives the right to change of arbitrator if the right is not exercised within 10 days after the date of the written notice of appointment. If a party enters an appearance after the arbitrator is appointed, that party waives the right to change of arbitrator if it is not exercised within 10 days after that party's appearance. A motion for recusal or motion to strike for cause tolls the time to exercise a change of arbitrator as of right.

(g) Disqualifying or Excusing an Arbitrator.

(1) ***Disqualifying an Arbitrator.*** On motion, the court may disqualify an appointed arbitrator from serving in a particular action. The motion must be in writing and establish that the

arbitrator has an ethical conflict of interest or that other good cause exists under A.R.S. § 12-409 or § 21-211. The motion must be submitted to and considered by the judge assigned to the action in accordance with the procedures provided in Rule 42.2.

(2) ***Excusing an Arbitrator.*** The presiding superior court judge or that judge's designee may excuse an arbitrator from serving in a particular action on the arbitrator's showing that he or she has completed contested hearings and ruled as an arbitrator under these rules in two or more actions assigned during the current calendar year.

(3) ***Replacement.*** If the court disqualifies or excuses an arbitrator, the clerk or court administrator must appoint a new arbitrator consistent with these rules.

Rule 74. General Proceedings and Prehearing Procedures

(a) Arbitrator's Powers. The arbitrator has the power to administer oaths or affirmations to witnesses, determine the admissibility of evidence, and decide the law and the facts in an action.

(b) Initial Disclosure. Unless the parties agree or the arbitrator orders otherwise, the parties must serve their initial disclosure required under Rule 26.1 no later than the deadline provided in Rule 26.1(d).

(c) Scheduling an Arbitration Hearing. The arbitrator must set a hearing date not earlier than 60 days nor later than 120 days after the arbitrator's appointment. If good cause exists, an arbitrator may set a hearing date that is before or after this time period, or reschedule a noticed hearing date for a date later than 120 days after the arbitrator is appointed. The arbitrator must provide at least 30 days' written notice of the hearing's time and place, unless waived by the parties. Unless the parties agree otherwise, no hearings may be held on Saturdays, Sundays, legal holidays, or evenings.

(d) Arbitrator's Rulings.

(1) ***Authorized Rulings.*** After an action has been assigned to an arbitrator, the arbitrator will make all legal rulings, including rulings on motions, except on:

(A) motions to continue on the Dismissal Calendar or otherwise extend time allowed under Rule 38.1(d);

(B) motions to consolidate actions under Rule 42;

(C) motions to dismiss;

(D) motions to withdraw as attorney of record under Rule 5.3;

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party; and

(F) motions for sanctions under Rule 68(g).

(2) ***Procedure.*** The parties must deliver to the arbitrator copies of all documents requiring the arbitrator's consideration. The arbitrator may hear motions and testimony by telephone.

(3) ***Discovery Motions.*** In ruling on discovery motions, the arbitrator should consider that the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, and may limit discovery when appropriate to accomplish this purpose.

(4) ***Interlocutory Appeal of Discovery Ruling.*** If an arbitrator makes a discovery ruling requiring the disclosure of matters that a party claims are privileged or otherwise protected from disclosure, the party may appeal the ruling by filing a motion with the judge assigned to the action within 10 days after the arbitrator transmits the ruling to the parties. No party need respond to the motion unless the court so orders, but no such motion may be granted without the court providing an opportunity for response. The arbitrator's ruling is subject to de novo review by the court. If the court finds that the motion is frivolous or was filed for the purpose of delay or harassment, the court must impose sanctions on the party filing the motion, including an award of reasonable attorney's fees incurred in responding to the

motion. The time for conducting an arbitration hearing is tolled while such motion is pending.

(e) Time for Filing Summary Judgment Motion. A motion for summary judgment must be filed at least 20 days before the date for hearing. A copy of the motion must be delivered to the arbitrator and judge assigned to the action. The time for conducting an arbitration hearing is tolled while any such motion is pending. If the court finds that the motion is frivolous or was filed for the purpose of delay or harassment, it must impose sanctions on the party filing the motion, including an award of reasonable attorney's fees incurred in responding to the motion.

(f) Receipt of Court File. If the arbitrator believes the court file contains materials needed to conduct the arbitration hearing, the arbitrator may, within 4 days before the hearing, sign for and receive the original superior court file from the clerk, if the file exists in paper form. If the clerk maintains an electronic court record, the arbitrator must have access to the original or to a certified paper or electronic copy of the file. The clerk may deliver the documents electronically to any arbitrator who files a consent in a form acceptable to the clerk. Alternatively, the arbitrator may order the parties to provide the arbitrator those pleadings and other documents the arbitrator deems necessary.

(g) Settlement of Actions Assigned to Arbitration. If the parties settle an action assigned to arbitration, they must file with the court an appropriate stipulation for the entry of final judgment or a dismissal order, and must mail or otherwise deliver a copy to the arbitrator. The arbitration terminates on entry of the judgment or order.

(h) Offer of Judgment. A party to an action subject to arbitration may serve an offer of judgment under Rule 68.

Rule 75. Hearing Procedures

(a) Issuing Subpoenas. Subpoenas may be issued, served and enforced as provided by these rules or other law.

(b) Prehearing Statement.

(1) ***Requirement.*** No later than 10 days before the hearing, the parties or their counsel must confer, prepare, and submit to the arbitrator a joint written prehearing statement. In preparing this prehearing statement, the parties and their counsel must consider that the purpose of compulsory arbitration is to provide for the efficient and inexpensive resolution of claims and the parties are encouraged to agree on facts and issues.

(2) ***Content.*** The statement must contain the following:

(A) a brief statement of the nature of each party's claims or defenses;

(B) a witness list including the subject matter of witness testimony for each witness who will be called to testify;

(C) an exhibit list; and

(D) the estimated time required for the arbitration hearing.

(3) ***Evidence Excluded.*** Unless the parties agree otherwise or the offering party shows good cause, no witness or exhibit may be offered at the hearing other than those listed and exchanged.

(c) Evidence. The Arizona Rules of Evidence apply to arbitration hearings, except as provided in Rule 75(d). Certificates or controverting certificates are not admissible in evidence in any proceedings on the action's merits.

(d) Documentary Evidence. Unless the document is not what it appears to be and an objection is stated in the prehearing statement, the arbitrator must admit into evidence the following documents without further proof, if relevant, and if listed in the prehearing statement:

(1) hospital bills, if on the hospital's official letterhead or billhead, dated, and itemized;

(2) bills of doctors and dentists, if dated and stating the date of each visit and the incurred charges;

(3) bills of registered nurses, licensed practical nurses, or physical therapists, if dated and stating the date and hours of service, and the incurred charges;

(4) bills for medicine, eyeglasses, prosthetic devices, medical belts, or similar items, if dated and itemized;

(5) property repair bills or estimates setting forth the costs or estimates for labor and material, if dated, itemized, and stating whether the property was, or is estimated to be, repaired in full or in part;

(6) a witness's deposition testimony, whether or not the witness is available to appear in person;

(7) an expert's sworn written statement, other than a doctor's medical report, whether or not the expert is available to appear in person, but only if:

(A) the statement is signed by the expert and summarizes the expert's qualifications; and

(B) the statement contains the expert's opinions, and the facts on which each opinion is based;

(8) in a personal injury action, a doctor's medical report, if a copy of the report was disclosed at least 20 days before the hearing, unless the offering party shows good cause;

(9) records of regularly conducted business activity qualified under Arizona Rule of Evidence 803(6); and

(10) a sworn witness statement, except from an expert witness, whether or not the witness is available to appear in person, if listed in the prehearing statement.

(e) Assessing Damages Against Defaulted Parties. In actions involving multiple defendants, if default has been entered against one or more, but fewer than all of the defendants before the arbitration hearing, the arbitrator must refer all further proceedings involving the defaulted defendant(s) to the judge assigned to the action. The arbitrator must continue to serve and proceed with the arbitration for the remaining parties.

(f) Record of Proceedings. The arbitrator is not required to make a record of the hearing. If any party wants a court reporter to transcribe the hearing, the party must pay for and provide the reporter. The reporter's charges are not considered costs in the action.

(g) Failure to Appear or Participate in Good Faith at a Hearing. Absent good cause, a party waives the right to appeal if the party fails to appear or to participate in good faith at a hearing under Rule 74(c).

Rule 76. Posthearing Procedures

(a) Arbitrator's Decision. Within 10 days after completing the hearing, the arbitrator must:

(1) make a decision;

(2) if the original paper file was obtained from the superior court, return it to the clerk by messenger or certified mail;

(3) notify the parties that their exhibits are available for retrieval;

(4) notify the parties or their counsel of the decision in writing; and

(5) file a notice of decision with the court.

(b) Arbitrator's Award.

(1) ***Submission of Proposed Award.*** Within 10 days after the notice of decision is filed, either party may submit a proposed form of award to the arbitrator. The proposed award may include blanks for requested amounts for attorney's fees and costs.

(2) ***Award Exceeding Limit.*** If an arbitrator finds that the appropriate award in an action exceeds the limit for compulsory arbitration set by local rule or statute, the arbitrator must render an award for the full amount.

(3) ***Objections to Proposed Award.*** Within 5 days of receiving the proposed form of award, an opposing party may file objections.

(4) ***Final Award.*** Within 10 days of receiving the objections, the arbitrator must rule on the objections and file one signed original award with the clerk. On the same day the arbitrator must mail or otherwise deliver copies of it to all parties or their counsel.

(c) Arbitrator's Failure to File Award. If an award or stipulation for entry of another form of relief is not filed with the court within 50 days after the notice of decision is filed, the notice of decision will constitute the arbitrator's award.

(d) Judgment. If no appeal is filed by the deadline for filing an appeal under Rule 77(b), any party may file a motion to enter judgment on the award. If no party files such a motion within 90 days of the filing of the notice of decision and if no appeal is pending, the clerk or court administrator must notify the parties in writing that the action will be dismissed without prejudice unless a motion to enter judgment is filed within 30 days after the date of the notice. If no motion is filed within that time, the court must dismiss the action without prejudice and enter an appropriate order regarding any bond or other posted security. No further notice to the parties is required before dismissing the action.

(e) Referral of an Action to the Assigned Judge. If the arbitrator does not file an award with the clerk within the later of 145 days after the arbitrator's appointment or 30 days after a noticed hearing, the clerk or the court administrator must refer the matter to the assigned judge for appropriate action.

(f) Arbitrator's Compensation. An arbitrator assigned to an action under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12-133(G) per day for each day, or part of a day, necessarily expended in hearing the action. For this rule's purposes, "hearing" means any fact-finding proceeding or oral argument resulting in the filing of an award, or at which the parties agree to settle and stipulate to the action's dismissal. The fee to be paid in each county must be decided by a majority vote of the judges in that county. The amount must be incorporated into a superior court order that is filed with the Supreme Court clerk, with a copy filed with the clerk in that county. When more than one action arising out of the same transaction is heard at the same hearing or hearings, it will be considered as one action for purposes of compensating the arbitrator.

(g) Payment of Compensation. The arbitrator is not entitled to receive compensation under Rule 76(f) until after an award is filed with the clerk, or, if the parties agree to settle and stipulate to dismiss the action at a proceeding before the arbitrator, until after the action is dismissed.

Rule 77. Appeal

(a) Filing a Notice of Appeal. Any party who appears and participates in the arbitration proceedings, except the party(s) who chose Compulsory Arbitration, may appeal an arbitrator's award by filing a notice of appeal with the clerk. The notice of appeal must be entitled "Appeal from Arbitration and Motion for Trial Setting." It must request that the action be set for trial in the superior court, and must state whether a jury trial is demanded and the estimated length of trial.

(b) Time for Filing. To appeal an award, a party must file a notice of appeal no later than 20 days after (1) the award is filed or (2) the date on which the notice of decision becomes an award under Rule 76(c), whichever occurs first.

(c) Deposit on Appeal. At the time of filing the notice of appeal, the appellant must deposit with the clerk a sum equal to one hearing day's compensation of the arbitrator or 10 percent of the amount in controversy, whichever is less. The court may waive the deposit only on a showing that the appellant is financially unable to make such a deposit.

(d) Appeal De Novo. Although the proceeding is denominated as an "appeal," the parties are entitled to a trial on all issues determined by the arbitrator. The arbitrator's legal rulings and factual findings are not binding on the court or the parties. If, however, the court finds that further proceedings before the arbitrator are appropriate, it may remand the action to the assigned arbitrator.

(e) Waiver of Right to Appeal. At any time before the entry of an award by the arbitrator, the parties may stipulate in writing that the award so entered is binding on the parties. If the parties enter such a stipulation, no party may appeal or collaterally attack the award except as allowed by A.R.S. § 12-1501, *et seq.*

(f) Discovery and Listing of Witnesses and Exhibits on Appeal.

(1) Any discovery conducted while the action was assigned to arbitration may be used on appeal.

(2) Simultaneous with the filing of the notice of appeal, the appellant may serve a "List of Witnesses and Exhibits Intended to be Used at Trial" that complies with Rule 26.1.

(3) No later than 20 days after the Notice of Appeal is served, the appellee may serve a "List of Witnesses and Exhibits Intended to be Used at Trial" that complies with Rule 26.1.

(4) If any party does not serve a timely "List of Witnesses and Exhibits Intended to be Used at Trial," that party's trial witnesses and exhibits will be deemed to be those set forth in any such list previously filed in the action or in the prehearing statement submitted under Rule 75(b).

(5) The parties have 80 days after the filing of the notice of appeal to complete discovery under Rules 26 through 37.

(6) For good cause, the court may extend the time to conduct discovery or to serve a supplemental list of witnesses and exhibits.

(g) Refund of Deposit on Appeal. The clerk must refund the deposit on appeal to the appellant if:

(1) the judgment on the trial de novo is at least 23 percent more favorable than the monetary relief or other type of relief granted by the arbitration award; or

(2) there is no order from the court for the disposition of the deposit on appeal upon the action's final disposition.

(h) Forfeiture of Deposit on Appeal; Sanctions on Appeal. If the judgment on the trial de novo is not at least 23 percent more favorable than the monetary relief or other type of relief granted by the arbitration award, the court must order that the deposit on appeal be used to pay the following costs and fees:

(1) to the county, the compensation actually paid to the arbitrator;

(2) to the appellee, those costs taxable in civil actions together with reasonable attorney's fees as determined by the trial judge for services necessitated by the appeal; and

(3) reasonable expert witness fees incurred by the appellee in connection with the appeal.

If the deposit is insufficient to pay those costs and fees, the court must order that the appellant pay them, unless the court, on motion, finds that imposing costs and fees would create a substantial economic hardship that is not in the interests of justice.

(i) Contact by Court. A court may contact an arbitrator regarding the arbitration award or other matters relating to the arbitration.

Rule 72.1. Short Trial Alternative

(a) Application. Rules 72.1 through 77.1 are experimental rules that apply in counties where the Supreme Court and the superior court in a county have authorized a short trial as an alternative to compulsory arbitration under Rules 72 through 77. In those counties, cases that are subject to compulsory arbitration under Rule 72 may instead proceed to a short trial as provided by these experimental rules.

(b) Determining Suitability. The procedure for determining the suitability of an action for compulsory arbitration described in Rule 72(e) continues to apply to the short trial alternative. Although a case may proceed to a short trial, the plaintiff still must file a certificate of compulsory arbitration under Rule 72(e)(1), and the defendant may file a controverting certificate under Rule 72(e)(2).

Rule 73.1. Plaintiff's Choice of a Short Trial Alternative; Assignment of a Judicial Officer

(a) Plaintiff's Choice. The plaintiff alone has the choice of proceeding by a short trial as an alternative to compulsory arbitration.

(b) Manner of Choosing a Short Trial. Within 20 days after the defendant files an answer, the plaintiff must choose compulsory arbitration or a short trial and confirm that choice on a statement filed with the court. The statement must inform the court and the defendant whether plaintiff will proceed by compulsory arbitration under Rules 72 through 77, or by the short trial alternative under Rules 72.1 through 77.1.

(c) Failure to Choose. If the plaintiff does not file a timely statement under Rule 73.1(b), the case will proceed to short trial under these experimental rules.

(d) Action with a Counterclaim or a Third Party Claim. If there is a counterclaim, crossclaim, or a third party claim, the action will proceed to short trial if the plaintiff chooses one under Rule 73.1(b) or fails to file a timely statement under Rule 73.1(c).

(e) Trial by Jury; Waiver. The court will empanel a jury for a short trial. The parties may waive a jury by a written stipulation filed at least 30 days before trial.

(f) Inapplicability of Rule 68. Whether the plaintiff chooses a short trial, or whether the matter proceeds to a short trial under Rule 73.1(c), no party may thereafter tender a Rule 68 offer of judgment, and any previous tender of a Rule 68 offer of judgment is of no effect.

(g) Assignment of a Judicial Officer. The clerk or court administrator must assign a judicial officer to every action proceeding by short trial. A judicial officer as used in this rule includes a superior court judge or commissioner, or a judge pro tempore. Within 30 days of the assignment, on request of a party or on its own initiative, the assigned judicial officer must set a date for trial that is within the period specified by Rule 74.1(h). The assigned judicial officer will make all legal rulings in the case, including rulings on motions.

(h) Challenge of the Assigned Judicial Officer. Parties in a short trial proceeding may challenge the assigned judicial officer in the manner provided by Rules 42.1 and 42.2.

Rule 74.1. Pretrial Proceedings

(a) Joint Report and Proposed Scheduling Order. Rule 16(b), which requires parties to file a joint report and proposed scheduling order, does not apply in actions proceeding to short trial.

(b) Disclosure Deadline. The parties must exchange Rule 26.1 disclosure statements within 30 days after the filing date of the first answer. The parties have a duty to make continuing and supplemental disclosures without a specific request from any other party.

(c) Discovery Limits. Each side in a short trial proceeding has the following discovery limits: 5 Rule 33 interrogatories, 5 Rule 34 requests for production, 10 Rule 36 requests for admissions, 1 Rule 35 examination, and 5 total hours of fact witness deposition.

(d) Medical and Other Experts. The deposition of a medical expert, including a treating physician, or other expert witness, is limited to one hour per side, and a total of two hours. The deposition fee of a medical or other expert witness under this rule is limited to $500 per hour, but a party or the witness may file a motion showing good cause for exceeding the limit. Parties must endeavor to take the deposition at the expert's usual place of business.

(e) Video Recording of Medical and Other Expert Witness Depositions. Any party may video record the deposition of a medical or expert witness under this rule by any unobtrusive and reliable device, and without leave of court, but the party must provide a copy of the video, without charge, to other parties within 10 days after the deposition.

(f) Apportionment of the Fee of Medical and Other Experts. Each party who asks questions during the deposition of a medical or expert witness is responsible for the medical or expert witness' fee in proportion to the questions asked, and the witness' time used, by each party during the deposition. On motion, the judicial officer assigned to the action can impose cost shifting or cost sharing of a deposition under this rule as may be reasonable, fair, and appropriate.

(g) Discovery Deadline. Parties in a case proceeding by short trial must complete all discovery under Rules 26 through 36 within 120 days after the filing date of the first answer or 190 days from the filing of the complaint, whichever is sooner. The assigned judicial officer may extend this deadline only for good cause.

(h) Trial Date. The court will set a date for a short trial not less than 180 days nor more than 270 days after the filing date of the complaint.

(i) Summary Judgment Motions. Parties must file motions for summary judgment at least 70 days before the trial date.

(j) Settlement. If the parties settle an action in a short trial proceeding, they must file an appropriate stipulation for entry of a final judgment or a dismissal order.

(k) Assessing Damages Against Defaulted Parties. In actions involving multiple defendants, if the court has entered a default against one or more, but fewer than all, of the defendants before trial, the assigned judicial officer must proceed against any defaulted defendant under Rule 55, and proceed with a short trial for the remaining parties.

(l) Pretrial Conference. The judge may set one or more Rule 16 pretrial conferences.

Rule 75.1. Short Trial Procedures.

(a) Pretrial Statement. No later than 10 days before the trial, the parties or their counsel must confer, prepare, file, and submit to the assigned judge a joint written pretrial statement. In preparing this statement, the parties must consider that the purpose of a short trial is to provide for the efficient and inexpensive resolution of claims and the parties are encouraged to agree on facts and issues. The statement must contain the following:

(1) a brief statement of the nature of each party's claims or defenses;

(2) a witness list including the subject matter of a witness' testimony for each witness who will be called to testify;

(3) an exhibit list;

(4) the parties' stipulations; and

(5) the estimated time required for the trial.

Unless the parties agree otherwise or the offering party shows good cause, a party may not call a witness or offer an exhibit at trial other than those listed and exchanged.

(b) Documentary Evidence. Unless there is an objection in the pretrial statement, the following documents are admissible in evidence:

(1) Medical bills of licensed or authorized providers, provided the party requesting admission of a bill establishes a foundation that the amount of the bill is reasonable and the treatment or service described in the bill was medically necessary;

(2) Property repair bills or estimates containing costs or estimates for labor and material, if a bill is dated and itemized, and if the bill states whether the property was repaired in full or in part;

(3) Records of regularly conducted business activity under Rule 803(6) of the Arizona Rules of Evidence;

(4) A witness' deposition, whether or not the witness is available to appear in person;

(5) A sworn witness statement, except a statement of an expert witness, whether or not the witness is available to appear in person.

(c) Video Recording of Medical and Other Experts. A party who deposed and made a video record of a medical or other expert under Rule 74.1(d) may introduce the video record at trial to avoid the cost of calling the expert. However, any party may object to the form or foundation of a question, or to the responsiveness of an answer, in the video record.

(d) Subpoenas. The court may issue and enforce a subpoena, and a party may serve subpoenas, as provided by these rules or other law.

(e) Order of the Short Trial; Limits. A short trial proceeds in the order described in Rule 40.

The manner of selecting a jury, juror notebooks, juror questions of witnesses, jury instructions, deliberations, and the return and entry of the verdict are as provided in other civil trials in the superior court, except for the following presumptive limits:

(1) Jury size: 6 jurors, no alternates

(2) Jury verdict: 5 of the 6 jurors must agree on a verdict

(3) Voir dire: 30 minutes per side

(4) Opening statements: 15 minutes

(5) Presenting a case in chief, including cross examination and rebuttal: 3 hours per side

(6) Closing arguments: 30 minutes

(7) Length of trial: 2 full days

(f) Record of Proceedings. The court is not required to make a verbatim record of a short trial. Any party who wants a court reporter to transcribe the proceeding must request, provide, and pay for the reporter. The reporter's charges are not costs in the action.

Rule 76.1. Post-trial Procedures

(a) Form of Judgment, Costs and Attorneys' Fees. After the jury returns its verdict, the judge must direct the prevailing party, pursuant to procedures provided in Rules 54 and 58, to prepare a statement of costs, a request for attorney's fees, if any, and a judgment. The judge may then proceed to enter judgment on the verdict under those rules.

(b) Verdict Exceeding Limit. If a jury verdict exceeds the limit for compulsory arbitration set by local rule or statute, the court must render a judgment for the full verdict amount.

Rule 77.1. Post-trial Motions; Appeal

(a) Post-trial Motions. A party may file post-trial motions as provided by these rules in other civil cases.

Appeal. A final judgment entered at the conclusion of a short trial is appealable to the Court of Appeals as provided by law.

APPENDIX 3A: REDLINE OF PROPOSED CHANGE TO ACJA § 1-302(I)(4)(B)

Section 1-3.2. Education and Training.

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4. Superior court judges

a. Orientation. Before assuming office, or within the first twelve months of assuming office, a new superior court judge shall receive orientation by an experienced judge of the superior court and shall complete the orientation requirements for judges of general jurisdiction courts approved by COJET.

b. Bench assignment. The presiding judge of the court shall determine if a superior court judge shall attend an approved program before assuming a new assignment in a specialized division. Judges assigned to a civil docket shall complete a training program within 60 days of commencing an assignment to the civil bench or a calendar involving civil cases. A judge shall complete the specialized dependency-training program approved by COJET prior to or within twelve months of assuming a new assignment involving dependency cases.

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APPENDIX 3B: TABLE CONTAINING EXAMPLE OF JUDICIAL PROTOCOL INFORMATION FOR INCLUSION IN A UNIFORM TEMPLATE

JUDGE NAME	
JUDICIAL ASSIGNMENT	
PRE-TRIAL PRACTICE AND MANAGEMENT	
Motion Practice	
General Protocol	
Form of Order	
Citations	
Supplemental Briefing	
Page Length Extensions	
Motion in Limine	
Motions for Summary Judgment	
Single or Combined Motions	
May Motions be Combined with Replies	
Form of Orders	
Omnibus Motions	
Oral Argument	
Other	
Discovery or Disclosure Disputes and/or Sanctions	
Standing Orders	
Personal Communication	
Communication between Parties	
Written Discovery and Rule 26.1	
ESI Discovery	
Other Pre-trial Practice Guidelines or Comments	
TRIAL PRACTICE AND PROTOCOL	
Voir Dire	
Trial Schedule	
Courtroom Protocols	
Where to stand in courtroom	
Protocol for approaching witnesses	
Approaching the bench or jury box	

A CALL TO REFORM

Report and Recommendations of the Committee on Civil Justice Reform

September 29, 2016

Tab 4

URCP Queue

4/20/17

Topic	Rule	Raised By	Pending Since	Agenda to add to
Review all rules for conformity with "filing" documents; plain language drafting.	000 All			
Review all committee notes for "the committee determined" and replace with "the committee views." Come up with preamble to discuss that the committee's view is not binding; the supreme court's is.	000 All	Supreme Court	2016/11	January 2017
Superseded 11/1/2011 rules: do they still need to appear on the website? See superseded Rules 1, 8, 9, 16, 26, 29, 30, 31, 33, 34, 35, 36, 37, 54	000 All	Tim Shea, Nancy Sylvester	2016/06	
Rules 1 and 81 defer to the legislature. Indeed, they appear to say that if a rule regulating a process is at odds with a statute, the statute controls. Rule 81 should be repealed so everything about scope is governed by Rule 1. Rule 1 should recognize statutory causes of action, and perhaps even procedure, but if the court adopts a rule, the rule should be superior.	001, 081	Tim Shea	2016/01	
Proposed Rule 4(d)(1) should address the issue that anyone interested in the action and not just a party to the action can not serve the process. A father's son should not be able to serve the summons and complaint to the defendant that his dad is suing. It should also be served by an American citizen. It should read something like, The summons and complaint may be served by any US citizen 18 years of age or older at the time of service and not a party to or interested in the action or a	004(d)(1)	Silvan Warnick SL Co Constable (in comments to Rule 4)	6/2016	

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party's attorney or agent. The person serving the process can not have any interest from the service or non service thereof.				
Place electronic service under the heading of "Methods of Service."	004(d)	Lane Gleave	11/2016	
~~Inmate mailbox rule.~~ ~~Does rule allow order not to be served because the order does not say that it has to be? (a)(1)(B)~~	~~006~~	~~James Blanch, Linda Jones~~ ~~Sherman Lynch, OFN 64063~~ ~~POB 250, Oquirrh 1~~ ~~Draper, Utah 84020-0250~~	~~2015/08~~	Adopted pending Appellate Rules Committee changes
~~Address issue with certificate of service and electronic notifications in paragraph (d) (extra work for clerks when attorneys are already getting elec notification through CORIS and E-filing)~~ ~~(b)(3)(A): submitted to the electronic filing service provider~~ ~~(d): certificate of service: revise to exclude court notifications (no need for signature)~~ ~~*attorney email addresses on notices?~~	~~005~~	~~Clayson Quigley, Debra Moore, Clerks of Court~~	~~2017/01~~	~~March Agenda~~
~~Change time to respond to be triggered from date of filing to date of service, so people have the benefit of the 3-day mailing provision in Rule 6. I believe that Rule 7 is the only rule affected. Mary Jane: choose 1 term in Rules 7 & 101; amend Rule 6(b) to give 3 extra days if filed.~~	~~007~~	~~Brent Johnson forwarded complaint of self-represented parties.~~	~~2015/10; 2016/06~~	~~March agenda~~

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~~Motion for order to show cause.~~(awaiting report from Domestic Case Improvements Study Committee)	~~007A~~	~~Tim Shea~~	~~2014/02~~	
See Feb 2016 comments to Rule 9 r.e. lines 65-79. Non-party's contact info is classified as private under 4-202.02(4)(K). Problem with expiration of period language; rule conflicts with rule 26(c)(5). Replace (9)(l) with this language: (9)(l) Allocation of fault. (l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 must affirmatively state the following in a responsive pleading under Rule 8(c): (l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and (l)(1)(B) the non-party's name. If the party does not know the name of the non-party, it must state that fact and provide any other information known or reasonably available to the party identifying the non-party, such as the non-party's relationship to known parties or non-parties, the non-party's employer, or the non-party's business address, business telephone number. (l)(2) A party may amend its responsive pleading to state the information required by paragraph (l)(1) under Rule 15(a). A motion to amend a pleading to state the information required by paragraph (l)(1) must be filed no less than 90 days before trial. (l)(3) A party must not seek to allocate fault to a non-party except by compliance with this rule	009	Nathan Whittaker	2015/12	

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The Rule 10 advisory notes need to be reworked. The note corresponding to paragraph (d) does not match the rule language. Also “dox matrix” should be “dot matrix”.	010	Tax Commission	2017/04	
Rule 12(a) provides that “The plaintiff shall serve a reply to a counterclaim in the answer within 21 days after service of the answer.” Yet, Rule 7(a) does not appear to contemplate such a pleading. Rule 7(a)(3) provides for an answer to a counterclaim, not a reply.	012	Daniel Young	2016/06	September 2016?
~~Delete Rule 12(j). Bonds are permissive for in-state plaintiffs but mandatory for out-of-state plaintiffs (on motion). Whatever justification may have existed for this rule, there is no practical basis for it now. Most banking and other financial institutions are regional or national, and there are very few obstacles to collecting judgments across state lines. Where the plaintiff is located should not matter to whether a cost bond is appropriate.~~	~~012~~	~~John Bogart~~	~~2013/10~~	
Amend intervention by AG to better match new URAP 23D.	024	Tim Shea	2015/11	
File all dispositive motions or certificate of readiness for trial within 28 days after close of expert discovery. Include in notice form.	026	Jon Hafen	2013/10	
Frank Carney raised a discussion point with Jonathan Hafen about a decision that Judge Kara Petit recently issued. The plaintiff pleaded his case as a Tier 2, got a $641,000 verdict, and then wanted to amend up (after verdict) to make it Tier 3. Judge Petit followed what the rules committee thought was the proper outcome in	026	Jon Hafen, Frank Carney	2016/10	
Add to Rule 26(a)(1)(A):	026	Nathan Whittaker	2015/12	

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such a situation and denied the motion. Reexamine rule 26?				
26(a)(1)(A)(iii) each non-party identified under Rule 9(m)(1).				
Delete Rule 26.2(c)(5).	026.2	Nathan Whittaker	2015/12	
Automatic disclosures in employment actions.	026.#	Bob Wilde (rule drafted; no follow up)	2012/02	
Automatic disclosures in probate actions.	026.#	Mike Jensen (no follow up)	2013/10	
Rule 30(b)(6) deposition can be used "for any purpose." Apparently this is now a problem although the provision has been there for a long time.	032	Greg Sanders	2015/10	
In *Helf v. Chevron*, 2015 UT 81, the Utah Supreme Court provided a fairly dramatic interpretation to Utah Rule of Civil Procedure 32 – dealing with objections during depositions. The new interpretation is unworkable. Judge Lee in his dissent was spot on in his analysis. It could be fixed with a simple clarification that the questioning party need not object to answers of the deponent to the questioning attorney's own questions in order to preserve any challenge to the testimony).	032	Mark James	2016/07	
Add committee note explaining that the removal of the "signature" language in Rule 33 does not mean the rule no longer requires it. It means it is superfluous to the "oath or affirmation" language in paragraph (b). Clients and their attorneys must still sign the document. (this differs from the Fed rule, but not in a meaningful way). Or add the language back in re signatures.	033	Frank Carney	2016/12	

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~~Rule 37(c) failure to preserve/spoliation~~	~~037~~	~~Paul Stancil, URCP~~	~~2016/03~~	Will be sent out for comment from committee, not Sup Ct. Reexamine at May 2017 meeting.
In *Cannon v. Holmes*, 2016 UT 42, footnote 3, the Utah Supreme Court noted a tension between Civil Rule 41(b) and CJA Rule 4-103(2). The Court recommended "amending rule 4-103 to require that all dismissals entered pursuant to the rule must contain the language 'without prejudice,' and by developing forms consistent with that requirement." But should the presumption in Rule 41(b) be flipped so that failures to prosecute are dismissed without prejudice? This could make sense, especially when the legislature has provided statutes of limitation and there is a presumption in case law in favor of dispositions on the merits. Alternatively, change the rule to provide that the court must clarify whether the dismissal is with or without prejudice, and if the court doesn't, the parties can ask for a clarification.	041	Judge James Blanch, Nancy Sylvester	2016/10	
The committee changed the name of the post-trial legal motion from "Motion for Judgment Notwithstanding the	050	Frank Carney	2016/05	

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Verdict" to "Motion for Judgment as a Matter of Law" to comport with the federal practice. That change is reflected in the body of Rule 50, but the caption for Rule 50(b) still says "Motion for JNOV" while the body refers to "Motion for Judgment as a Matter of Law."				
Statement of post judgment interest rate in final judgment.	054	Todd Shaughnessy	2013/10	
Post-judgment costs. Rule 54 was amended in paragraph (e) to allow attorneys to amend the judgment to include costs and attorneys' fees. What about post-judgment costs?	054	Chris Rogers	2016/05	
Require any party seeking a default under rule 55 to certify to the court that s/he has searched the docket for a responsive pleading before seeking a default.	055	Dallas Young	2016/12	February 2017?
~~Logue v. Court of Appeals, 2016 UT 44: issue of newly discovered evidence and awaiting the conclusion of appeal as a procedural bar is being directed to the Civil Rules Committee for purposes of reexamining Rule 60(b)(2), (c). (Notes from Brent J: Start with Criminal Procedure Committee. This is more likely to be a problem in criminal cases. May be great reluctance on the part of civil rules committee to tinker with rule 60(b). But this might also be a rule of appellate procedure. Because the trial court will have lost jurisdiction during the pendency of the appeal, there may need to be a process for a defendant to raise this before the appellate court, asking that court to stay or remand so that the trial court can take evidence. It might be like a~~	~~060~~	~~Utah Supreme Court~~	~~2016/10/20~~	~~November 2016~~

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~~23B proceeding.) Subcommittee of crim proc and app proc will be formed.~~				
~~From Brent: Earlier this year a district court judge referred a motion to disqualify to the Chief Justice. The procedure is permitted under the rules. However the Chief Justice was uncomfortable deciding the motion, in part because such an issue might subsequently come up on appeal, and there were practical difficulties--i.e. access to the court filing system for the purpose of entering an order--and therefore the Chief referred the motion to another district court judge. The Crim Proc Committee is therefore proposing a rule 29 amendment to eliminate the option of referring these to the presiding officer of the Judicial Council. Because rule 63 contains similar language, the URCP committee might want to consider joining in.~~	063	Brent Johnson	2016/11	Need to revisit at another meeting. New changes with justice court PJ rule and sup ct edits.
Form seems to allow multiple writs. Rule does not. Figure out why. Amend one or the other. Specific concern: if ORS is garnishing less than 25%, should Rule 64D allow another writ to be in play up to 25%?	064(d)(3)(B)(ii) and 64D	Angelina Tsu	2014/01	January 2017
Revise attorney fee schedule. See comments when rule 73 last circulated for comment.	073	Mark Olson, etc.		
Add to Rule 73(d) that the court may sua sponte determine the reasonableness of the request for fees (raised after presentation at DC Conference).	073	Judge Samuel Chiara	2016/05	
Commissioner rules.	106, 109	Michele Blomquist (under development)		

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