

# Committee on Civil Justice Reform

## Working Group Two

### MEMORANDUM

**TO:** Committee on Civil Justice Reform  
**FROM:** Working Group Two  
**DATE:** August 19, 2016  
**RE:** Draft Changes to Ariz. R. Civ. P. 1, 4, 8, 16, 26, 26.1, 26.2, 30, 31, 33, 34, 36, 37

This Memorandum continues this group's iteration of its draft changes to the Arizona Rules of Civil Procedure (the "Draft"). The Draft has been provisionally approved by the full Committee, subject to further revision and voting item by item on particular potential changes to them. In Sections I-VII, this Memorandum sets forth proposals that we adopted at our July 28 meeting to resolve issues raised at the July 19 meeting of the Committee on Civil Justice Reform ("CCJR"). In Sections VIII and IX., we set forth further changes we agreed to on August 18.

**I. Proposal: That the Draft Conform To the Task Force's Proposed Ariz. R. Civ. P. 16(a)(3), Which Was a Further Statement of the Task Force's Rejection of Proportionality as the Governing Principle of Discovery.**

As one of the Committee's members noted at our recent meeting, the Draft did not track with the Task Force's proposed Ariz. R. Civ. P. 16(a)(3). The Task Force's proposed rules included a Rule 16(a)(3) that restated the Task Force's reformulation of "proportional" as "appropriate" along with supporting factors that resembled the proportionality factors in our proposed Ariz. R. Civ. P. 26(b)(1), but with modest changes to them. Given that the thrust of our Draft is the adoption of proportionality, and the December 2015 amendments to the Federal Rules of Civil Procedure as concern proportionality, we propose an Ariz. R. Civ. P. 16(a)(3) that tracks precisely the proportionality language in our proposed Ariz. R. Civ. P. 26(b)(1). As we explained more fully in our prior memoranda proposing conformance with the new federal rules, conformance achieves the benefits of: (1) the use of the federal case law under the new rule; (2) the avoidance of arguments as to the nature and extent of the difference between the Arizona and federal rules; and (3) proportionality as a preferable standard for discovery, in the ways we have argued that it is preferable. This conformance is consistent with our agreement to strike the Task Force's proposed "appropriateness" comment to Rule 16, and also our proposal to adopt the federal proportionality language in Ariz. R. Civ. P. 26(b)(1).

**II. Proposal: That the Draft Permits Discovery To Occur Before Disclosure Within Proposed Ariz. R. Civ. P. 26(d) To the Degree That Is Appropriate.**

One of the Committee's members was concerned that our draft does not permit a party to take discovery until after it makes its initial disclosure, to avoid the use of discovery as an asymmetric cudgel. The concern was that the Draft should include a "safety valve" to permit the parties to take discovery earlier, as by stipulation or court order. A provision to this effect is present in the Draft's proposed Ariz. R. Civ. P. 26(d). We propose leaving this aspect of the Draft as it is.

**III. Proposal: To Modify the Draft To Permit Parties To Request Overlimit Discovery When Discovery Has Been Requested That Reaches the Limits, and Not Only After That Discovery Has Been Taken.**

At the Committee's last meeting, members were concerned that the Draft's proposed Ariz. R. Civ. P. 26(e)(4) – which required parties to wait until all discovery below tier limits was taken before seeking additional discovery – would create rushes and panics on the part of parties seeking overlimit discovery under unreasonably tight time constraints near the close of discovery. To ameliorate that, we proposed to amend that rule to permit a party to request overlimit discovery at the time the limit of discovery has been requested. That amendment is set forth in Ariz. R. Civ. P. 26(e)(4)'s introductory language and also its subpart (A).

**IV. Proposal: To Remove the Requirement of “Budgets” From the Rules.**

Several of the Committee's members expressed a particular concern that the Draft's requirement in its proposed Ariz. R. Civ. P. 26(e)(1)(A) and 26(e)(4)(A) and (B) that counsel affirm that they have provided a party with a “discovery budget” was inappropriate, for reasons including the idea that for some large institutional clients, a “budget” is a term of art implicating levels of review and approval that are not practical to require counsel to obtain. There was discussion in the meeting of providing softer language, pertaining to a “statement of anticipated additional discovery expense.” We have made an amendment to the above-noted rules, using that softer language.

**V. Proposal: Make Stipulations For Overlimit Discovery Self-Executing in Proposed Ariz. R. Civ. P. 26(e)(4)(B), But Only While Retaining the Requirement That Counsel Warrant That the Client Has Approved the Additional Expense.**

In our discussion of how to make the process of obtaining overlimit discovery work better, two themes emerged. One was concern over requiring lawyer budgeting and lawyer reporting to the court that a client had approved a budget. The second was the idea that letting parties stipulate to overlimit discovery would avoid the necessity of bothering courts with stipulations for one additional deposition or reasonable requests for discovery above tier limits.

In our view, eliminating the client's assent to the additional expense while also empowering counsel to enter into self-executing agreements to exceed tier limits would undo much of the intended benefit of the tiering. The point of the reform is in part to constrain discovery, and to limit the degree of lawyer self-management of the amount of discovery, for the reasons set forth in detail in our prior memoranda, resting on extensive empirical critiques of the amount of discovery, the cost of discovery, and its impact on merits-based resolution.

Our way of reconciling these competing concerns is to permit the requested self-executing stipulation to overlimit discovery, but to retain Utah's design feature, which we think wise and warranted, to require client assent in advance to the cost as a condition of making stipulations self-executing. Objections that lawyers can always be trusted to manage that (to us)

ignore the major thrust of the critique of discovery that underlies the reform we are crafting. If client assent is not required, judicial review and assent to overlimit discovery would be required to maintain the integrity of the tiers. We think confronting the parties with the cost of discovery is deeply consistent with Rule 1 and provides good reason to empower the parties to use self-executing stipulations in such circumstances. It will not strain judicial resources, and will insure that cases remain as “inexpensive” under Rule 1 as possible while facilitating needed discovery.

**VI. Proposal: To Guarantee That a Party May Take Every Deposition To Which They Are Entitled Under Rule 30(a) Up To a Limit of Two Hours, Even If That Affords Them More Hours of Deposition Than the Relevant Tier Limit Under Proposed Ariz. R. Civ. 26(e).**

There were two issues raised in the last Committee meeting concerning the aggregate time limit for depositions in proposed Ariz. R. Civ. P. 26(e).

The first concern was that in cases with many parties, it would be possible that the aggregate limits would not be adequate to allow one party to depose many other parties. For that reason, some members discussed that it would be desirable to have an entitlement to depose each of the persons (parties, experts, and document custodians) listed in Ariz. R. Civ. P. 30(a)(1) for up to two hours.

The second concern was that the limits might not be adequate when parties are abused by truculent witnesses or obstructive counsel. As we then discussed in the committee meeting, that issue is addressed by a passage from the December 2015 amendments to the federal rules, which was already recommended to be adopted in the Draft’s proposed Ariz. R. Civ. P. 30(d)(1).

To address these issues, we propose adding a new subpart 26(e)(5) to address both issues. In proposed Ariz. R. Civ. P. 26(e)(5)(A), we add the entitlement to take depositions of up to two hours of each of the persons listed in Ariz. R. Civ. P. 30(a). And in proposed Ariz. R. Civ. P. 26(e)(5)(B), we add a cross-reference to Ariz. R. Civ. P. 30(d), to encourage people to take advantage of it, and to remind that time obtained to repair abuses in depositions do not count against the aggregate limits in tiers.

**VII. Proposal: Shorten the Deadline in Ariz. R. Civ. P. 26(e)(1) for Initial Disclosures From 40 Days to 30 Days After the Filing of the First Responsive Pleading.**

As part of the mission of the Committee to reduce the time of litigation, one of the members suggested reducing the 40 day wait between the first responsive pleading and the deadline for initial disclosures under Ariz. R. Civ. P. 26.1(e)(1). The Draft adopts that suggestion, scaling that time back from 40 to 30 days. That reduction is consistent with the Task Force’s reduction of the time for response to discovery from 40 to 30 days.

## **ADDITIONAL CHANGES FROM AUGUST 18 MEETING**

### **VIII. Relocating and Textually Modifying the Tiering Subrule.**

Until our August 18, 2016 meeting, tiering was addressed in proposed Ariz. R. Civ. P. 26(e). That subrule is simply too long to be a subrule. We agreed to make it a freestanding rule, and in our draft, it is now Ariz. R. Civ. P. 26.2. At Mark Meltzer's suggestion, we also added a subsection (a), Generally, to that rule, setting out its purpose.

We have also added a subrule 26.2(c) explaining when a case receives its tier assignment. Under this subrule, the default is that a case is assigned from birth to the tier the economics would indicate, while a court may take a further month after the Report of Early Meeting to tier a case on its own initiative by examining the attributes of the case, and the case is otherwise assigned a tier whenever the court rules on a stipulation or motion, which the rule urges the court to do at the earliest time.

Finally, to address the mechanics of Rule 26.2(g), which permits extra hours of deposition time in where there are many depositions of parties or document custodians to be taken, we unanimously determined that a Comment was necessary to explain the mechanics of that rule's operation, much as the mathematical function of Rule 6(e) required a comment to explain its function.

### **IX. Creating an Expedited Procedure for Resolution of Disclosure and Discovery Disputes, and Making it the Default Procedure, Unless Courts Direct Otherwise.**

Seeking to make discovery and disclosure practice leaner, quicker, cheaper, and more actively managed by the court, we created a procedure for expedited resolution of discovery disputes, modeled on the informal, largely telephonic practice prevailing in many Arizona federal courts, and some state courts, under which parties do not submit briefs, and get quick guidance from the court. We located the procedure in Ariz. R. Civ. P. 26(d).

The procedure requires the submission of a short description of the discovery dispute, simply to make a record of what is requested. Each party gets one and one-half pages to state what is at issue. This is not intended to permit briefing, simply to denote what is requested. The parties are encouraged to jointly contact the court to request a call or hearing with the court, and the court is encouraged to hear the dispute as quickly as possible. To promote certainty and reviewability, the court must issue a minute entry indicating the resolution of the dispute, and the parties retain their right to file materials relating to the ruling to make a record.

**Rule 1. Scope and Purpose**

These rules govern the procedure in all civil actions and proceedings in the superior court of Arizona. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

## Rule 4. Summons

### (a) Issuance; Service.

- (1) ***Pleading Defined.*** As used in this rule, Rule 4.1, and Rule 4.2, “pleading” means any of the pleadings authorized by Rule 7 that bring a party into an action—a complaint, third-party complaint, counterclaim, or crossclaim.
- (2) ***Issuance.*** On or after filing a pleading, the filing party may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the filing party for service. A summons—or a copy of the summons if addressed to multiple parties—must be issued for each party to be served.
- (3) ***Service.*** A summons must be served with a copy of the pleading. Service must be completed as required by this rule, Rule 4.1, or 4.2, as applicable.

### (b) Contents; Replacement Summons.

#### (1) ***Contents.*** A summons must:

- (A) name the court and the parties;
- (B) be directed to the party to be served;
- (C) state the name and address of the attorney of the party serving the summons or—if unrepresented—the party’s name and address;
- (D) state the time within which the defendant must appear and defend;
- (E) notify the party to be served that a failure to appear and defend will result in a default judgment against that party for the relief demanded in the pleading;
- (F) state that “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”;
- (G) be signed by the clerk; and
- (H) bear the court’s seal.

#### (2) ***Replacement Summons.*** If a summons is returned without being served, or if it has been lost, a party may ask the clerk to issue a replacement summons in the same form as the original. A replacement summons must be issued and served within the time prescribed by Rule 4(i) for service of the original summons.

(c) **Fictitiously Named Parties; Return.** If a pleading identifies a party by a fictitious name under Rule 10(d), the summons may issue and be directed to a person with the fictitious name. The return of service of process on a person identified by a fictitious name must state the true name of the person who was served.

(d) **Who May Serve Process.**

(1) **Generally.** Service of process must be made by a sheriff, a sheriff's deputy, a constable, a constable's deputy, a private process server certified under the Arizona Code of Judicial Administration § 7-204 and Rule 4(e), or any other person specially appointed by the court. Service of process may also be made by a party or that party's attorney if expressly authorized by these rules.

(2) **Special Appointment.**

(A) **Qualifications.** A specially appointed person must be at least 21 years of age and must not be a party, an attorney, or an employee of an attorney in the action in which process is to be served.

(B) **Procedure for Appointment.** A party may request a special appointment to serve process by filing a motion with the presiding superior court judge in the county where the action is pending. The motion must be accompanied by a proposed order. If the proposed order is signed, no minute entry will issue. Special appointments should be granted freely, are valid only for the cause specified in the motion, and do not constitute an appointment as a certified private process server.

(e) **Statewide Certification of Private Process Servers.** A person seeking certification as a private process server must file with the clerk an application under Arizona Code of Judicial Administration § 7-204. Upon approval of the court or presiding judge of the county in which the application is filed, the clerk will register the person as a certified private process server, which will remain in effect unless and until the certification is withdrawn by the court. The clerk must maintain a register for this purpose. A certified private process server will be entitled to serve in that capacity for any state court within Arizona.

(f) **Accepting or Waiving Service; Voluntary Appearance.** There are two ways to accomplish service with the assent of the served party—waiver and acceptance. A party also may voluntarily appear without being served.

(1) **Waiving Service.** A party subject to service under this rule, Rule 4.1, or 4.2 may waive issuance or service. The waiver of service must be in

writing, signed by that party or that party's authorized agent or attorney, and be filed in the action. A party who waives service receives additional time to serve a responsive pleading, as provided in Rule 12(a)(1)(A)(ii).

**(2) *Accepting Service.*** A party subject to service under this rule, Rule 4.1, or 4.2 may accept service. The acceptance of service must be in writing, signed by that party or that party's authorized agent or attorney, and be filed in the action. A party who accepts service does not receive the additional time to serve a responsive pleading under Rule 12(a)(1)(A)(ii).

**(3) *Voluntary Appearance.***

**(A) *In Open Court.*** A party on whom service is required may, in person or by an attorney or authorized agent, enter an appearance in open court. The appearance must be noted by the clerk on the docket and entered in the minutes.

**(B) *By Responsive Pleading.*** The filing of a pleading responsive to a pleading allowed under Rule 7 constitutes an appearance by the party.

**(4) *Effect.*** Waiver, acceptance, and appearance under (f)(1), (f)(2), and (f)(3) have the same force and effect as if a summons had been issued and served.

**(g) *Return; Proof of Service.***

**(1) *Timing.*** If service is not accepted or waived, and no voluntary appearance is made, then the person effecting service must file proof of service with the court. Return of service should be made by no later than when the served party must respond to process.

**(2) *Service by the Sheriff.*** If a summons is served by a sheriff or deputy sheriff, the return must be officially marked on or attached to the proof of service and promptly filed with the court.

**(3) *Service by Others.*** If served by a person other than a sheriff or deputy sheriff, the return must be promptly filed with the court and be accompanied by an affidavit establishing proof of service. If the server is a registered private process server, the affidavit must clearly identify the county in which the server is registered.

**(4) *Service by Publication.*** If the summons is served by publication, the return of the person making such service must be made as provided in Rules 4.1(l) and 4.2(f).

**(5) *Service Outside the United States.*** Service outside the United States must be proved as follows:

(A) if effected under Rule 4.2(i)(1), as provided in the applicable treaty or convention; or

(B) if effected under Rule 4.2(i)(2), by a receipt signed by the addressee, or other evidence satisfying the court that the summons and complaint were delivered to the addressee.

**(6) *Validity of Service.*** Failure to make proof of service does not affect the validity of service.

**(h) *Amending Process or Proof of Service.*** The court may permit process or proof of service to be amended.

**(i) *Time Limit for Service.*** If a defendant is not served with process within 90 days after the complaint is filed, the court—on motion, or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This Rule 4(i) does not apply to service in a foreign country under Rules 4.2(i), (j), (k), and (l).

## **Rule 8. General Rules of Pleading**

**(a) Claim for Relief.** A pleading that states a claim for relief must contain:

- (1) 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;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief. A party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages in an amount above the limit for the tier pleaded, unless the pleading is amended under Rule 15. A party who receives permission under Rule 26(e)(2) 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 pleading is amended 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. Answering an allegation about a document with “the document speaks for itself” does not fairly respond to the substance of the allegation. Answering an allegation about a document by stating that one “denies any allegations inconsistent with the language of a document” does not fairly meet the substance of the allegation. Answering an allegation by claiming that it states a legal conclusion does not fairly meet the substance of the allegation.

(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 deny if it has information sufficient to form a belief, or must instead state that it has insufficient information to form a belief.
- (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 pleaded, the discovery tier to which the pleaded 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 it should be assigned under Rule 26(e)(1). The parties are to 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 point 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 (ESI);
- (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(e), 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 five 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(e)(1)(B) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. The parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue the unreasonability of the other party in a Report of Early Meeting. Unless ordered by the court, a summary must not exceed four 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(e)(1)(A)(i). Any motion to vary the tier to which a case will be assigned under Rule 26(e)(1)(A)(i) must be made by the date on which the parties file their joint Report of Early Meeting.

## **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);
- (C) actions assigned to Tier 3 under Rule 26.2(d); and
- (D) 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(a)(6);
  - (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.

(A) **Expedited.** The parties must use Forms 11(a) and (b) (Expedited Case) when all of the following factors apply:

- (i) every party, except any defaulted parties, has filed an answer;
- (ii) there are no third-party claims;
- (iii) the parties intend to have no more than one expert per side; and
- (iv) each party intends to call no more than 4 lay witnesses at trial.

(B) **Standard.** The parties must use Forms 12(a) and (b) (Standard Case) if the action is ineligible for management as an Expedited Case or Complex Case.

(C) **Complex.** The parties must use Forms 13(a) and (b) (Complex Case) if the factors enumerated in Rule 8(h)(2) apply, regardless of whether the court has designated the action as complex.

(6) **Case Designation.** On any party's request, the court may designate an action as expedited, standard, or complex. The court should endeavor to conduct trial in expedited actions within 12 months after the action commenced.

(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. The Scheduling Order also may direct that a party must request a conference with the court before filing a discovery or disclosure motion. 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)(D);
- (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 prevoir 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.

**(e) 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 26.2(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)(D);
- (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 the scope of discovery may 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.

(B) ***Specific Limits on Discovery of Electronically Stored Information.*** 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. 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)(1)(B). The court may specify conditions for the disclosure or discovery.

(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).

**(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)(5)(B), 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)(4)(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)(4)(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(a)(6).

**(B) 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.

**(C) 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)(5)(A) or (B), including the time the expert spends testifying in a deposition; and
- (ii) for discovery under Rule 26(b)(5)(B), 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.

**(D) 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)(5)(D)(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.***

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.

**(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. 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).

**(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 three pages of explanatory text, with each party entitled to submit one and one-half pages of that text, and 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 only permitted if ordered by the court.

- (3) **Expedited Hearing By Court.** Unless the court orders otherwise, the parties may jointly contact the court by telephone or e-mail 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) **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's initial disclosure obligations under Rule 26.1 are fulfilled.
- (f) **Supplementing and Correcting Discovery Responses.** 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. 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. The party must state in the supplemental or corrected discovery response why the additional or correct information was not previously provided.
- (g) **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.
- (h) **Discovery and Disclosure Motions.** Any discovery or disclosure motion must attach a good faith consultation certificate complying with Rule 7.1(h).

## Comment

### 2017 Amendment to Rule 26

Rule 26 is amended in several ways, to control discovery and make it proportional, so that it serves the important goals in Rule 1.

First, Rule 26(b)(1) is amended to conform to Federal Rule of Civil Procedure Rule 26(b)(1), as amended in December 2015, with respect to the permissible scope of discovery. This amendment makes Arizona’s Rule 26 focused on achieving “proportionality” in discovery to the same degree as Federal Rule of Civil Procedure 26. The many factors for determining what is discovery is proportional – “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” – are all to be given weight and balanced against each other. No single factor is intended to be dispositive in all cases.

Second, Rule 26(b)(1), like Rule 26.1(b), no longer refers to discovery as “reasonably calculated to lead to the discovery of admissible evidence.” The “reasonably calculated” language had been misunderstood as defining the scope of discovery, sometimes leading courts and litigants to treat discovery as an end, when it is only a means. This amendment clarifies that the touchstones of discovery are relevance and proportionality, not the prospect of obtaining additional discovery.

Third, Rule 26(e) is amended to establish 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 non-monetary relief. However, parties can ask for a different tier, based upon the many 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 Early Report of Counsel under Rule 8(g). Rule 26(e) provides many factors for courts to use in determining the tier to which a case is best suited.

Fourth, making discovery proportional is not an end in itself. The 2017 revisions to Rules 8, 26, 26.1, and 37 work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Amended Rule 26 emphasizes keeping discovery proportional based on the understanding that proportional discovery follows up on robust initial disclosure under Rule 26.1. These amendments seek to make initial disclosure robust through a clearer

**Clean CJRC Versions – 1, 4, 8, 16, 26, 26.1, 26.2, 29, 30, 33, 34, 36, 37**

mandate to impose sanctions under Rule 37 for failures to disclose relevant material and for abuses of discovery.

**Rule 26.1. Prompt Disclosure of Information**

**(a) Duty to Disclose; Disclosure Categories.** Within the times set forth in Rule 26.1(d) 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 name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;
- (7) a computation and measure of each category of damages alleged by the disclosing party, the documents or 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 and Electronically Stored Information.**

(1) *Hard-Copy Documents.* Subject to the limits of Rule 26(b)(1)(B) 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.

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

(A) *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, including:

- (i) requirements and limits on the disclosure and production of electronically stored information;
- (ii) the form in which the information will be produced; and
- (iii) if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing the information.

**(B) *Resolution of Disputes.*** If the parties are unable to satisfactorily resolve any dispute regarding electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and the separate certification from all counsel required under Rule 26(g). In resolving any dispute regarding electronically stored information, the court may shift costs, if appropriate.

**(C) *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.

**(D) *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.

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

**(c) Additional Disclosure of Expert Testimony in Certain Actions.**

**(1) *In General.*** In actions assigned to Tier 3 by Rule 26(e)(1), and in such other cases as the court orders or the parties agree, a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Arizona Rule of Evidence 702, 703, or 705.

**(2) *Witnesses Who Must Provide a Written Report.*** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written

report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony. The report must contain:

- (A) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (B) the facts or data considered by the witness in forming them;
- (C) any exhibits that will be used to summarize or support them;
- (D) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
- (E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (F) a statement of the compensation to be paid for the study and testimony in the case.

**(d) 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.

**(e) 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.

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

**(g) *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 jointly or any one party by motion may move the court to 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 shown. Good cause to vary a tier must be determined with reference to the factors that define proportional discovery in Rule 26(b)(1). The court may reject any such stipulation.

**(B) *Requirement of Assent to Additional Expense For Placement in Higher Tier.*** If a stipulation or motion asks the court to place a case in a higher tier than the tier in which the case would be placed based on its amount in controversy, then the stipulation or motion must confirm that each party requesting that relief has been provided by its counsel with a statement of the anticipated additional discovery expense from placement in a higher tier and has approved it.

- (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 1 or 2 days. Automobile tort, intentional tort, premises liability, and insurance coverage claims arising from those types of claims should generally 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 should generally 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 non-monetary 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 upon a stipulation or motion under Rule 26(b)(1), it should decide the motion as soon at the earliest practicable time.

**(d) Definition of Damages in Tiering.** For purposes of determining the tier for standard discovery, the amount of damage 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 days to complete standard fact discovery run 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 deposition, 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 deposition, 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 deposition, 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.** To obtain discovery beyond the limits established in Rule 26.2(e), a party must file before the close of standard discovery and after service of a discovery request that reaches a limit imposed by Rule 26.2(e) on any discovery category either:

**(1)** 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 and approved its counsel's statement of the additional expense anticipated to result from the additional discovery, and attaching a good faith consultation certificate complying with Rule 7.1(h); or

**(2)** an agreed statement that, for each discovery category 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 and approved its counsel's statement of the additional expense anticipated to result from the additional discovery. 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.** Notwithstanding 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; and
  - (2)** additional examination time ordered for the reasons set forth in Rule 30(d) does not count against the tier limits.
- (h) Variations in Expert Discovery By Tier.** Unless otherwise ordered by the court or agreed to by the parties, expert disclosures 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 Form 13 found within Rule 84, to permit the court to fashion such orders as may be appropriate under Rules 26(g) and 37(h).

### Comment

Rule 26.2(g) insures 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 fact witnesses, who are nonparties 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 29. Modifying Discovery and Disclosure Procedures and Deadlines**

### **(a) By Written Agreement.**

(1) **Generally.** 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) modify any procedures in these rules governing or limiting discovery or disclosure, other than the limits in Rule 26(e).

(2) **Court Order.** A written agreement under Rule 29(a)(1) is effective without court order unless it interferes with court-ordered deadlines, alters the time set for a hearing, alters the time set for trial, modifies the tier to which a case is assigned under Rule 26(e), or permits more discovery than is permitted within the tier to which a case is assigned.

**(b) By Motion.** A party may move to modify any procedure governing or limiting discovery or disclosure. The motion must:

(1) set forth the modification sought;

(2) show good cause for the modification; and

(3) comply with Rule 26(g).

## **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(a)(6); 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. A party may not unreasonably withhold its agreement to additional depositions under this rule.
- (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(e), which limit cannot be extended except as provided under Rule 26(e)(5). Notwithstanding the foregoing, 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; Filing.**

**(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.

### **Committee Comment**

#### **1991 Amendment to Rule 30(a)**

Rule 30(a) is intended to address the problem of overuse of expensive and unnecessary depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6), the deposition of any disclosed expert, and the depositions of the custodian of documents without agreement or leave of court. Treating physicians are regarded as disclosed experts for purposes of this rule. Depositions of custodian taken as a matter of right shall be limited to questions necessary to secure the documents and to provide evidentiary foundation for their admissibility. The rule, along with Rule 26.1 and Rule 16, is intended to encourage voluntary disclosure of information between the parties and is further intended to require at a minimum consultation between counsel prior to the setting of depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6) and the deposition of any disclosed expert, without agreement or leave of court. Any other depositions must be taken either by agreement of the parties, on motion and order of the court, or pursuant to an order of the court following a Comprehensive Pretrial Conference under Rule 16. Refusing to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f).

### **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(e)(4). Each subpart of an interrogatory counts as one interrogatory, except that a uniform interrogatory and its subparts count as one interrogatory. Notwithstanding the foregoing, leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).
- (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(e)(4). Notwithstanding the foregoing, leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1) and (2).

(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 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(e)(4). Notwithstanding the foregoing, leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1) and (2).
- (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.*** 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. 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. Answering a request about a document with “the document speaks for itself” does not fairly respond to the substance of the request. Answering a request about a document by stating that one “denies any allegations inconsistent with the language of a document” does not fairly meet the substance of the request. Answering a request by claiming that it states a legal conclusion does not fairly meet the substance of the request. 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 determines 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. This discretion extends to the imposition of serious sanctions, up to and including dismissal of the action—or rendering of a default judgment—in whole or in part.

(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 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, 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 and 26.1 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**

#### **2017 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 2017 amendments that provide the court with more information to enable it to supervise compliance. Amended Rule 26(e)(6) 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 they were entitled to under the discovery tier to which they were assigned under amended Rule 26(e). And amended Rules 26(f) and 26.1(d)(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 failures even to respond to discovery are “not mitigated” by claims that the discovery sought was objectionable, in addition to not being excused by such claims.

The 2017 revisions to Rules 8, 26, 26.1, and 37 work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Amended Rule 26 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.