R-17-0010 in a Nutshell

by

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R-17-0010 was a rule petition filed by the Supreme Court's Committee on Civil Justice Reform in January 2017. The Supreme Court's Order in R-17-0010, which was entered on August 31, 2017, amended or adopted more than a dozen of the Arizona Rules of Civil Procedure. Although the Order is lengthy (it's 151 pages), the Order's concepts are relatively straightforward. This article presents the Order in a nutshell.

A few preliminary notes. First, the rule amendments shown in the R-17-0010 Order include amendments arising from another rule petition, R-17-0006, which was filed by the State Bar and concerned rules in medical malpractice cases. This article encompasses those amendments. Second, although R-17-0010's rule changes are generally applicable to cases filed after July 1, 2018, some of the changes also apply to cases that are pending on that date. The Order details these applicability criteria and deserves careful review. And third, here is a general disclaimer: readers must know and cite to the rules themselves, rather than this nutshell. Please read the rules.

Part I: Tiering

The Tiers. A new Rule 26.2 is titled "tiered limits to discovery based on attributes of the case." This new rule goes to the heart of differentiated case management envisioned by these amendments. Rule 26.2(a) offers this summary:

> 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.

Rule 26.2(b) provides a list of characteristics for each tier. Tier 1 is for the simplest cases. Tier 1 cases have minimal documentary evidence, few witnesses, and can be tried in one or two days. Tier 3 cases are logistically or legally complex, and may include class actions, multi-party commercial cases, medical malpractice actions, and products liability cases. Cases that do not fit within Tiers 1 or 3 are generally Tier 2. Tier 2 cases have more than minimal evidence and more than a few witnesses, and may have expert witnesses, multiple theories of liability, counterclaims, or crossclaims. Rule 8.1(f) provides that cases in Maricopa County's pilot commercial court are deemed to be assigned to Tier 3 unless the court assigns the case to a different tier after the scheduling conference.

Assigning a Case to a Tier. Rule 26.2(c) describes three methods by which cases are assigned to a tier.

> (1) Parties by stipulation or motion may request the court to assign the case to a tier other than the one to which it would be assigned based on the monetary relief requested (see (3) below). However, the court must determine whether there is

good cause for a request to vary a tier after considering the proportionality factors in Rule 26(b)(1), and it may reject the request. The parties should present a stipulation or motion concerning the assigned tier at the earliest practicable time.

(2) Based on its own evaluation and the totality of circumstances in a case, the court may assign a case to a tier that is consistent with the characteristics of the case and Rule 26(b)(1) proportionality factors. The court may reassign the case to a different tier based on its own evaluation no later than 20 days after the parties file their Rule 16(c) joint report.

(3) If a tier is not assigned under methods (1) or (2), then it is assigned to a tier based on the requested damages. (Tier 1 = less than $50,000; Tier 2 = $50,000 to $300,000 or actions for nonmonetary relief; Tier 3 = more than $300,000.) At the initial case filing, and unless and until it is assigned to a different tier, the case is deemed to be assigned to the tier indicated by these monetary brackets. Under Rule 26.2(e), the calculation of monetary damages excludes duplication for alternative theories of relief, punitive damages, interest, and attorney's fees.

Discovery Limits. The tier assignment is important because under Rule 26.2(f), each tier has distinctive limits on discovery (depositions, interrogatories, requests to produce or admit). For example, Tier 1 has a limit of 5 interrogatories and 5 hours of fact witness depositions, Tier 2 allows 10 interrogatories and 15 hours of fact witness depositions, while Tier 3 has a limit of 20 interrogatories and 30 hours of fact witness depositions. The rule also specifies limits on the time in which to complete discovery (120, 180, and 240 days for Tiers 1, 2, and 3 respectively.)

Exceeding the Discovery Limits. Rule 26.2(g) allows parties to file a motion or stipulation before the close of standard discovery that requests discovery beyond the tier limit. The additional discovery must be necessary and proportional under Rule 26(b)(1). If the parties file a stipulation, they may proceed with the additional discovery without the necessity of a court order, although the court has authority to disapprove the stipulation.

Under Rule 26.2(h), the court may also order additional time for a deposition examination for the reasons described in Rule 30(d) (i.e., "if needed to fairly examine the deponent, or if the deponent, another person, or any other circumstance impedes or delays the examination"), which does not count against the tier limit. Under Rule 26.2(h), in a case with more than one party on a side and for good cause, the court also may increase a side's allotted hours for deposition, allocate deposition hours among the parties on a side, or take any other action to provide each party on a side with a reasonable opportunity to conduct deposition discovery. In addition to allocating deposition time, the court may allocate written discovery among sides. Under Rule 26.2(i), parties also can stipulate or the court can order that expert witness disclosures be other than as provided by Rule 26.1(d).

The Importance of Initial Disclosures and a Mandate for Sanctions. A new and noteworthy comment to Rule 26.2 states that "making discovery proportional is not an end in itself." It says that other rules:

> work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. Rule 26.2 now emphasizes keeping discovery proportional based on the understanding that proportional discovery follows up on robust initial disclosure under Rule 26.1.

The comment also notes that the intent for robust initial disclosure is accompanied by "a clearer mandate to impose sanctions under Rule 37 for failures to disclose relevant material and for abuses of discovery." A section on sanctions appears later in this nutshell.

Part II: Initial Filings, Meetings, and Reports.

Getting Started: The Complaint and Civil Cover Sheet. Other than a complaint for a sum certain or for a sum which can be made certain by computation, Rule 8(d) disallows the pleading to state a dollar figure for damages. The amendments to Rule 8(b) require a party who claims damages, but who does not plead an amount, to nevertheless plead that damages are such as to qualify for a specified tier defined by Rule 26.2(c)(3). Under amended Rule 8(g), the civil cover sheet must contain the amount in controversy that was pled, or if not pled, the discovery tier to which the pleading alleges the action would belong.

Getting Started: The Answer. Under Rule 8(c), a denial does not fairly respond to the substance of an allegation if it: (a) answers an allegation by stating that "the document speaks for itself," (b) answers an allegation by stating that the responding party "denies any allegations inconsistent with the language of a document," or (c) answers a factual allegation, or an allegation applying law to fact, by claiming that it states a legal conclusion. The rule also provides that a party cannot deny an allegation on information and belief. If the answering party has sufficient information to form a belief, the party must either admit or deny the allegation, or must state that it has insufficient information to form a belief about the truth of an allegation.

The Next Step: The Early Meeting. Rule 16(b) requires the defendant to meet and confer with the plaintiff about the anticipated course of litigation, including the tier assignment of the case, at the earliest practicable time, but no later than 30 days after filing a response to the complaint or 120 after the action commences. The rules refer to this meet-and-confer as the "early meeting." The rule contains a short list of items the parties must discuss at that meeting. Rule 16(c)(8) provides that the early meeting requirement applies to cases subject to compulsory arbitration, but the provisions of Rule 16(c) regarding the joint report and proposed scheduling order do not apply to those cases.

The Joint Report and Proposed Scheduling Order. Under Rule 16(c), the parties must file a Joint Report ("JR") and Proposed Scheduling Order ("PSO") no later than 14 days after the early meeting. The court will issue the SO as soon as practicable after receiving the documents or after holding a scheduling conference. Rule 16(c) contains a list of items that must be included in the PSO. The PSO must include specific calendar deadlines that are consistent with the discovery tier of the case. Rule 16(c) provides,

> The parties are not required to describe their Early Meeting in the Joint Report, but may do so. Any summary must describe the case with respect to the characteristics in Rule 26.2(b) and (c) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. In the Joint Report, the parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue that the other party has taken unreasonable positions.

The summary of the early meeting must not exceed 4 pages, and the length must be split evenly between the parties' separate statements if they do not agree on its contents. (Rule 41 forms for the JR were modified to include a spot for the summary.) The JR may include a stipulation to a discovery tier. The JR must be accompanied by a Rule 7.1(h) certificate of good faith consultation. The parties may modify dates established in a SO only by court order for good cause.

The Scheduling Conference. As with the current rule, Rule 16(d) continues to provide for a scheduling conference. But unlike the title of the current rule, "scheduling conferences in non-medical malpractice actions," the new rule is simply titled "scheduling conferences." The R-17-0010 Order deletes current Rule 16(e), "scheduling and subject matter of comprehensive pretrial conferences in medical malpractice actions." The Court's Order in R-17-0006 contains amendments to Rule 16.1 shown separately from the rule changes in R-17-0010. The R-17-0006 amendments, among other things, say that the court may require the parties to participate in settlement conferences, but the rule no longer requires a settlement conference in a medical malpractice case.

Part III: Electronically Stored Information.

Disclosure of Electronically Stored Information. Rule 26.1(c) provides new requirements for disclosure of electronically stored information ("ESI"). The first requirement imposes on the parties a duty to promptly confer and attempt to agree on matters of disclosure and production. Each party must have available at the conference at least one representative (which may include counsel) who is reasonably familiar with the party's systems containing ESI. The rule provides a list of topics that should be discussed at the conference, as applicable, such as the location and types of systems, whether to conduct discovery of ESI in stages, methods for filtering information, the form in which information will be produced, preservation agreements, agreements concerning inadvertent disclosure, and sharing or shifting of costs. Parties must present their

disputes under this rule as provided in Rule 26(d). (Rule 26(d) is titled, "expedited procedure for resolving discovery and disclosure disputes." See Part IV below.)

Under Rule 26(b)(2), a party is not entitled to obtain discovery of ESI for purposes that are unrelated to the case. A party is not entitled to image or inspect an opposing party's data sources or data storage devices, absent a claim of fraud or intentional misconduct, or when restoration is required to address prejudice arising from spoliation of evidence. Rule 26(b)(6) concerns privilege logs, and allows the court to order alternate requirements to reduce burdens and expenses; but a party seeking alternative privilege log requirements must first confer with the opposing party and try to reach agreement, and absent agreement, a party must present disputes at a scheduling conference or under Rule 26(d). Under Rule 26(c), a person who receives a request to preserve ESI may move for a protective order in the county where the action is pending, as provided in Rule 45.2(d)(2).

"Reasonably Accessible." Rule 26(e) is titled "determining whether electronically stored information is reasonably accessible." The rule includes a list of factors for determining whether the party or person opposing the discovery or disclosure would incur undue burden or expense. The provision also includes a list of factors for the court to consider when determining whether the requesting party has shown good cause for the discovery or disclosure. The rule allows the court to shift costs as a condition of allowing discovery or disclosure of ESI.

Subpoena for ESI. Rule 45(c) allows objections to subpoenas requesting ESI from sources that are unduly burdensome or expensive to access because of the past good-faith operation of an electronic information system or the good-faith and consistent application of a document retention policy. A person who withholds subpoenaed information on a privilege or work-product claim must comply with Rule 26(b)(6)(A) (a privilege log), unless the party makes a timely objection under Rule 45 that providing such a log would impose an undue burden or expense. If there is such an objection, a subpoenaing party who requests a privilege log must pay the person's reasonable expenses in preparing the log. The rule permits a person who objects to a document subpoena to move for a protective order, or move to modify or quash a subpoena. But before filing the motion, the person must attempt to resolve the dispute by good faith consultation with the other party or person, and must include a good faith consultation certificate with the motion. The expedited procedures in Rule 26(d) do not apply to these motions.

Rule 45.2: Request to Preserve ESI. Rule 45.2 is a new rule titled "dispute resolution procedures regarding preservation requests." It governs the resolution of disputes concerning the scope of a party or non-party's duty to preserve ESI. Rule 45(b) defines relevant terms, including a "preservation request," which is "a written notice to a party or nonparty requesting that the recipient preserve electronically stored information for possible use in pending or anticipated litigation. The preservation request may, but need not, relate to anticipated litigation against the nonparty." Rule 45(c) provides that a party or nonparty who receives a preservation request may respond in

writing, including on grounds that there is no duty to preserve the ESI, or that preservation would impose an undue burden or expense. The objection is not waived if there is no written objection, but the dispute resolution procedures in sections (d) and (e) apply only if an objection was served.

Rule 45.2(d) concerns disputes in pending actions. If the dispute is between parties, they must follow the procedure in Rule 26(d). A non-party may move for a Rule 26(c) protective order, which must be accompanied by a good faith consultation certificate.

Rule 45.2(e) is the process if there is no pending action. A non-party may file a verified petition aptly titled "verified Rule 45.2 petition." The petition must identify the respondent, the issues of agreement and disagreement, any undue burden or expense, and the relief requested. The pleading must be served on the respondent as required by Rule 4, 4.1, or 4.2, who must then file a response within 20/30 days in the form of a memorandum. The petitioner may file a reply. Rule 7.1(a)(3) page limits apply to the response and reply. The court will decide the petition as it does a motion, but the court must hold a hearing unless the parties stipulate otherwise. The court may issue orders limiting the preservation obligation based on Rule 26(b)(1) ("discovery scope and limits") or Rule 37(g) ("failure to preserve electronically stored information"); it may impose conditions that require the requestor to pay the costs of preservation; and it may award expenses, including attorney's fees, for a proceeding under this rule.

Rule 45.2(g) provides that a party or nonparty who complies with a preservation order under this rule is deemed to have taken reasonable steps to preserve ESI under Rule 37(g). Rule 45.2(h) provides that a party or person's election not to proceed under Rule 45.2 is not a waiver and there is no resulting prejudice, and it will not be deemed a failure to take reasonable steps to preserve under Rule 37(g).

A new Rule 84 Form 7, for use in conjunction with rule 45.2, is titled, "notice of petition: preservation of electronically stored information."

Part IV: Disclosure and Discovery.

Time. Under Rule 26(f), a party may not seek discovery from another party or non-party before that party serves an initial Rule 26.1 disclosure statement. Rule 26(g) requires a party who knows that additional or corrective information is relevant to a hearing or deposition that is set to occur in less than 30 days must supplement or correct its discovery response reasonably in advance of the hearing or deposition.

Documents. Rule 26.1(b) now applies only to disclosure of hard copy documents. Rule 26.1(c), mentioned above, applies to electronic documents.

Experts. A revision to the categories of disclosure deletes several lines of text concerning the disclosure of expert witnesses and simply provides instead that a party must disclosure the anticipated subject areas of expert testimony. A new Rule 26.1(d) concerns disclosure of expert testimony (i.e., witnesses under Evidence Rules 702, 703,

705.) The rule specifies disclosure requirements for expert witnesses who do not provide a written report, and for those who do. Both categories require, among other items, disclosure of the expert's compensation in the case, and a list of other cases in which the expert testified during the previous four years. Parties are required to provide reports for a witness retained or specially employed to provide expert testimony in a Tier 3 case, or as the court may order. Disputes over the form or sufficiency of expert disclosures must be presented at the scheduling conference or as provided in Rule 26(d).

Medical Malpractice Cases. Current Rule 26.2 ("exchange of records and discovery limits in medical malpractice actions") has been relocated to Rule 26.3, retitled ("exchange of medical records and timing of expert disclosure in medical malpractice actions"), and this is substantially revised. Rule 26.3(a)(1) now requires that the plaintiff, in addition to serving defendant with copies of all available medical records, must provide a medical records authorization to allow the defendant to obtain copies of plaintiff's medical records from their original source. Rule 26.3(a)(3) further provides that if a defendant uses that authorization to obtain records, complete copies of any non-duplicative records not previously produced must be furnished at that defendant's sole expense to all other parties. The discovery limits provisions of current Rule 26.2(b) are deleted. A new Rule 26.3(b) requires parties to disclose the identities and opinions of standard of care and causation experts simultaneously, unless the parties agree or the court orders otherwise for good cause. Note again that under Rule 26.2(b), medical malpractice cases generally belong in Tier 3.

Agreements. Rule 29 retains a provision about agreements between parties to modify the time, place, or manner of a deposition; and adds a provision that the parties may agree to extend the time provided in Rules 33, 34, and 36 to respond to discovery (unless it interferes with a court-ordered deadline). But other provisions of the current rule are deleted.

Depositions. Rule 30(a) adds "any treating physician in a medical malpractice action" to those persons a party may depose. A change to Rule 30(d) is mentioned above under "exceeding the discovery limits." Depositions by written questions under Rule 31(a) require leave of court.

Interrogatories. In Rule 33(a), the 40-interrogatory limit has been replaced with text that it is "subject to the numeric limits in Rule 26.2(f) and the procedures in Rule 26.2(g) and (h) for obtaining permission to exceed those limits." (Rules 34(b) and 36(a) contain similar text for requests for production and admissions, respectively.) Rule 33(a) adds that except for uniform interrogatories, each subpart of an interrogatory counts as one interrogatory.

Physical and Mental Examinations. Rule 35(c) was modified to allow video or audio recording of an examination, but the court may limit the recording using the least restrictive means possible on a showing that recording may adversely affect the outcome of the exam.

Requests for Admission. Rule 36(a), consistently with the amendments to Rule 8(c), provides that an answer to a request for admission does not fairly respond by stating that a document "speaks for itself," that the responding party "denies any allegations inconsistent with the language of a document," or claiming that a request regarding a fact, or the application of law to fact, states a legal conclusion.

Subpoenas: A new provision in Rule 45(d) ("service") requires that a copy of a subpoena requiring the production of documents, ESI, or tangible things, or the inspection of premises, must be served on other parties at least two days before it is served on the person to whom it is directed. Rule 45(e) ("protecting a person subject to a subpoena; motion to quash or modify") also has new provisions. One provision provides that absent good cause, a subpoena may not seek production of materials that have already been produced in the action or that are available from other parties to the action. The other provision requires, unless otherwise ordered by the court for good cause, that the party seeking discovery pay the reasonable expenses incurred by the subpoenaed person in responding to a subpoena seeking the production of documents, ESI, tangible things, or an inspection of premises. If those expenses are other than routine clerical or copying costs allowed by statute, the person must object on grounds that the expenses will cause an undue burden without payment, and must provide to the requesting party an advance estimate of those expense. The court may then quash or modify the subpoena, or it may specify conditions that include payment of those expenses by the subpoenaing party, and payment in advance.

Expedited Procedure. Rule 26(d) is an expedited procedure for resolving discovery and disclosure disputes. Filings under this new rule are not motions. When parties have a dispute that would otherwise be addressed under Rules 26(c) or 37(a), they must file a joint statement of the dispute, not exceeding 3 pages (1.5 pages per party). The parties must include a Rule 7.1(h) good faith consultation certificate. Briefing is permitted only if the court orders it. The parties may contact the court by telephone to request a hearing, and the court should set the matter at the earliest convenient time, whether by telephone or in person. The court must issue a minute entry containing its resolution of the dispute. Parties may then file materials they deem necessary to create a record. The rule does not limit the ability of parties to contact the court during a deposition without the need for a written filing.

Part V: Sanctions.

Rule 11. The court may impose sanctions on a party for filing a document in violation of the rule, or for failing to participate in a Rule 11(c)(2) consultation.

Rule 37 Generally. Rule 37(a) allows the court to order the party whose conduct necessitated a Rule 26(d) motion ("expedited procedure for resolving discovery and disclosure disputes") to pay the moving party's reasonable attorney's fees, unless the movant sought relief before attempting to resolve the issue in good faith, the other party's objection was substantially justified, or other circumstances would make an award

unjust. The rule also allows the court to issue a protective order authorized under Rule 26(c) if a Rule 26(d) motion is denied, or denied in part and granted in part. In Rule 37(b) ("failure to comply with a court order"), the list of sanctions is preceded by the phrase "including without limitation the following…."

Failure to Disclose, Attend, Preserve. If a party failed to timely disclose under Rule 26.1, Rule 37(c) provides that the party may not use that information, witness, or document unless the court specifically finds that the failure to disclose caused no prejudice; in appropriate circumstances, the court may also order sanctions. For a failure to timely disclose unfavorable information, the court may impose any appropriate sanctions under the circumstances. In Rule 37(f), the failure of a party to attend their own deposition, or to respond to interrogatories or requests to produce, is neither excused "or mitigated" on grounds that the discovery was objectionable. Under Rule 37(g) ("failure to preserve electronically stored information"), a party must take reasonable steps to prevent the application of a document retention policy from destroying information that should be preserved, and whether that policy was applied consistently and in good-faith are factors the court may consider in determining whether reasonable steps were taken.

Proportionality. Rule 37(h) is new. It is titled, "orders to achieve proportionality," and it provides,

> Timely and full compliance with Rules 26, 26.1, and 26.2 being essential to the discovery process, achieving proportionality, and trial preparation, the court may make any order to require or prohibit disclosure or discovery to achieve proportionality under Rule 26(b)(1), including without limitation: (1) entry of any order permitted by Rule 26(c); and (2) entry of any order allocating the costs, expenses, and attorney's fees of discovery or disclosure among the parties as justice requires.

A new comment to the 2018 Amendment to Rule 37 reinforces that the rule was amended in ways that "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."

Part VI: Miscellaneous.

Complex Civil Litigation. Rule 8(h) regarding complex civil actions is deleted. So is Rule 16.3 regarding the initial case management conference in complex cases. These provisions may be supplanted with a local rule by the superior court in Maricopa County.

Dismissal. Under Rule 38.1(d), the clerk must place a civil action on the dismissal calendar if 210 days (rather than 270 days under the current rule) have passed since the action was commenced and the parties to the action, other than an arbitration action, have not filed a joint report and proposed scheduling order. The separate provision under this rule for medical malpractice actions is deleted.

Forms. A comment to the 2018 amendment to Rule 84 ("forms") advises that the use of a form is not required unless these rules or a court order otherwise requires.

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