Changes to Litigation in Arizona

The New Civil Rules and The Impact on Insurers

By: Lynn Allen - Tyson & Mendes
Alicyn Freeman - Broening Oberg Woods & Wilson P.C.
Jathan McLaughlin - Broening Oberg Woods & Wilson P.C.
Robert Sullivan - Broening Oberg Woods & Wilson P.C.
Discovery Changes

- Major changes to the discovery process have federalized the rules to a degree.
- Changes to Rule 26 (discovery in general)
- Changes to Rule 26.1 (Initial Disclosure Statement)
- Preservation of ESI
- Hyperlinks
Rule 26 -- Scope of Discovery

- Federalized the rule
- Proportionality matters
- ESI Discovery has its own limitation
  - "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). The court may specify conditions for the disclosure or discovery."
Rule 26.1 -- Initial Disclosure Statement

- Must disclose
  - All individuals/custodian of records with ESI.
  - Insurance policy and limits
  - A copy of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy
  - The remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement.
- Must supplement: “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”
- Reservation of Rights best practices
ESI Discovery Responses

- “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.”
Rule 37 -- Duty to Preserve Evidence

- Begins when a party reasonably anticipates the commencement of an action -- does not require a litigation hold letter.
  o But, litigation hold letter still suggested
    ▪ Best practice in the event you are arguing a spoliation motion down the road.
- Sanctions - No greater than necessary to cure the prejudice.
  o Sanctions may be imposed regardless of intent.
Hyperlinks - Recommended in AZ Rules

• “When I pull up a memo with links, I have three immediate impressions:
  • This attorney knows how I work;
  • This is going to be easy;
  • I hope other attorneys notice this.”

  – Hon. David Nuffer, United States District Judge, D. Utah

“I find hyperlinks to be a very convenient way to check case citations, read pin-point case cites, and view attachments without having to open a new window or toggle between screens. I hope lawyers make greater use of this capability in federal court filings in the future.”

Hyperlinks already outdated?

Arizona Superior Court - Drafting Assistant from Westlaw
• Key Cite Flags
• Links to Page/Line Citations
• Will produce a case that supports a statement of law by keyword search

According to a recent report to the Texas Judicial Council, the Fifth Circuit has inspired upcoming enhancements to the Texas Appeals Management and E-filing System (TAMES) that will include automatic linking to record citations. As an additional step, TAMES will “take a properly formatted cite and automatically link it to the case in Westlaw or LexisNexis.”

Are Lawyer-Hyperlinked Briefs Headed for Extinction?  Posted by D. Todd Smith on September 8, 2014
http://www.texasappellatelawblog.com/2014/09/articles/technology/are-lawyerhyperlinked-briefs-headed-for-extinction/
Robert Dubose, in *Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World*, suggests that when appellate advocates switch from paper briefs to electronic briefs, they should rethink legal writing.

- Abandon long-winded text, long paragraphs within that text and lengthy argument development
- Draft briefs that look more like web pages, with highly structured text that is easy to scan and read rapidly.
- Eliminate footnotes
- Use easy to read fonts

*Time* magazine asked “Do E-Books Make It Harder to Remember What You Just Read?” because personal experience and research suggests that comprehension and retention differ when information is obtained from reading an electronic, rather than a paper, text. That article reported a study that found studying data on a computer or device required more “repetition” of the data. The study also suggested that readers of paper texts were able “to digest the material more fully.” [http://www.lawpracticetoday.org/article/the-quiet-revolution-in-brief-writing/](http://www.lawpracticetoday.org/article/the-quiet-revolution-in-brief-writing/)
Committee on Civil Justice Reform Report

Recommendations for reforming Arizona’s civil litigation landscape
Report issued October 2016

http://www.azcourts.gov/cscommittees/Committee-on-Civil-Justice-Reform
Eye Toward Lowering Costs

• Focus of the report is on improving access to courts by lowering costs. Proportionality is key.

• Differentiated Case Management System:
  • Tier 1 - $50,000 and under
  • Tier 2 - $50,000 - $300,000
  • Tier 3 - Over $300,000.

• Cases will be given different presumptive limits on discovery based upon the tier.
Other Proposals

• Encouraging courts to manage litigation - moving away from attorney-based case management.
• More informal discovery-dispute resolution - calls to chambers, not motions.
• Rule 11 - continue recently-instituted reforms by encouraging real sanctions for actual abuses.
• Less expert discovery - proposal to incorporate limitations on expert discovery found in federal Rule 26.
Initial Discovery Pilot
Project District of Arizona

Lynn M. Allen
Partner
Tyson & Mendes
Background and Purpose

• Mandatory initial standard discovery
• Accelerate the disclosure of relevant information
• Reduce cost and delay
• Early case resolution
• 3-year project
Case Participation

• General Order 17-08
• Cases filed after May 1, 2017
• Exemptions
  • Cases exempt under Rule 26(a)(1)
  • Multidistrict litigation
  • Private Securities Litigation Reform Act
Deferrals

• Stipulation no discovery will be conducted
• Stipulation of good faith settlement negotiations
  • One time 30 day extension
• No other extensions permitted
Mandatory Disclosures

- Persons likely to have discoverable information
- Persons believed to have given statements
- List of documents relevant to claims or defenses
- Statement of relevant facts
- Statement of legal theories
- Computation of each category of damages
- Insurance agreements
Mandatory Disclosures

- Based on information reasonably available
- Requires timely supplementation
- Signed under oath by the party and the attorney
- Requires disclosure of both favorable and unfavorable information relevant to the claims or defenses
Objections

• No boilerplate objections allowed
• Requires particularized objections based on disproportionate expense or burden
• Requires fair description of documents being withheld
Timeline

• Answers, counterclaims, and replies must be filed even if party files a motion to dismiss
• Plaintiff’s deadline 30 days after first responsive pleading
• Defendant’s deadline 30 days after filing its responsive pleading
• File notice of service (court will monitor!)
Other Requirements

• Discuss mandatory initial discovery during Rule 26(f) conference
• Describe summary of discussion in Rule 26(f) report
• Disputes resolved during Rule 16 scheduling conference
• Other disputes via pre-motion conference
Sanctions

- Failure to comply
- Rule 37(b)
  - Exclusion of evidence not timely disclosed
  - Imposition of costs
  - Egregious violations
- Sanctions must fit the offense
Impact on Insurers

• Accelerates discovery
• Identify and provide relevant information and documents to defense counsel early
• Disincentive to removal of diversity cases
  • Arizona state court rules/custom and practice