

## THE 2015 AND 2016 CIVIL RULE AMENDMENT UPDATE

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### IMPORTANT DATES IN THE RULE 28 RULES CYCLE

- August 26, 2014 - Supreme Court Rules Agenda
- January 1, 2016 - Effective Date of 2015 Amendments
- January 10, 2016 - Deadline for Submission of Rules Petitions
- May 20, 2015 Deadline for Submission of Comments on Petitions to Supreme Court
- Late August, 2016 - Supreme Court Rules Agenda
- January 1, 2017 - Effective Date of 2016 Amendments

## WHAT WILL BE COVERED

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- Recent Amendments to the Arizona and Federal Arizona Rules of Civil Procedure
- Experimental Rule 8.1 - The Commercial Court
- Task Force on the Arizona Rules of Civil Procedure - Restyling of the entirety of the Rules
- Other Pending 2016 Petitions

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## 2015 Amendments to Arizona Rules of Civil Procedure

## 2015 AMENDMENTS TO ARIZ. R. CIV. P.

### Rule 55(a)(1)(ii) - (Default Application and Entry)

- **R-15-0021** – Prepared by Civil Practice and Procedure Committee and filed by State Bar of Arizona
- Old Rule required that, “[w]hen party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney . . . .”
- *Neeme Systems*, 226 Ariz. 577 (App. 2011) involved two suits (one in UT and one in AZ) between same parties.
  - Both had counsel in UT suit.
  - When AZ defendant failed to answer in AZ, AZ Plaintiff applied for default without providing notice to UT counsel.
  - Ct. of App. found notice to have been required and held default void.
  - Opinion depublished by Arizona Supreme Court without comment.

## 2015 AMENDMENTS TO ARIZ. R. CIV. P.

### Rule 55(a)(1)(ii) - (Default App. and Entry) (cont’d.)

- Intent of Rule 55(a)(1)(ii) is to provide broad notice of applications for entry of default to attorneys representing parties to be defaulted.
- Question becomes how broad that notice requirement should be and how do you delineate it.
- Now, Rule provides that “[w]hen party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney in the action in which default is sought or in a related matter, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney . . . .”
- Amendment became effective January 1, 2016.

# Experimental Rule 8.1: The Commercial Court

## THE COMMERCIAL COURT: EXPERIMENTAL RULE 8.1

### Genesis:

Business Court Advisory Committee created by Supreme Court on 5/8/14

Committee's Report issued on 12/11/14 proposing the Maricopa County pilot project

### Recommendations Included:

- Appointment of judges knowledgeable about business issues
- Proactive case management
- Increased focus on ESI and ESI tools
- Increased predictability with a small bench and opinion repository

## THE COMMERCIAL COURT EXPERIMENTAL RULE 8.1

- 3-year pilot program began on **July 1, 2015**
- Experimental Rule 8.1 and Forms 14(a) and 14(b) adopted
- Participation is mandatory for all Maricopa County cases meeting the definition of “commercial case”
- No special fee
- Does not impact complex case procedures or assignment
- Does not impact the requirements for compulsory arbitration under Rule 72(b)
- Does not apply to cases filed before July 1, 2015

## THE COMMERCIAL COURT: EXPERIMENTAL RULE 8.1

### WHAT IS A COMMERCIAL CASE?

At least one Plaintiff and one Defendant are  
“**Business Organizations,**” or

The primary issues of law and fact concern:

a “**Business Organization,**” or

a “**Business Contract or Transaction**”

**AND it meets the criteria of either 8.1(b) or 8.1(c)**

## THE COMMERCIAL COURT™ EXPERIMENTAL RULE 8.1

8.1(b): no amount in  
controversy required

Governance, receivership  
Derivative action, indemnity  
Sale, merger, dissolution  
Misappropriation of IP  
Commercial real estate  
Franchise, securities, antitrust

8.1(c): amount in cont. of  
\$50,000 or more

UCC contract or transaction  
Sales of services by or to a  
business  
Prof. malpractice (non-med)  
Tortious business activity  
Surety bond, commercial ins.

## THE COMMERCIAL COURT: EXPERIMENTAL RULE 8.1

### A “Business Organization”

Includes:

Sole proprietorship  
Corporation, LLC  
Partnership, LP, MLP  
Business trust  
**Government entity if a  
party to a business contract  
or transaction**

Excludes:

An individual  
A family trust  
**Governmental entity not a  
party to a business contract  
or transaction**

## THE COMMERCIAL COURT" EXPERIMENTAL RULE 8.1

### A "Business Contract or Transaction"

Is one in which a business organization

- sold, purchased, licensed, transferred, or otherwise provided
- goods, materials, services, IP, funds, realty, or other obligations

"Consumer Contracts or Transactions" are EXCLUDED  
(...Primarily for personal, family or household purposes ...)

## THE COMMERCIAL COURT" EXPERIMENTAL RULE 8.1

### NOT ELIGIBLE FOR COMMERCIAL COURT

- Evictions
- Eminent domain, condemnation
- Civil rights
- Motor vehicle torts
- Torts involving physical injury
- Administrative appeals
- Domestic relations
- Wrongful termination of employment

## THE COMMERCIAL COURT: EXPERIMENTAL RULE 8.1

### THE PROCESS: WHAT IS DIFFERENT ?

- Early conference on ESI
- Joint Report requires additional information (Form 14(a))
- New proposed Scheduling Order (Form 14 (b))
- Rule 16(d) Conference is Mandatory

## THE COMMERCIAL COURT: EXPERIMENTAL RULE 8.1

### EXAMPLES OF CASE MANAGEMENT TOOLS

- Rule 16(d) Conferences
  - Vigorous discussion of ADR options, including settlement conferences with another Commercial Court Judge
  - Broader scope (ESI, protective orders, privilege, etc.)
  - Possible client participation
- Bifurcating and sequencing discovery to address particular issues
- Focus on proportionality of discovery (particularly e-discovery)
- Informal and early involvement of Court in discovery disputes
- Stick to proposed dates
- Increased use of bench trials

THE COMMERCIAL COURT:  
EXPERIMENTAL RULE 8.1

**REMINDERS...**

1. Review **Rule 8.1**.
2. Use the **new cover sheet** starting July 1, 2015.
3. Add to the caption of eligible complaints the words: **“Commercial Court assignment requested”**
4. Review the **ESI checklist**.
5. Use **new Forms 14(a) and 14(b)** for the Joint Report and Proposed Scheduling Order.

**Task Force on the Arizona Rules  
of Civil Procedure:  
Restyling of the entirety of the  
Arizona Rules**

## TASK FORCE ON THE ARIZONA RULES OF CIVIL PROCEDURE

- A.O. 2014-116: Established the Task Force on November 24, 2015
- The A.O. directed the Task Force to:
  - Review the ARCP and identify possible changes to conform to modern usage, to clarify and simplify language, and to avoid unintended variation from language in counterpart federal rules
  - Propose changes that promote access to the courts and the resolution of cases without unnecessary cost, delay, or complexity
  - Seek input from interested persons and entities
  - Submit a rule petition by January 2016

## EXAMPLES OF TASK FORCE ISSUES

- Stylistic changes
- Substantive changes
- Divergence versus uniformity between federal and Arizona rules
- Electronically stored information (“ESI”)
- Usefulness of new rule provisions
- Integration with pending rule petitions

## GENERAL GUIDELINES

- Where no good reason exists to depart from newly restyled language of a federal rule, the Task Force is adopting the restyled federal wording verbatim.
- Where there are good reasons for an Arizona rule to differ from a corresponding federal rule, the Arizona rule maintains those differences.
- However, even in these circumstances, and to enhance the clarity of the Arizona rule, its wording has been revised and its structure has been reorganized pursuant to restyling conventions.

## GENERAL GUIDELINES (CONT'D.)

- If an Arizona rule has recently undergone substantive revisions, the Task Force has been reluctant to revisit the substance.
- The Task Force has attempted to identify and eliminate archaic practices and traps, such as the requirements to verify certain pleading elements.
- The Task Force recommends revisions to Rule 26.1 and Rule 37 to meet the realities of identifying, handling and producing electronic data in a rational, cost-effective fashion, and in a manner consistent with the new Commercial Court's e-discovery processes.

## ILLUSTRATION OF STYLISTIC REVISION: CURRENT RULE 6(B)

### Rule 6(b). Enlargement

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(d), (g) and (l), and 60(c), except to the extent and under the conditions stated in them, unless the court finds (a) that a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (b) that no party would be prejudiced, in which case the court may, upon motion filed within thirty days after the expiration of the period originally prescribed or within 7 days of receipt of such notice, whichever is earlier, extend the time for taking such action for a period of 10 days from the date of entry of the order extending the time for taking such action.

## ILLUSTRATION OF STYLISTIC REVISION: PROPOSED RULE 6(B)

### (b) Extending Time.

- (1) *Generally.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:
  - (A) with or without motion or notice if the court acts, or the request is made, before the original time or its extension expires; or
  - (B) on motion made after the time has expired if the party failed to act because of excusable neglect.
- (2) *Exceptions.* A court may not extend the time to act under Rules 50(b), 52(b), 59(d), (g) and (l), and 60(c) except as those rules allow. Additionally, on motion, a court may extend the time to act under these rules for 10 days after the entry of the order extending the time, if:
  - (A) the moving party files the motion within 30 days after the specified time to act expires under these rules or within 7 days after the party received notice of the entry of the judgment or order triggering the time to act under these rules, whichever is earlier;
  - (B) the court finds that the moving party was entitled to notice of the entry of judgment or the order, but did not receive notice from the clerk or any party within 21 days after its entry; and
  - (C) the court finds that no party would be unfairly prejudiced by extending the time to act.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

- Response time for written discovery reduced from 40 to 30 days.
- Font size increase to 13 point, with corresponding increases to limits on the length of motions, responses and replies.
- Elimination of most comments, with substantive material moved into text of rule in some instances
- New procedures for joint filings, meet and confer requirements, orders to show cause.
- Partial federalization of Rule 11.
- Practical procedures for disclosure of ESI.
- Guidance for duty to preserve ESI.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

- **Rule 7.1(h) Good Faith Consultation Certificate.** When these rules require that a “good faith consultation certificate” accompany a motion or that the parties otherwise consult in good faith, the movant must attach to the motion a separate statement certifying and demonstrating that the movant has tried in good faith to resolve the issue by conferring with – or attempting to confer with – the party or person against whom the motion is directed. The consultation required by this rule must be in person or by telephone, and not merely by letter or email.
- Provides guidance for all rules having meet and confer requirement (e.g. Rule 11, Rule 37, Rule 56(d))

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### Rule 7.4. Joint Filings

(a) **Duties.** If a rule or order requires parties to jointly prepare and file a document with the court, each party must:

- (1) make itself reasonably available to participate in preparing the document;
- (2) promptly respond to communications from any other party concerning the document;
- (3) cooperate and make a good faith effort to resolve differences about the document's content, format, and the manner in which it will be filed; and
- (4) assure that the document is timely filed.

(b) **Separate Sections.** If a rule or order allows it, each party or side may prepare its own section of a joint filing, but each section must be clearly identified as being separately prepared by that party or side. A party or side may not make changes to another party's or side's section of a draft joint filing.

(c) **Separate Filing.** If the filing of a joint document becomes impractical because another party fails to comply with its duties under this rule, a party may prepare and file a document on its own behalf. If it does so, the filing's title must indicate that the party is filing it separately from the other party.

(d) **Sanctions.** A court may sanction any party who violates any of its duties under this rule.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### Rule 11(c) Sanctions.

(1) **Generally.** If a pleading, motion, or other document is signed in violation of this rule, the court – on motion or on its own – must impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

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

- (A) attempt to resolve the matter by good faith consultation as provided in Rule 7.1(h); and
- (B) if the matter is not satisfactorily resolved by consultation, serve the opposing party with written notice of the specific conduct that allegedly violates Rule 11(b). If the opposing party does not withdraw or appropriately correct the alleged violation(s) within 10 days after the written notice is served, the moving party may file a motion under Rule 11(c)(3).

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

- (A) be made separately from any other motion;
- (B) describe the specific conduct that allegedly violates Rule 11(b);
- (C) be accompanied by a Rule 7.1(h) good faith consultation certificate; and
- (D) attach a copy of the written notice provided to the opposing party under Rule 11(c)(2)(B).

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### 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:

(3) ensuring that discovery is appropriate to the needs of the action, considering the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery, and the parties' resources;

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

**Rule 26(b) Discovery Scope and Limits.** Unless the court orders otherwise in accordance with these rules, the scope of discovery is as follows:

(1) *Generally.*

(A) *Scope.* Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter of the pending action, including matters relevant to: (i) the claim or defense of any party; (ii) the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things; and (iii) the identity and location of persons having knowledge of any discoverable matter. If the information appears reasonably calculated to lead to the discovery of admissible evidence, it is not a ground for objection that the information, though relevant, would be inadmissible at trial.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### **Rule 26.1(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.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### **Rule 26.1(b). Disclosure of Hard Copy Documents and Electronically Stored Information**

(1) *Hard Copy Documents.* Unless there is 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 production is not so made, the party must provide with its disclosure the name and address of the custodian of the documents. 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 confer promptly 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.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

- (B) *Resolution of Disputes.* If the parties are unable to satisfactorily resolve any dispute, they may present it to the court for resolution 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).
- (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.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### **Rule 37(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 first 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.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### Rule 37(g) Failure to Preserve Electronically Stored Information (cont'd).

#### (1)(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.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### Rule 37(g) Failure to Preserve Electronically Stored Information (cont'd).

(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.

## EXAMPLES OF SUBSTANTIVE PROPOSED AMENDMENTS

### **Rule 56(d) When Facts Are Unavailable to the Opposing Party; Request for Rule 56(d) Relief; Expedited Hearing.**

**(1) Requirements.** If an opposing party cannot present evidence essential to justify its opposition, it may file a request for relief and expedited hearing. The request must be titled: "Request for Rule 56(d) Relief and for Expedited Hearing." The request must be accompanied by:

**(A)** a supporting affidavit establishing specific and adequate grounds for the request and addressing, if applicable, the following:

**(i)** the particular evidence beyond the party's control;

**(ii)** the location of the evidence;

**(iii)** what the party believes the evidence will reveal;

**(iv)** the methods to be used to obtain it;

**(v)** an estimate of the amount of time the additional discovery will require; and

**(B)** a good faith consultation certificate complying with Rule 7.1(h).

## TASK FORCE ROAD MAP

December 17, 2015	Final TF.ARCP meeting of 2015
January 2016	Rule petition filed
April 2016 [tent.]	End of first comment period
May 2016 [tent.]	Filing of an amended rule petition
June 2016 [tent.]	End of second comment period
July 2016 [tent.]	Filing of a reply petition
August 2016 [tent.]	Supreme Court's rules agenda
January 1, 2017	Probable effective date

## ADDITIONAL PENDING 2016 PETITIONS

- **R-15-0043 - Rule 11 (Pima County Bar)**
  - Would make imposition of Rule 11 sanctions discretionary as opposed to mandatory through use of word “may”.
- **R-16-0017 - Rule 5.1(a) (Maricopa County Attorney)**
  - Would allow governmental offices, public firms and private firms that have appeared as counsel of record to substitute or associate their attorneys into actions through notice and without order of the court.
- **R-16-0018 - Rule 49(a) (Judge Warner)**
  - Would permit jury foreperson and/or jurors to sign verdict forms by use of their juror numbers and initials in lieu of signature.
- **R-16-0019 - Rule 10(f) (Brian Partridge)**
  - With respect to fictitiously named defendants whose actual name is discovered after entry of judgment, would permit entry of judgment against defendant.