The Arizona Association of Defense Counsel

Common Defense

Spring 2018

A Magazine for Arizona Defense Attorneys

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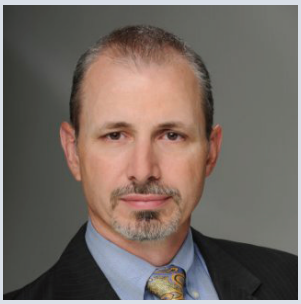

Charles Callahan, Esq.

"May you live in interesting times." Although this phrase is generally perceived as a blessing or an expression of hope, it is often used ironically as a broad comment on the times in which we live. In fact, contrary to popular usage, this phrase originated as a curse, and when introduced into the western lexicon by politicians, it was represented that the phrase was an ancient Chinese curse. Not surprisingly, the political avowal as to ancient Chinese origins is widely viewed as false, but the fact that it was originally intended as a curse remains true.

"Do Good"

Regardless of whether you view the phrase as a blessing or a curse, it cannot be argued that these are not "interesting times." Those of you who are still reading this may be thinking, "Oh no, he's not *really* going to start a political debate, is he?!" No, I am not. My point is that in times like these, it is often easy to lose sight of certain things. If I am not fretting, or debating others, over world and national affairs, I find myself consumed with disclosure deadlines, motion deadlines, reporting to clients and carriers, marketing, wondering when new cases will come in, etc., etc. I forget about the relative position of privilege that we, as attorneys, hold in our communities and the opportunities that our positions afford us. If I am alone in these thoughts (and if you haven't done so already), you can stop reading and flip forward to the pictures of the Judicial Receptions.

How can we "do good" for our bar and communities? We are, first and foremost, a profession, comprised of attorneys who have benefitted tremendously from those who came before us. While there is no substitute for putting in the time and effort to develop our craft as defense attorneys, I, myself, find that much of what has formed me as a lawyer did not come from the "books." It came from AADC functions and receptions, conference rooms, courthouse steps, lobbies, lunches, after work at Durant's, etc., where lawyers senior to me were willing to give guidance and share experiences -- many times in the form of only mostly-true war stories, but shared experiences nonetheless.

Luckily for me, this was at a time before the proliferation of emails, web conferences, and other technological advancements - they have made our practices more efficient, but frequently at the cost of personal interaction. Whether brand new, young, or experienced attorneys, I believe we all have an obligation to at least attempt to make our bar better than when we entered. More easily said than done. As I reflect, I realize that I can make more effort to personally interact with attorneys, and particularly our younger members of the defense bar, to improve our bar through shared experiences and guidance. OK, OK, maybe I'm a bad example for improving the bar through mentoring younger lawyers, but you get the idea – we can "do good" for our community of defense lawyers by becoming part of, and more involved in, that community.

This year, the AADC has seen an uptick in the turnouts for some of our signature events – the Fall Kickoff, and the Judicial Receptions. For not only comradery and collegiality, but also toward the goal of making our bar better, we want to encourage everyone to keep showing up and extend the hope that more and more will join us. In the end, it does all of us good.

Change in Barry Fish Memorial Golf Tournament

As a Board, we have also considered and discussed how we can "do good" for our communities, as a whole. Therefore, in the coming weeks and months, you will see a philanthropic component added to some of our events. More to come.

As for existing philanthropic activities, the YLD puts on its annual charity softball tournament, which is always a big success, and, as most of you know, the AADC holds its annual Barry Fish Memorial Golf Tournament to benefit ALS charity. As you may have already seen from earlier announcements, however, this year we will not be putting on the traditional golf tournament. We are not jettisoning golf altogether, but, instead of 18 holes of golf, we will be hosting a Barry Fish Memorial event at Top Golf to raise money for ALS.

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Correspondence and articles are welcome and should be sent to the Editor. Email articles for submission to Amy Wilkens at awilkens@lorberlaw.com. The right is reserved to select materials to be published. Material accepted for publication becomes property of the Arizona Association of Defense Counsel.

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President's Message *(continued)*

We are mindful that this is a significant departure from AADC tradition, but we decided that times and circumstances warranted a "change of pace." Unfortunately, in recent years, participation in the golf tournament has noticeably decreased while the cost of putting on the tournament has increased. We fully understand and appreciate the increasing time demands in all of our lives, and the sacrifice of time required to participate in the tournament. But, ultimately, our recent contributions toward fighting this insidious disease, which claimed the life of one of AADC's own, Barry Fish, were not where they could be or, in our minds, where they should be.

As members of the defense bar, and our Arizona communities, we feel it is incumbent upon us to "do the most good" that we can, and we are very excited about the opportunities this new event affords – i.e., raising more money to benefit the ALS foundation, providing direct tax benefits to participants, increasing the number of participant lawyers of all ages and skill levels, more interaction amongst the lawyers (instead of just those in your foursome)… The list goes on. *Please watch your emails for further details on the event, and we look forward to a BIG turnout!*

AADC Annual Meeting

Hopefully you are in the process of registering for the Annual Meeting being held on June 1, 2018, at the ASU law school. We are very honored that the Arizona Court of Appeals has once again agreed to hold an oral argument at our meeting. Last year's oral argument at the Annual Meeting was lively, well advocated, topical, and well attended, and we look forward to the same this year. The AADC will also be putting on additional CLE programs after the oral argument, with additional activities following.

You may have noticed that this year's Annual Meeting is not being held at a resort, and does not involve an overnight stay. This was intentional because of our preparation for next year's meeting, ***which will be held in Coronado, California!*** We are thrilled to announce that the AADC and Tucson Defense Bar will jointly host their annual meetings in Coronado next year, which will hopefully serve as a launching point for fun, relaxing, and educational meetings in the years to come. Please make plans to join us!!

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President

The "Sum Certain" Notice of Claim Requirement under A.R.S. § 12-341.01

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Claims against public entities (including public schools and employees sued in their public capacities) are subject to a pre-lawsuit notice of claim. *See* A.R.S. § 12-821.01. The purpose for requiring a notice of claim is to give reasonable notice to the public entity, allow it to investigate, budget, and provide an opportunity to resolve the claim without the need for litigation. *Havasupai Tribe of Havasupai Reservation v. Arizona Bd. of Regents*, 220 Ariz. 214, 223, 204 P.3d 1063, 1072 (Ct. App. 2008). As part of the notice of claim, a "sum certain" settlement demand must be made on the public entity. This article discusses the considerations for challenging a claimant who fails to provide a sum certain demand.

The Arizona notice of claim statute is clear on its face:

A.R.S. § 12-821.01

(A). Persons who have claims against a public entity, public school or a public employee shall file claims with the person or persons authorized to accept service for the public entity, public school or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. **The claim shall contain facts sufficient to permit the public entity, public school or public employee to understand the basis on which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount.** Any claim that is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.
[...]

A.R.S. § 12-821.01

The substance of a notice of claim must therefore include:

1) Facts sufficient to allow the public entity to understand the basis for the claim;

2) A specific "sum certain" amount for which the claim can be settled.[1]

Despite these seemingly unambiguous requirements, issues related to compliance with the notice of claim statute have been litigated repeatedly.

Arizona's appellate courts have decided numerous cases on whether a claimant has provided a "sum certain" demand. As a preliminary matter, courts require that plaintiffs strictly comply with the notice of claim statute – "substantial compliance" is insufficient. *Simon v. Maricopa Med. Ctr.,* 225 Ariz. 55, 62, 234 P.3d 623, 630 (Ct. App. 2010). While demanding strict compliance, Arizona appellate courts have found that "[c]ompliance with this statute is not difficult." *Deer Valley Unified Sch. Dist. No. 97 v. Houser,* 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007). Specifically, the Court has held the notice of claim statute "unmistakably instructs claimants to include a particular and certain amount of money that, if agreed to by the government entity, will settle the claim." *Deer Valley*, 214 Ariz. at 296.

So, if a plaintiff is equivocal in its notice as to the amount required to settle the claim, a public entity must carefully evaluate whether the notice of claim truly provides a sum certain settlement offer that would resolve the case. If a plaintiff fails to set forth a specific settlement offer, the defending public entity should challenge the subsequent lawsuit for failure to comply with A.R.S. § 12-821.01.

At first blush, some practitioners may suggest that the sum certain

1 The Notice of Claim must meet other statutory requirements that are not addressed in this article. *See generally* A.R.S. § 12-821.01.

The "Sum Certain" Notice of Claim Requirement *(continued)*

demand requirement would rarely, if ever, create a close call. But, cases applying the sum certain requirement to specific facts are instructive.

In *Deer Valley*, a school district employee sought compensation for wrongful termination under the Arizona Employment Protection Act. In her notice of claim, the employee (Pamela McDonald) alleged that her termination caused her to lose her ongoing salary, and also resulted in emotional distress and general damages. In her Notice of Claim, Ms. McDonald provided specific damages that she believed she suffered because of her alleged wrongful termination. Ms. McDonald's Notice of Claim included the following claim amounts:

> 1. All economic damages arising as a result of her removal from the position in an amount anticipated to be approximately $35,000.00 per year or more going forward over the next 18 years;
>
> 2. Compensatory damages for emotional distress suffered as a result of the wrongful termination in an amount no less than $300,000.00;
>
> 3. General damages, compensating Ms. McDonald for damage to her reputation of employment in an amount of no less than $200,000.00

Id. at 295. McDonald's notice of claim also stated that "McDonald hereby makes demand on the District for payment of these said amounts." *Id.* at 296.

Defendant Deer Valley moved to dismiss McDonald's complaint arguing that her failure to quantify a sum certain that would settle her allegations was fatal to her claim. While the trial court denied the initial motion to dismiss, the Arizona Supreme Court reversed, holding that dismissal was appropriate.

The *Deer Valley* opinion holds that an enumerated damages approach is not sufficient to comply with the notice of claim statute. The opinion explains, "[I]t is unclear whether McDonald would have resolved her claim for economic damages for payment of $630,000, the total reached by multiplying $35,000 by eighteen years, whether she would have demanded the "more" she states applies to her claim, or whether she would have accepted an amount reduced to present value." *Id.* at 296-297. The *Deer Valley* court held that the specific damage figures included in McDonald's notice of claim were insufficient. McDonald was required to provide a specific figure for which she would settle the claims, not just her anticipated damages. As a result, McDonald's claims were dismissed.

The Court of Appeals (Div. 1) in *Yollin v. City of Glendale*, 219 Ariz. 24, 191 P.3d 1040 (Ct. App. 2008) reached the opposite conclusion in evaluating whether the plaintiff provided a sum certain demand. Mr. Yollin was the plaintiff in a slip and fall injury, and his notice of claim stated, in part:

> For purposes of complying with this claim notice statute, **we hereby demand $150,000.00** on behalf of Mr. Yollin. **We have stated this number to comply with the "sum certain" requirement of the statute.** Obviously, as the remaining records and bills come in, we will be in a better position

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The "Sum Certain" Notice of Claim Requirement *(continued)*

> to intelligently discuss settlement of this matter. **In exchange for said payment, we will release the City of Glendale and their agents and employees from any liability associated with this claim.**

Yollin v. City of Glendale, 219 Ariz. 24, 27, 191 P.3d 1040, 1043 (Ct. App. 2008) (emphasis added).

The City of Glendale challenged plaintiff's notice of claim on two separate grounds, including whether Yollin provided a sum certain in his notice of claim. Glendale argued that plaintiff failed to comply with the sum certain requirement by including language in the notice of claim that plaintiff's demand would potentially be negotiable after obtaining additional medical bills related to plaintiff's medical treatment. The court disagreed. Instead, the court held that Yollin made a definite, unambiguous demand, consistent with the language of the notice of claim statute that would have bound plaintiff if the City had accepted the offer.

The *Yollin* court couched its analysis in contract doctrine finding that Yollin's notice of claim contained a valid offer, which if accepted, would have created a binding agreement between the parties. *Id.*

Last summer, the Arizona Court of Appeals (Div. 1) revisited what constitutes a "sum certain" demand, and again emphasized that a specific sum certain demand is a mandatory element of the notice of claim. *See Yahweh v. City of Phoenix*, 243 Ariz. 21, 400 P.3d 445, 446 (Ct. App. 2017), review denied (Oct. 17, 2017).

In Yahweh, a former police detective filed claims against the City of Phoenix claiming that he was defamed in an internal affairs report. The report resulted in Yahweh being added to the "Brady List" – a list of officers who have been implicated in professional misconduct. *Id.* In his notice of claim, Mr. Yahweh provided facts related to his claim, and in outlining his alleged damages stated:

> The Claimant will be bringing legal action against the Phoenix Police Department and the City of Phoenix seeking damages for 1.5 million dollars, as the Claimant planned to earn for the next ten years and these were his projected earnings. He is suing for defamation of his character in the public, as the PSB report is a public record, and among his peers, and it has affected his earning potential to obtain employment. He will also be bringing action for violations of the Family Medical Leave Act.
>
> **In order to obtain an agreeable resolution to this matter, contact his lawyer…**

The City moved to dismiss his claims based on his failure to make a sum certain demand. The City argued that Yahweh's notice of claim merely outlined a summary of the potential damages that he would seek in a subsequent lawsuit, but did not provide a sum certain for which Yahweh would settle the claim. The trial court agreed and dismissed the case, finding that Yahweh failed to provide a sum certain demand. The Court of Appeals affirmed the dismissal.

Relying heavily on *Deer Valley* and *Yollin*, the court found that Yahweh's notice of claim "included a series of ambiguous statements that merely informed the City of the amount Yahweh intended to demand in litigation, not a sum-certain settlement offer. There were no words of intent in the NOC granting the City the power to settle all of Yahweh's claims for a particular and certain amount of money." *Id.* at 21.

The Court also held – consistent with past authority – that a plaintiff must strictly comply with the notice of claim statute, and that complying with the statute is not difficult.

Applicability In Defending Public Entities

Arizona courts have repeatedly renewed their commitment

The "Sum Certain" Notice of Claim Requirement *(continued)*

to holding plaintiffs to a strict compliance standard when a notice of claim is required. The lesson from these cases is to closely examine every notice of claim that precedes litigation against a public entity. While the notice of claim statute provides clear direction on the mandatory elements for a pre-litigation demand, the requirements continue to pose some problems and pitfalls for plaintiffs. Public entities should also be cognizant to raise challenges to notice of claim issues early in the case, as those defenses are not jurisdictional, and can be waived. *Pritchard v. State*, 163 Ariz. 427, 432, 788 P.2d 1178, 1183 (1990). Accordingly, if the notice of claim appears deficient, a variety of authority supports disposal of the case in its earliest stages. The strict compliance standard has been repeatedly upheld by Arizona courts, and failure to meet the sum certain requirement described in this Article will certainly result in early dismissal.

The 2018 Amendments to the Arizona Rules of Civil Procedure: What do they mean to the practicing trial lawyer?

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Arizona defense lawyers need to familiarize themselves with the amendments to the Arizona Rules of Civil Procedure ("Rules") that go into effect on July 1, 2018. Certain rules have been significantly changed as a result of the amendments including the adoption of Rule 26.2 which implements a new three-tier system of damages that will dictate what presumptive limits to discovery is allowed in a particular case.

While this Article focuses on the newly created discovery tiers, other significant amendments address the imposition of sanctions (Rules 11 and 37), discovery (especially discovery disputes and electronically stored information under Rules 26, 37, and 45.2), experts (Rule 26.1(d)(1)), and subpoenas (Rule 45) that all practitioners need to study and understand to properly advise their clients and prepare for arbitration or trial.

Scope of Changes. The Rule amendments are authorized pursuant to Arizona Supreme Court Order No. R-17-0010 and Attachments A and B (filed 8/31/17 and amended on 9/14/17, 10/12/17, and 10/26/17), available at http://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Civil-Procedure. Effective July 1, 2018:

- Rules 5.1, 8, 8.1, 11, 16, 26, 26.1, 26.2, 29, 30, 33-37, 38.1, 45, and 84, and the associated comments to Rules 37 and 84, are amended;
- Rule 16.3 and its associated comment are abrogated;
- New Rules 26.2 and 45.2, and the associated comment to Rule 26.2, are adopted; and
- Rule 84, Forms 7, 9, 10, 11(a), 11(b), 12(a), 12(b), 13(a), 13(b), 14(a), and 14(b) are adopted or amended.

Cases Filed Before 7/1/18. For cases filed before July 1, 2018: (1) only amended Rules 11, 26, 26.1 (except for the first sentence of Rule 26.1(d)(2) relating expert reports in Tier 3 cases), 31, 35, 37, 45, and new Rules 26.3 and 45.2, and the amended or new rules' associated amended or new forms, shall apply, unless (b)(3) applies or the application of those rules would be infeasible or would work an injustice, in which case the former rule applies; (2) the pre-July 1, 2018 unamended versions of Rules 5.1, 8, 8.1(f), 16, 29, 30(d)(1), 33, 34, 36, and 38.1, and their associated forms and comments, shall continue to apply; and (3) the pre-July 1, 2018 unamended versions of Rules 26(c), 26(f), 31, 37(a), and 45 shall continue to apply to any discovery motion, discovery request or notice, or subpoena filed or served before July 1, 2018.

For Cases Filed On or After 7/1/18. The amendments to Rules 5.1, 8, 8.1, 11, 16, 26, 26.1, 26.2, 29, 30, 33-37, 38.1, 45, and 84 and their associated forms and comments, and new Rules 26.2 and 45.2 and their associated forms and comment, apply. Additionally, Rules 47(a)(1), 47(i), 48(b), 58(b), 58(f), and 92(a)(6) of the Rules of the Arizona Supreme Court and Rule 28 of the Arizona Rules of Probate Procedure are amended, effective July 1, 2018, and shall apply to all cases and proceedings *pending* on, *filed* on, or *after*, July 1, 2018.

Initial Pleadings. The discovery tiers begin to be implicated from the commencement stage. Under amended Rule 8(b)(1), in all actions in which a party is pursuing a claim other than for a

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sum certain or for a sum which can by computation be made certain, no dollar amount or figure for damages sought may be stated in any pleading allowed under Rule 7. The pleading setting forth the claim may include a statement reciting that the minimum jurisdictional amount established for filing the action has been satisfied. Under amended Rule 8(b)(2), a party who claims damages but does not plead an amount **must plead that their damages are such as to qualify for a specified tier defined by Rule 26.2(c)(3)**. In addition, under amended Rule 8(g)(1)(B), the Civil Cover Sheet will need to state the amount in controversy pleaded, or if that amount is not pled, the discovery tier to which the pleading alleges the action would belong. The "complex litigation" section has been deleted. Cases in the commercial court will default to Tier 3 (absent reassignment) under Experimental Rule 8.1(f).

The answering party to a pleading can no longer state that "the document speaks for itself," that the party "denies any allegations inconsistent with the language of a document," or answer a factual allegation, or an allegation applying law to fact, by claiming that it states a legal conclusion. *See* amended Rule 8(c)(2). Also, under amended Rule 8(c)(5), an answering party can no longer deny an allegation "on information and belief." Instead, it must either admit or deny an allegation if it has information sufficient to form a belief, or must instead state that it has insufficient information to form a belief about the truth of an allegation.

Early Meeting and Tiering. Rule 16(b) is amended to eliminate the old "Joint Report" language and instead to require participation in an *Early Meeting* to address discovery tier assignment and other matters. At the earliest practicable time, but no later than 30 days after a party files an answer or files a motion directed at the complaint, or 120 days after the action commences—whichever occurs first—*that party and the plaintiff must meet and confer about the anticipated course of their case*, including the tier to which it should be assigned under Rule 26.2 and the subjects set forth in Rule 16(b)(2) and (c). The parties must discuss whether and how they can agree to streamline and limit claims and affirmative defenses to be asserted, discovery to be taken, and motions to be brought. The purpose of the conference is to plan cooperatively for the case, and to facilitate the case's placement in one of three tiers discovery. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging and participating in the Early Meeting.

Topics for Early Meeting. Under Rule 16(b)(2), the parties should at least discuss the following topics at the Early Meeting:

> (A) their anticipated disclosures concerning witnesses, including the number of fact witnesses, whether they will seek to use expert witnesses, and how much deposition testimony they expect will be necessary;
>
> (B) their anticipated disclosures of documents, including any issues already known to them concerning electronically stored information;
>
> (C) motions they expect to file, so that the parties can determine whether any of the motions can be avoided by stipulations, amendments, or other cooperative activity;
>
> (D) any agreements that could aid in the just, speedy, and inexpensive resolution of the case;
>
> (E) the discovery tier to which the case should be assigned under Rule 26.2, 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; and
>
> (F) the subjects set forth in Rule 16(c).

Joint Report/Scheduling Order – Timing. Under Rule 16(c), no later than *14 days after the Early Meeting*, the parties must file a Joint Report and a Proposed Scheduling Order. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible 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. The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order or after holding a Scheduling Conference.

Content of Joint Report. The Joint Report must state—to the extent practicable—the parties' positions on the subjects set forth in Rule 16(b)(2) and (c)(3) and must attach a proposed Scheduling Order. The parties

The 2018 Amendments to the Arizona Rules *(continued)*

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. Unless ordered by the court, a summary must not exceed 4 pages of text, which length must be split evenly between separate statements of the parties if they do not agree on the summary's contents. The Joint Report must attach a good faith consultation certificate under Rule 7.1(h) and certify that the parties conferred regarding the subjects set forth in Rule 16(b)(2) and (c)(3).

Content of Proposed Scheduling Order. The proposed Scheduling Order must state the discovery tier to which the case is assigned, and must specify deadlines for the following by calendar date, month, and year:

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

(B) identifying areas of expert testimony;

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

(D) propounding written discovery;

(E) disclosing nonexpert witnesses;

(F) completing depositions;

(G) completing all discovery other than depositions;

(H) final supplementation of Rule 26.1 disclosures;

(I) unless the court orders otherwise for good cause, a deadline for holding a Rule 16.1 settlement conference or private mediation to occur no more than 15 months after the action commenced, but in no event later than 60 days after the date discovery is set to complete consistent with the discovery tier to which the case is assigned under Rule 26.2(f);

(J) filing dispositive motions;

(K) a proposed trial date; and

(L) the anticipated number of days for trial.

Dates Certain. The Scheduling Order must include calendar deadlines specifying the month, date, and year for each of the items included in the Proposed Scheduling Order, consistent

with the discovery tier to which the case is assigned under Rule 26.2(f). The Scheduling Order must also set either: (A) a trial date; or (B) a date for a Trial-Setting Conference under Rule 16(e) 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 address other appropriate matters.

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.

Request for Discovery Tier. The parties may include in the Joint Report a proposed stipulation to a discovery tier, setting forth good cause for the requested tiering in compliance with Rule 26.2(c)(1). Any motion to vary the tier to which a case is deemed to be assigned under Rule 26.2(c)(3) must be made by the date on which the parties must file their Joint Report. Any such motion must be filed separately from the Joint Report and may not exceed three pages in length. Any responsive memorandum may not exceed three pages in length and must be filed within 5 days after service of the motion. No reply memorandum is permitted.

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

Applicability of Rule 16 Amendments. The requirements of Rule 16(b) and (c) apply to *all civil actions* with only limited exceptions. The requirements of Rule 16(b) (regarding the Early Meeting) apply to actions subject to compulsory arbitration under Rule 72(b), but the requirements of Rule 16(c) (regarding the Joint Report and Scheduling Order) do not. In actions subject to compulsory arbitration, no later than 14 days after the Early Meeting, the parties must file a Report of Early Meeting stating the date(s) on which the Early Meeting occurred, and containing either a proposed stipulation to a discovery tier, or the parties' positions regarding the appropriate discovery tier. The Report of Early Meeting must attach a good faith consultation certificate under Rule 7.1(h). The requirements of Rule 16(b) and (c) do not apply to 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;

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

(xiii) petitions under Rule 45.2(e).

Rule 26.2 – Tiered Limits to Discovery Based on Attributes of Cases. Rule 26.2 explains the amount of discovery a party may take in their case. The quantity of discovery a party may take is limited by the tier to which their case is assigned. Rule 26.2 explains how and when cases are assigned to one of three tiers, each of which has different limits. According to Rule 26.2(b), cases should be considered for assignment to a tier by case characteristics, consistent with the factors that define proportional discovery in Rule 26(b)(1). The following sets of characteristics are not exhaustive:

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

1 As a practical matter, having tried more than 3 dozen automobile tort trials, in cases involving disputed causation and damages, Mr. Donaldson has yet to have a jury trial start and end in one to two days. This would put an undue burden on both plaintiff lawyers and defense lawyers

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.[2]

Tier 3: Case Characteristics. These are cases that are logistically or legally complex. Class actions, antitrust, multi-party commercial or construction cases, securities cases, environmental torts, construction defect cases, medical malpractice cases, products liability cases, and mass torts are among those cases that generally belong in Tier 3, absent unusual 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.

How Courts Assign Cases to Tiers. Under Rule 26.2(c), the tier to which a case is assigned is determined by either: (1) stipulation or motion, for good cause shown; (2) placement by 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.

Stipulation or Motion. Rules 16(c)(6) and 26.2(c)(1) provide that all parties by stipulation or any party by motion may request that the court assign the case to a tier other than the one to which it would be assigned under Rule 26.2(c)(3), for good cause. A court must determine good cause to vary a tier with reference to the factors that define proportional discovery in Rule 26(b)(1). The court may reject any stipulation or joint motion requesting assignment under this rule.

Placement by Court. Under Rule 26.2(c)(2), the court may evaluate a case for assignment to a tier. The court has the discretion to assign a case to any tier, based on the totality of the circumstances of that case, consistent with the case characteristics set forth in Rule 26.2(b) and the factors that define proportional discovery in Rule 26(b)(1).

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

Pursuant to Rule 26.2(d), from the filing of the complaint until a court assigns a case to a different tier, the case is deemed to be assigned to the tier to which it would be assigned based on its monetary or nonmonetary relief requested under Rule 26.2(c)(3). If a court evaluates a case for tiering under Rule 26.2(c)(2), it must assign the case to a tier no later than 20 days after the parties file their Joint Report under Rule 16(c)(1). If a court assigns a case a tier based on a stipulation or motion under Rule 26.2(c)(1), it should do so at the earliest practicable time. That notwithstanding, a later joined or later served party may promptly move the court to change the assigned tier.

Definition of Damages in Tiering. Under Rule 26.2(e), for purposes of determining the tier for standard discovery, the amount of damages claimed in an action includes all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings, but excludes claims for punitive damages, interest, attorney's fees in the case to be tiered, and costs.

Limits on Discovery. Under Rule 26.2(f), discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is limited as stated below. The time to complete discovery runs from the date of the Early Meeting, subject to the court's power to

to try and pick a jury, conduct opening statements, and perform examination of their respective witnesses all within 3 to 4 hours of actual court time (remember there are only 5.5 hours at most of trial time per day).

2 Counsel who practice personal injury/tort motor vehicle litigation should discuss with opposing counsel within the 14-day deadline that they should agree there is good cause that the case should have a Tier II discovery schedule.

extend the time for completion of discovery for good cause shown.

- **Tier 1.** Each side in a Tier 1 case is permitted 5 total hours of fact witness depositions, 5 Rule 33 interrogatories, 5 Rule 34 requests for production, 10 Rule 36 requests for admission, and 120 days in which to complete discovery.[3]

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

- **Tier 3.** Each side in a Tier 3 case is permitted 30 total hours of fact witness depositions, 20 Rule 33 interrogatories, 10 Rule 34 requests for production, 20 Rule 36 requests for admission, and 240 days in which to complete discovery.

Obtaining Discovery Beyond Tier Limits. Rule 26.2(g) provides that, in order to obtain discovery beyond the limits on discovery established in Rule 26.2(f), a party must file either: (A) a motion for discovery beyond tier limits setting forth why that discovery is necessary and proportional under Rule 26(b)(1), attaching that discovery, or in the case of a request for deposition, describing the anticipated discovery, and attaching a good faith consultation certificate complying with Rule 7.1(h); or (B) a stipulation that, for each category of discovery for which the limit of discovery has been requested, that discovery beyond tier limits is necessary and proportional under Rule 26(b)(1).

Timing. The motion or stipulation must be filed before the close of standard discovery and before serving a discovery request that reaches or exceeds the limit imposed by Rule 26.2(f) on any category of discovery.

Effect of Stipulation. A filed "Stipulation for Overlimit Discovery" complying with Rule 26.2(g) authorizes the taking of the agreed additional

3 Regarding depositions of treating care providers, opposing counsel may try to include the doctor in the time allotted to taking the deposition of other fact witnesses—unless defendant agrees to pay an expert fee. This should not be agreed to as it is contrary to the *Sanchez v. Gama*, 233 Ariz. 125, 310 P.2d 1 (App. 2013) decision that holds for purposes of a treating care provider's testimony, they are not required to be paid an expert fee in conjunction with their deposition—even though the doctor has expertise specific to that doctor's background. Hence, don't fall into the trap that the doctor is another fact witness subject to the 5-hour limitation like any other *lay* witness.

CONGRATULATIONS!

ASU 2018
Oplinger-Blake Competitors

Huge congratulations to the sterling winners of the ASU 2018 Oplinger-Blake Closing Argument Competition:

First Place: Kevin Koljack

Second Place: Angelika Doebler

Third Place: Jenny Adams

discovery without the necessity for a court order. But, the court still retains the power to disapprove any such stipulation.

Circumstances Requiring Additional Deposition Time or Written Discovery. Rule 26.2(h) provides that, despite the total limits on deposition hours set forth above: (1) in a case with more than party on a side, the court may for good cause increase a side's allowed hours for fact witness depositions, allocate the allowed deposition hours among the parties on a side, or take any other action necessary to provide each party on a side with a reasonable opportunity to conduct deposition discovery; (2) additional examination time ordered for the reasons set forth in Rule 30(d) does not count against the tier limits; and (3) if the configuration of sides as defined in Rule 26.2(f) provides more deposition time or written discovery to one group of parties with common interests than another group of parties with common interests, the court may for good cause adjust how Rule 26.2(f) allocates the totality of deposition time or written discovery it allows between those sides.[4]

Variations in Expert Discovery by Tier. Unless the parties agree or the court orders otherwise, expert disclosures in Tier 1 or Tier 2 cases are governed by Rule 26.1(d)(3), while expert disclosures in Tier 3 cases are governed by Rule 26.1(d)(4).

The **2018 Comment on Rule 26.2** explains that the Rule establishes a three-tiered system of case management to make discovery occur in a manner that is proportional under Rule 26(b)(1). If neither the parties nor the court seek to actively direct a case toward a tier, the case will receive a tier based upon the amount at issue in the case or requests for nonmonetary relief. However, parties can ask for a different tier, based on the proportionality factors in Rule 26(b)(1). And courts can actively manage cases and assign a case to a tier at the start of the matter, on their own initiative or based upon their own review of the Rule 16(c) Joint Report, under Rule 26.2(c)(2). Rule 26.2(b) provides many factors for courts to use in determining the tier to which a case is best suited. However, making discovery proportional is not an end in itself. Rules 8, 26, 26.1, 26.2, and 37, as now revised, work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation. 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 2018 amendments seek to make initial disclosure robust through a clearer mandate to impose sanctions under Rule 37 for failures to disclose relevant material and for abuses of discovery.

Conclusion. Parties will need to plan their litigation activity very efficiently under these new amendments. For plaintiffs, this means before filing the lawsuit, it is incumbent to anticipate potential issues in the case and who and what will you need to prove the case. The same goes for insurance adjusters and the insurance defense lawyers. The court may pigeon hole the case based on the amount in controversy versus what it will take to prove and defend a case before a jury, which could have an adverse effect on the defense side of the case. For example, under Rule 26.2(f), defendants in even the most complex "Tier 3" cases are presumptively only entitled to 15 hours of fact witness deposition time (assuming an equal split with plaintiff). In certain cases, that simply will not suffice. Counsel will need to become adept at negotiating and requesting over-limit discovery where appropriate. In discussing these new amendments with defense bar colleagues, there does seem to be a legitimate concern that the tier-based system will unduly restrain our ability to vigorously defend our clients. Additionally, it will also require the court to address disputes on a regular basis through phone calls as few if any discovery motions can be filed unless the court has had a telephone conference with the parties and it then orders a brief of the issue to be filed. *See* Amended Rule 26(d). It is *presumed* that the new system has the *potential* to result in greater efficiency, less cost, and greater satisfaction with the judicial process, something we all should applaud. However, there is a real potential that the phone lines to the court will need to be increased unless both sides realize they need to work together and be proactive in discovery so each side has a fair chance at providing the best representation possible under the constraints of the rules.

4 Try early on to get opposing counsel to stipulate to a "real world" discovery plan and get it filed with the court. Explain how it will benefit both sides to obtain reasonable discovery early on so the arbitrator in compulsory arbitration cases will have a fair amount of evidence to hopefully make a reasonable decision based on actual evidence instead of assumptions and speculation.

In Memory of Larry Dean Langley
1942 - 2018

Larry Dean Langley

Scottsdale - Larry Dean Langley passed away on Feb. 24, 2018 in Scottsdale, AZ following a month long battle against a rare form of cancer. He was born in Tulsa, OK, on Feb. 7, 1942 to L.J. "Shorty" and Lucille (Roschewski) Langley. He graduated from Oklahoma State University and moved to Northern California in the mid-'60s where he lived for 40 years. After receiving his law degree from the University of San Francisco in 1973, Larry enjoyed his profession as a trial attorney and was honored with many distinguished legal awards throughout his career. He and his wife, Kathy, moved to Scottsdale in 2004 where they opened their law practice, Langley Law Firm.

Larry had a passion for big band music which began in high school. He played saxophone in the Shadow Lake Eight band to work his way through college and his love for music continued to the present as he played in the North Ridge Community Church orchestra and founded and led the Terravita Band and Forever Young Orchestra in Scottsdale.

Larry lived life to the fullest with a smile on his face every day and love in his heart. He was humble and kind to everyone he met and was loved and respected by all. His passions were his devotion to God, his wife, Kathy, and their life together, his accomplished children, family, friends, golf, tennis and music.

Larry is survived by his wife of 21 years and partner in law, life and love, Kathy (Bernard) Langley; daughter, Lisa (Langley) Costello; son, Mark Langley and his partner, Theresa Willard; daughter, Dr. Kathryn (Langley) Hughes and her husband, Peter Hughes; and granddaughter, Emily Costello. He is also survived by his sister Margaret (Langley) Butler; sister in-law Julie and husband Ben Romero; brother-in-law Steve and wife Sandi Bernard; and his former spouse Ann (Kennedy) Langley, plus many nieces, nephews and cousins.

The Memorial Service will be held Sat., Mar. 24, 2018 at 1:00 p.m. at North Ridge Community Church in Cave Creek, AZ. Donations to Hospice of the Valley or HopeKids, Inc. would be appreciated in lieu of flowers.

In Memory of William R. Jones, Jr.
1939 - 2017

William R. Jones, Jr.

We report the passing of colleague and friend, William R. Jones, Jr., on May 7, 2017.

Bill lived his life not only as the consummate gentleman and professional, but also dedicated to his belief in his "responsibility as a public servant to protect, shape, nourish, and grow the justice system for all citizens." As Bill once put it, "contributing back to the profession and to society is a sacred obligation that goes hand-in-hand with the privilege of being a member of this honorable profession."

In his 54-year career, Bill tried more than 250 civil jury cases, and helped write many of the statutes and rules that form the cornerstone of Arizona's legal system, including Rule 26.1, addressing discovery, and A.R.S. § 12-2506, which abolished joint and several liability. But in his comments to the American Board of Trial Advocates in May, 2011, Bill noted:

When the final judgment of who we are and what we have accomplished is made, it will not be based on how many cases we have won, but rather how we have fulfilled our obligation to others. We will not be judged on the number of billable hours or the bottom line. We will be judged, in part, on whether . . . we served others by discharging our duties as the trustees and guardians of our great justice system.

When I look in the mirror, . . . I do not see a balance sheet. I see a man who, hopefully, can say that he has done his best to fulfill the obligation of the public trust bestowed upon him as a member of this honorable profession. I hope that I see a person who is worthy of being called a true professional and one who has given of himself so that this honorable profession has discharged its fiduciary responsibility to our fellow citizens as custodian of the justice system in the best possible way.

This is the man Bill was and the shining legacy he has left us. We are privileged that Bill spent untold hours training young associates and mentoring countless lawyers. He will be greatly missed by everyone at JSH, and by his loving family, wife Ellen, children Lisa and Rusty, four grandchildren, and cherished pup Cooper.

AADC Annual Tucson Judicial Reception

On December 14, the Arizona Association of Defense Counsel and Tucson Defense Bar held their joint Annual Judicial Reception at the Arizona Inn, at which time both organizations had the pleasure of honoring retiring Pima County Superior Court Judge Sarah "Sally" Simmons with the 2017 Judicial Excellence Award for her career of distinguished service.

Judge Simmons grew up in Miami, Arizona and graduated with high honors in 1970 from the University of Arizona with a degree in history. She received her Juris Doctorate with high honors in 1973 from the University of Denver. She worked as an associate with the firm of Molloy, Jones and Donahue, P.C. from 1974-77 before becoming a shareholder in 1978. In 1993, she moved to the firm of Brown and Bain, P.A., and in 2002 became a partner at Lewis and Roca, LLP.

Judge Simmons was appointed to the Superior Court in January 2006, and she assumed leadership positions almost immediately. From January 2007 to February 2009, she served as the Presiding Family Law Judge, and from June 2009 until May 2011, she served as the Presiding Judge of the Juvenile Court. From May 2011 until July 2015, she was the Presiding Judge of the Supreme Court. She is retiring from the bench early this year.

In addition to her leadership on the Pima County Superior Court bench, Judge Simmons has dedicated her time to service beyond the courtroom. She has been active with the State Bar of Arizona, having served as the president from 1993-94, and as a member of the Board of Governors from 1987-95. She presently serves as an emeritus member of the DM-50 Board of Directors, and is a member of the University of Arizona James E. Rogers College of Law's Law College Association Board of Directors (former president) and Board of Governors (former co-chair). She has also served as the president of the Tohono Chul Park Board of Directors and the Metropolitan Tucson Convention and Visitors Bureau, and is on the Board of Directors of the Tucson Airport Authority.

For her exemplary career of service to the legal community and the Tucson community at large, the AADC and Tucson Defense Bar were honored to present Judge Simmons with this award. Judge Simmons is irreplaceable in the eyes of her colleagues and those who have practiced before her, and we wish her all the best in her retirement.

AADC Annual Phoenix Judicial Reception

The annual Phoenix Judicial Reception was held at the Bitter & Twisted Cocktail Parlour on Thursday, Dec. 5, 2017. The Honorable James A. Teilborg was presented with the AADC Judicial Excellence Award, recognizing him for epitomizing the highest standards of integrity and professionalism.

Born in Pueblo, Colorado, Teilborg received a Juris Doctor from the University of Arizona College of Law in 1966. He was in private practice in Phoenix, Arizona from 1967 to 2000. He served in the Air National Guard from 1966 to 1974, and was then a Colonel in the United States Air Force Reserve from 1974 to 1997.

On July 21, 2000, Teilborg was nominated by President Bill Clinton to a new seat on the United States District Court for the District of Arizona created by 113 Stat. 1501. He was confirmed by the United States Senate on October 3, 2000, and received his commission on October 13, 2000. He took senior status on January 30, 2013.

We had a packed house again this year with a lot of judges in attendance.

YLD President's Message

By John M. Gregory, Esq.
Jones, Skelton & Hochuli, P.L.C.

John M. Gregory, Esq.

This is the last time I will occupy this space, so I would like to close by first saying how grateful I am for being allowed to serve in this position. It has truly been an honor and privilege. But I would like to take advantage of this space to get on my soapbox for just one final time.

The Spring edition of the magazine is traditionally used to recap the AADC softball tournament. Unfortunately, because we played this year's event after the press deadline, that won't be possible other than to say that, of this writing, we are still on track to have another successful tournament. It looks likely that we will again raise more than $10,000 for our tournament beneficiary, Southwest Human Development. It also seems fair to say that everyone who played will have had fun.

The timeline shakeup was a good reminder about the importance of preparation. It's easy in our practices to get sucked into the biggest case we have or most pressing deadline. It's even easier for young or new lawyers, who often simply lack the experience to see the big picture, to fall into these traps. Are we all making adequate notes in our files, or leaving a good enough trail that someone could pick up and run with one of our files tomorrow if needed? It's easy to dismiss this possibility, but it can and does happen.

Preparation is important not just in managing cases or clients, but in the development of our professional careers. The AADC as a whole, and the young lawyers division in particular, offer opportunities for young lawyers to develop their skillsets, contacts, and overall knowledge bases. Unfortunately, we have been seeing fewer and fewer young lawyers taking advantage of all of these opportunities based on my observation from time spent on the YLD board. One of the largest complaints I hear when talking to young lawyers of all walks (not just in my firm or within the defense bar) is that there is so much pressure to get their daily or weekly work done that they lack the time, inclination, or both to want to participate in "extracurriculars" like AADC.

Many of us would surely agree this is error. The Roman philosopher Seneca said 2,000 years ago that "luck is what happens when preparation meets opportunity." This wisdom is just as applicable today. Many experienced lawyers have passed on to me the importance of this concept, saying that young lawyers looking to succeed later in their careers would be smart to prepare for that success now. Yes, we need to do good work and handle our cases, but we also need to start laying the foundation for future success by growing our professional networks by actively participating in professional groups and our communities. These may not have the short-term importance of getting a motion done, but they potentially have long-reaching effects that could be equally or in some cases more impactful on our careers when we have the opportunity to grow our practices and become self-sustaining attorneys.

Preparing young lawyers for long-term success also benefits our firms. I've been very fortunate to work at firms that support and encourage engagement in participating in professional organizations. The short-term benefits are immediate: I've met people that have helped me crack difficult legal and strategic questions and find good experts. The support at this stage in my career also builds loyalty such that, when I am able to build a sustainable book of my own clients, the firm will profit financially as well.

The benefits are both mutual and clear. I would hope that partners and other senior attorneys would encourage young lawyers to participate more and get involved—not just in the AADC YLD, but any other groups they can make time for. I would likewise encourage young lawyers to actually make the time to accept this encouragement. It has benefitted me tremendously in my young career, and I think it would benefit you as well. With this preparation, and a little bit of opportunity, young lawyers and their firms could both be feeling pretty lucky down the road.

2017-2018 Board of Directors

Arizona Association
of Defense Counsel

6101 S. Rural Rd. #106
Tempe, AZ 85283

SAVE THE DATES!

ADVOCACY LUNCHEON
Wednesday, May 9, 2018

Gust Rosenfeld,
1 E. Washington St., 15th floor

'Civil Rules Update'

Speakers: Bill Klain, Esq. Lang & Klain
Andrew Jacobs, Esq., Snell & Wilmer

This CLE qualifies for 1 hour of credit and includes lunch.

Register at www.azadc.org or email admin@azadc.org for instructions to register for the webinar.

AADC ANNUAL MEETING
Friday, June 1, 2018

ASU College of Law
111 E. Taylor St.
Phoenix, AZ

CLE, Live Court of Appeals Oral Argument, Lunch, Cocktail reception and Sponsor Hosted Dine-Around. For more information go to www.azadc.org

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BARRY FISH GOLF BENEFIT FOR ALS AZ CHAPTER
Thursday, September 27, 2018

Top Golf
9500 E. Talking Stick Way
Scottsdale, AZ 85256

WATCH FOR MORE DETAILS!