



Trial Rules

BY BRIAN J. POLLOCK

A New But Familiar System

**Case Management and Trial
Settings in the Arizona
Superior Court**

BRIAN J. POLLOCK is a partner with Lewis Roca Rothgerber LLP, in Phoenix. He practices in the areas of complex commercial litigation, professional liability, products liability, and director and officer liability. He serves as a member of both the State Bar of Arizona Civil Jury Instructions Committee and the State Bar of Arizona Civil Practice and Procedure Committee.

Arizona's rules have for many years outlined a system of case management and trial settings based on the use of "Motions to Set and Certificates of Readiness" and "Active" and "Inactive" calendars. (For more detail on that history, see the article on p. 30.) Over the past several years, however, these rules have been ignored to a sig-

nificant degree, and case management in practice has largely moved to a system based on scheduling orders.

Arizona's rules are now being amended to better reflect current practice. In August 2013, the Arizona Supreme Court approved amendments to the Arizona Rules of Civil Procedure eliminating the use of both motions to set and an active calendar for trial settings. The amended rules require parties to confer about case management shortly after an answer is filed



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and to propose a scheduling order for the court's consideration. These amendments go into effect on April 15, 2014. As discussed in more detail below, cases filed on or after that date will be subject to the amended rules. In addition, many cases pending on that date will also be subject to the amended rules and may require certain specified actions in relatively short order. (See p. 23 for the Court's language on applicability of the amendments.)

This article summarizes the current rules of case management/trial settings and the impending amendments to those rules. It focuses on the principal changes accomplished by the amendments; thus, readers should consult the text of the amended rules themselves when confronting case management and trial setting issues.

Current Rules and Practice

Under the current rules, the default system of case management is based on the use of motions to set, with little or no court involvement. Neither scheduling conferences nor scheduling orders are required in most cases, the exceptions being medical malpractice cases¹ and cases assigned to the complex civil litigation program.² Instead, unless a party requests a Rule 16 conference or the court *sua sponte* schedules one, a case is supposed to progress through discovery and toward trial without court involvement. Plaintiffs' counsel must then file a motion to set in which they certify that the parties have completed or will have had a reasonable opportunity to complete all disclosures and discovery either by (1) the time of filing the motion to set, (2) within 60 days thereafter, or (3) prior to 10 days before trial, depending on local rule.³ The motion to set must be filed within nine months of the filing of the action or the case is placed on the inactive calendar, where it is subject to dismissal without prejudice after two months.⁴ In practice, these certifications are often meaningless, with discovery nowhere near completion when the motion to set is filed many months into the case. In fact, upon receipt of a motion to set, many judges will as a matter of practice set a scheduling conference and enter a scheduling order.⁵

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Rule 38.1 currently governs trial settings. Under that Rule, cases are to be placed on the active calendar after the filing of a motion to set. When a case is placed on the active calendar, court administration is to stamp it with a chronological list number that governs the priority of the case for trial, with exceptions for short causes and other cases entitled to preference.⁶

In practice, however, the trial-setting provisions of Rule 38.1 are largely (if not entirely) ignored. Instead, cases are set for trial by individual judges as part of case management, with judges generally setting trial dates either as part of a scheduling order or at a status conference held later in the case.

Case Management Under the Amended Rules

The amendments approved by the Supreme Court in August align the rules with the general practice around the state to manage cases through scheduling orders. The amendments require more proactivity by parties and the court in getting a schedule in place relatively early. The belief is that a little more involvement up front will lead to more efficient and speedier case resolution.

The following is a summary of the key changes going into effect on April 15, 2014, to the rules regarding case management:

- Parties are required to confer about case management issues "[n]o later than 60 days after any defendant has filed an answer to the complaint or 180 days after commencement of the action, whichever occurs first." Within 14 days of conferring, the parties must file a "Joint Report and a Proposed Scheduling Order" stating their positions on the subjects set forth in Rule 16(d) and proposing a Scheduling Order with

deadlines for: (1) service of initial disclosures; (2) identification of areas of expert testimony; (3) disclosure of expert witnesses; (4) propounding of written discovery; (5) disclosure of lay witnesses; (6) completion of depositions; (7) completion of all other discovery; (8) final supplementation of Rule 26.1 disclosures; (9) holding a settlement conference or mediation; (10) filing dispositive motions; (11) a proposed trial date; and (12) anticipated number of trial days.⁸

"Unless otherwise ordered by the court for good cause shown," the proposed schedule must establish deadlines to complete discovery and hold a settlement conference/mediation no more than 15 months after the case was filed.⁹

Certain categories of cases are excepted from these case management requirements, namely medical malpractice cases (which continue to be governed by Rule 16(e), formerly Rule 16(c)), cases subject to compulsory arbitration (which continue to be governed by Rules 72-77), cases designated complex under Rule 8(i)(6) (which continue to be governed by Rule 16.3), and cases seeking certain forms of relief, including (among 12 listed categories), name changes, forcible entry and detainer, and enforcement of a judgment.¹⁰

- The Joint Report and Proposed Scheduling Order are to be filed using forms approved by the Supreme Court and set forth in Rule 84, Forms 11-13. There are three types of forms: (1) forms for "Expedited Cases" (Forms 11(a) and 11(b)); (2) forms for "Standard Cases" (Forms 12(a) and 12(b)); and (3) forms for "Complex Cases" (Forms 13(a) and 13(b)). Expedited Cases are those where (1) every party except defaulted parties has filed an answer, (2) there are no

third-party claims, (3) the parties intend to have no more than one expert per side, and (4) each party intends to call no more than four lay witnesses at trial. In expedited cases, the court is to “endeavor to conduct trial” within 12 months of the filing of the case.

Complex Cases are those in which the factors enumerated in Rule 8(i)(2) apply, regardless of whether the case has been designated as complex by the court. Standard Cases are those not eligible as Expedited or Complex.¹¹

One of the subject matters the parties are to discuss when they confer about case management is which form of Joint Report and Scheduling Order is appropriate.¹² In addition, the court may designate any case as Expedited, Standard or Complex upon the request of a party.¹³

- Unless a party or the court sees a need for a scheduling conference (e.g., if the parties are in material disagreement on a schedule or the court finds a proposed schedule unreasonable), one need not be held. Instead, upon receipt of the Joint

Report and Proposed Scheduling Order, the court can enter a Scheduling Order that then governs the case. The dates established in the Scheduling Order can be modified only “for good cause and with the court’s consent.”

- Motions to Set and Certificates of Readiness and Controverting Certificates have been eliminated from the Rules. The Inactive Calendar remains part of Rule 38.1 under the amendments, but is re-termed the “Dismissal Calendar,” with placement on that calendar tied to the failure to file the Joint Report and Proposed Scheduling Order within 270 days of the filing of the case.

Trial Settings Under the Amended Rules

Like the case management rules, the impending amendments align the rules regarding trial settings with the current practice for individual judges to set trials as part of case management rather than through use of an active calendar system. The following is

a summary of the key changes going into effect on April 15, 2014:

- Rule 38.1 has been amended to eliminate the “Active Calendar” system of trial settings. The Rule now instead provides, “Civil actions shall be set for trial pursuant to Rule 16 or Rule 77.”¹⁴
- Under amended Rule 16(c), the court can set a trial date either as part of the Scheduling Order or at a Trial-Setting Conference held later in the case (likely around the time of the discovery deadline and the deadline for holding a settlement conference or mediation).¹⁵ Amended Rule 16(f) discusses the logistics of such Trial-Setting Conferences, including those required to attend and the topics for discussion.¹⁶
- Lastly, the amendments establish a new ADR requirement as part of trial settings. Namely, under amended Rule 16(c), “Absent leave of court, no trial shall 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 established by the court.”¹⁷



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Other Changes

Other rules are being amended to account for the changes in case management/trial settings:

- Stemming from the new scheduling order provisions, Rule 37(c)(2) is being amended to require parties to file a motion establishing certain factors in order to use evidence “disclosed later than (a) the deadline set in a scheduling order or (b), in the absence of such a deadline, sixty (60) days before trial.” The pre-amendment Rule provided that such a motion was required only if a party wanted to use evidence disclosed later than 60 days before trial.
- Tying into the changes regarding trial settings, a sentence has been added to amended Rule 16(i): “The fact that a trial date has not been set does not preclude sanctions under this Rule, including the exclusion from evidence of untimely disclosed information.” Some older case law in Arizona suggested a party may not be precluded from using late-disclosed evidence if no trial date had been set.¹⁸ However, the Arizona Court of Appeals in *Marquez v. Ortega*,¹⁹ recently rejected any such rule, explaining that it would “encourage[e] excessive delay rather than the efficient administration of justice.”²⁰ That ruling has now been codified in amended Rule 16(i).
- Rules 26(b)(5) (designation of non-parties at fault), 38 (jury trial demands), 72 (compulsory arbitration), 73 (appoint-


ment of arbitrators), 74 (arbitration proceedings), and 77 (appeals from arbitration awards) are being amended to eliminate references to the nomenclature of the old system of case management and trial settings. For example, pre-amendment Rule 26(b)(5) set the deadline for designating non-parties at fault as the earlier of 150 days after the filing of one’s answer or the deadline for the party to file a controverting certificate. Amended Rule 26(b)(5) simply sets the deadline at 150 days after the filing of one’s answer.

Applicability of the Amendments

With changes as fundamental as those to the case management/trial setting system, questions arise as to the best manner to transition to the new system. Here, the Arizona Supreme Court originally stated that the case management/trial setting amendments would be “effective on April 15, 2014 as to all cases filed on or after that date.”²¹ The Supreme Court subsequently entered an Amended Order regarding the applicability of the amendments.²² Under the Amended

Order, the amendments apply to (1) all cases filed on or after April 15, 2014; and (2) all cases pending on April 15, 2014, unless before that date a scheduling order has already been proposed or entered or a party has already filed a motion to set. If the amendments apply, the parties are required to file the Joint Report and Proposed Scheduling Order by the later of (1) 270 days after the case was filed or (2) June 30, 2014. The Amended Order also sets forth the manner in which cases pending on the Inactive Calendar on April 15, 2014, are to be handled. The pertinent text of the modified order appears on page 23 and should be consulted if questions arise during the transition period to the amended rules.

Conclusion

Although the case management/trial setting rule amendments are meant to better reflect current practice, as with any fundamental change in the rules, there is likely to be a period of adjustment. However, it is hoped that the end result will be a set of rules lending themselves to more proactive case management and thereby a more efficient resolution of cases. 

endnotes

1. ARIZ.R.CIV.P. 16(c) (text of Rule effective until April 15, 2014).
2. ARIZ.R.CIV.P. 16.3.
3. ARIZ.R.CIV.P. 38.1(a) (text of Rule effective until April 15, 2014).
4. ARIZ.R.CIV.P. 38.1(d) (text of Rule effective until April 15, 2014).
5. See, e.g., *Marquez v. Ortega*, 296 P.3d 100, 103 (Ariz. Ct. App. 2013) (noting scheduling order with discovery deadline 8 months out was not put in

- place until 14 months after case was filed, after plaintiff filed motion to set when case had already been pending for over a year).
6. ARIZ.R.CIV.P. 38.1(c) (text of Rule effective until April 15, 2014).
7. ARIZ.R.CIV.P. 16(b)(2) (text of Rule effective April 15, 2014).
8. *Id.*
9. *Id.*
10. ARIZ.R.CIV.P. 16(b)(1) (text of Rule effective April 15,

2014).

11. *Id.* 16(b)(3) (text of Rule effective April 15, 2014).
12. *Id.* 16(d)(2) (text of Rule effective April 15, 2014).
13. *Id.* 16(b)(3) (text of Rule effective April 15, 2014).
14. *Id.* 38.1(a) (text of Rule effective April 15, 2014).
15. *Id.* 16(c) (text of Rule effective April 15, 2014).
16. *Id.* 16(f) (text of Rule effective April 15, 2014).
17. *Id.* 16(c) (text of Rule effective April 15, 2014).

18. See, e.g., *Zimmerman v. Shakman*, 62 P.3d 976, 981 (Ariz. Ct. App. 2003) (“there is little reason to completely bar the use of [late-disclosed] evidence when no trial ... is pending”).
19. 231 Ariz. 437, 296 P.3d 100 (App. 2013).
20. *Id.* at 443 ¶ 22, 296 P.3d at 106.
21. Ariz. Supreme Court Order filed Aug. 28, 2013.
22. Ariz. Supreme Court Amended Order filed November 27, 2013.