

Client Alert

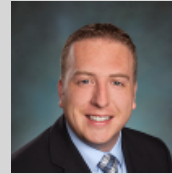
Pilot Project In Arizona Federal Court Adopts Arizona State Court's Broad Mandatory Disclosure Rules

For years, one of the biggest procedural differences between litigating in federal and state court in Arizona was the mandatory disclosure rules that applied in state court. That's going to change on May 1st, when Arizona's federal court's pilot project – officially called "Mandatory Initial Discovery" – becomes effective. Under the pilot project adopted by **General Order 17-08**, litigants will be required, among other things, to produce all documents relevant to the dispute, regardless of whether the other side asks for them and regardless of whether they help or hurt their case. This new rule is a sea change from the existing federal disclosure regime, which requires parties to produce only those documents "the disclosing party may use to support its claims or defenses."

The remaining categories of information that must be disclosed under the new pilot project are similar to the categories of mandatory disclosure under Arizona's rules, including (1) the identity of people who are likely to have discoverable information; (2) the identity of witnesses who have given written or recorded statements; (3) the factual and legal basis of each party's claims or defenses; (4) a computation of damages; and (5) copies or descriptions of insurance policies that might be used to satisfy some or all of an eventual judgment.

Although the categories of information that must be disclosed under the pilot project are substantially similar to Arizona's disclosure rules, there are significant procedural differences. Unlike Arizona's rules, the pilot project requires parties to file responsive pleadings (e.g., an answer to a complaint) within 21 days of being served with a claim, even if the party has filed or intends to file a motion to dismiss. The court has discretion to defer a responsive pleading for good cause while a motion to dismiss for lack of jurisdiction or immunity is pending. Still, this is a notable departure from the current federal rules (and Arizona's state court rules) that do not require a responsive pleading if a party elects to move to dismiss the claims against it. Finally, with two very narrow exceptions¹ the parties must serve their responses to Mandatory Initial Discovery within 30 days of the responsive pleading. Hard copy documents identified in a response must be produced simultaneously with the response, while electronically stored information must be produced 40 days later (i.e., 70 days from the date of the responsive pleading).


So what does this mean for litigating in Arizona federal court? Mandatory disclosure in Arizona, which appears to be the inspiration for this pilot project, has long been viewed as a gift and a curse. On the one hand, the parties will have ready access to documents relevant to the case, even if they haven't asked for them. Sometimes knowing what to ask for in discovery can be the most difficult part of litigation, and this new pilot project avoids that guessing game. All relevant documents have to be produced. Period. On the other hand, this new rule will likely make litigation more expensive – at least at the beginning of the case. The General Order is clear that "[a]



Jared Sutton
Associate
602.262.0259 direct
jsutton@lrrc.com
lrrc.com/jared-sutton

Jared Sutton is an associate in the litigation group. Since joining the firm in the fall of 2012, Jared has developed a diverse practice litigating real estate, corporate, construction, general contract, and insurance disputes (including coverage issues, agent disputes, and class actions). Jared practices primarily in trial courts, but is also growing an appellate practice in which he has drafted and assisted with numerous appellate briefs and second chaired appeals in state and federal appellate courts. Drawing on his experience before law school as a procurement clerk for the Department of Army, Jared also helps clients navigate the process for protesting and appealing state and federal procurement decisions.

¹ These deadlines do not apply if the parties: (1) stipulate that there will be no discovery in the case; or (2) get a one-time 30 day extension by certifying to the Court that they are pursuing settlement and have a good faith belief that the case will be resolved within 30 days.



party is not excused from providing its response because it has not fully investigated the case, it challenges the sufficiency of another party's response, or another party has not provided a response." Thus, even if a defendant files a motion to dismiss, for example, based on the plaintiff's failure to state a claim, they will be required to proceed with the burden of broad disclosure before the court rules whether the lawsuit can even proceed. The Order allows parties to supplement their responses, just as with regular disclosure and discovery, but this new rule undoubtedly imposes a substantial burden on each party to thoroughly investigate their claims and defenses at the outset of the case.

Ultimately, requiring parties to be engaged and forthcoming at the beginning of litigation is likely to save everyone time and money as the case progresses. The inclination to fight over every single discovery request, for fear that relevant documents and information have not been produced, may be largely diminished. Furthermore, the General Order retains the right to object to producing electronically stored information if the cost of doing so will be disproportionate to the needs of the case, which means parties with massive data sets still have options for controlling costs.

The General Order adopting the pilot project does not say how long it will last. But if Arizona's mostly favorable experience with mandatory disclosure is any indicator, parties litigating in Arizona federal court may need to get comfortable turning over everything they have, very early in the case.