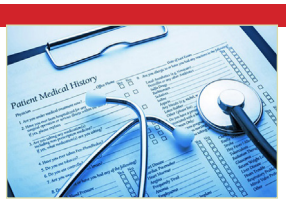
thinking with Current Issues Connecting our Community



Pima County Enacting Dramatic Changes to Mandatory Arbitration Rules

— Ted Schmidt

The Pima County Superior Court, under the wise leadership of Judges Chuck Harrington and Jeffrey Bergin and with the guidance and advice of fellows in the American College of Trial Lawyers, International Academy of Trial Lawyers and American Board of Trial Advocates, is boldly attacking the dilemma of the disappearing jury trial.

The ability to go to trial and effectively advocate for a client is vital in civil litigation. It is universally agreed that the most important characteristic of a good litigator is trial experience. The practical consequence of the current rules has been to make it virtually impossible for less experienced lawyers to get trial experience on cases where there isn't an enormous amount at stake.

It is proposed that effective April 2017 the following changes will take effect in Pima County:

- When a plaintiff files a lawsuit with a value under $50,000, within 20 days of the defendant filing an Answer the plaintiff must choose to arbitrate or go straight to a fast track short jury trial.
- A failure to choose results in automatic assignment to a short trial.
- If the plaintiff chooses arbitration the current rules apply except only the defendant can appeal the result—plaintiff waives the right to jury trial and appeal.
- No appeal sanctions allowed.
- The case would be heard by 6-8 person juries.
- If jury trial is chosen the case will be scheduled for an early date and must be conducted in 2 days or less.
- The trial would be a trial of record with appeal rights.
- No Rule 68 Offers or sanctions allowed under short trial rules.
- Discovery will be limited to 5 Rule 33 interrogatories, 5 Rule 34 requests for production, 10 Rule 36 requests for admissions, 1 Rule 35 examination, and 5 total hours of fact witness deposition.
- Expert and treating physician depositions are limited to 1 hour per side and a maximum of 2 hours and the expert may only charge the party taking the deposition $500 an hour.
- Each party pays the expert fee for a deposition based upon the amount of time each party spent questioning the witness.
- Video depositions videotaped with any reliable device are allowed.
- Short trials will be set for a jury between 180 and 270 days of the filing of the Complaint
- Time limits in short trials include--Voir dire: 30 minutes per side, Opening statements: 15 minutes, Presenting a case in chief, including cross examination and rebuttal: 3 hours per side, Closing arguments: 30 minutes, Length of trial: 2 full days

So once again, Pima County takes the bold step of leading the state by directly addressing an inadequacy in our legal system. It has created a new system that will hopefully reduce the cost and time it takes to resolve cases of lower value while providing less experienced lawyers the opportunity to get into the court room and try more cases thus improving their ability to better serve their clients down the road.

CONSUMER SAFETY AGENCY SEEKS TO LIMIT COURT SECRECY

— Dev Sethi

The federal government says that court secrecy is preventing it from protecting consumers. To stop that, the U.S. Consumer Product Safety Commission adopted a formal Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, published in the Federal Register on December 2, 2016. The Guidance urges all judges, plaintiffs, defendants, and lawyers to ensure that every protective and secrecy order "specifically allows for disclosure" to the "CPSC and other government public health and safety agencies."

The CPSC Guidance is an important step forward for consumer protection that could reduce injuries and save lives nationwide. Judges need to make sure all protective and secrecy orders comply with it. Everyone should follow it. As the deadly, growing series of examples—from Remington rifles to Takata airbags to GM ignition switches —proves, court secrecy injures and kills.

The danger is avoidable. The Guidance specifically notes that "safety information related to dangerous playground equipment, collapsible cribs, and all-terrain vehicle defects was kept from the CPSC by protective orders in private litigation." It cites protective orders in current cases involving allegedly defective propane heaters, wheelbarrows, office chairs, and gas cans that prevent the CPSC from learning the truth. There are undoubtedly many more.

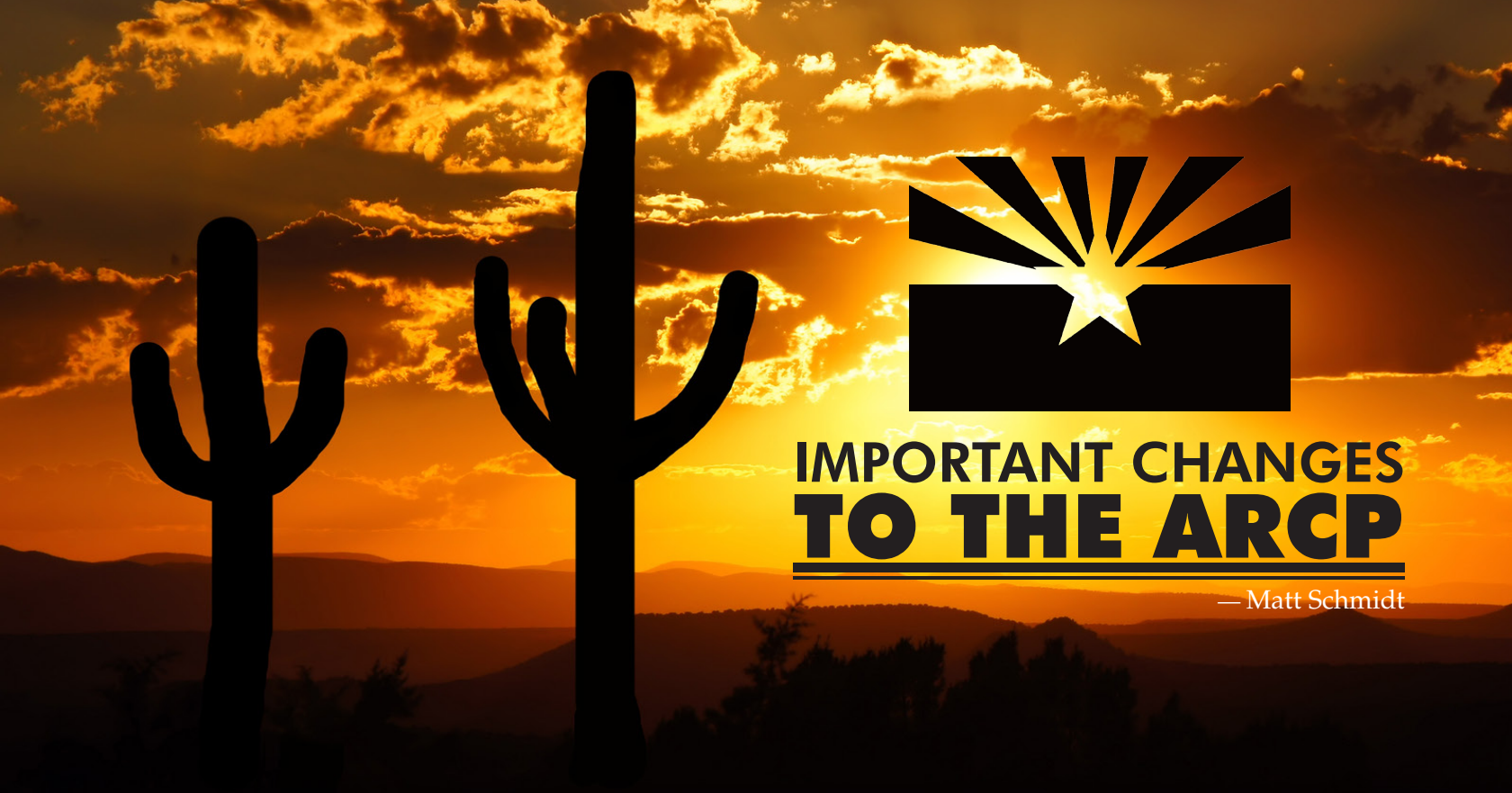
Recognizing that fact, the CPSC advises parties currently negotiating "or already subject to" confidentiality provisions to "use this Litigation Guidance and the CPSC's standing as a public-health authority" to create an exception to them ensuring that information can be reported to the CPSC and other relevant agencies. It even provides draft language that could be used.

Under the Consumer Product Safety Act, the Commission is "responsible for ensuring the public's safety from thousands of different ever-evolving product lines" and that the "timely collection of information regarding consumer product-related safety hazards is essential for carrying out the Commission's public health and safety mission."

To achieve these goals, the Guidance explains, manufacturers, retailers, and distributors are "required to report immediately to the CPSC when they obtain information that reasonably supports the conclusion that a product fails to comply with an applicable rule or standard, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death." But they don't always do so. They "may fail to report potential product hazards altogether, may fail to report them in a timely manner and/or may fail to report new incidents that occur after the initial hazard has been reported."

Since the CPSC "has limited alternative means of obtaining this critical safety information," the Guidance says, without the information discovered in civil litigation, it is "possible that a product hazard will never come to CPSC's attention." For that reason, it says, "The Commission believes the best way to protect public health and safety is to preemptively exclude or exempt the reporting of relevant consumer product safety information to the CPSC (and other government public health and safety agencies) from all confidentiality provisions."

Safety information related to dangerous playground equipment, collapsible cribs, and all-terrain vehicle defects was kept from the CPSC by protective orders in private litigation.



IMPORTANT CHANGES TO THE ARCP

— Matt Schmidt

Many important changes to the Arizona Rules of Civil Procedure will go into effect in 2017. Though every lawyer should do their homework and review the changes carefully, here is a summary of some of the rules to take an especially close look at:

7.1(h), 7.4. When parties meet and confer (11, 26, 37, 56), a form of certification is now required and mandates the parties actually speak to each. When one party fails to be responsive, the certification allows the other party to state they tried. When forming joint briefs, sanctions are encouraged for parties that do not cooperate or make themselves available. These line of rules encourage more overall cooperation and actual communication amongst the parties.

26.1. The rules require a broader, more specific, transparent and thorough disclosure of what insurance is available to cover a plaintiff's claim. This appears to come as a result of vague and incomplete insurance disclosures, leaving the plaintiff in the dark about an extremely important part of evaluating a case.

26(b)(1). Perhaps the most substantial change to the Rules is matching the scope of discovery allowed with the newer "proportional" standard in the Federal rules. Instead of simply being relevant, the parties and court must also weigh the importance of the issues in the case, amount in controversy, access to relevant information, resources available, the importance of the discovery in resolving the issue and burden of expense compared to the benefit. While critics contend this narrows the scope of what is discoverable and gives parties more room to challenge requests, others do not think it is going to change much to the current legal landscape.

26.1(b), 37(g), 43. The complexity and growth of technology and electronically stored information has led to new rules specifically designed to address this special type of discovery and litigation. These rules encourage parties to work together in determining what, how and when ESI will be produced, with a special court proceeding in place to address any conflicts. They also encourage sanctions against any party who fails to preserve relevant ESI, the severity of the sanction depending on how prejudicial and intentional the spoliation is. Finally, they allow more leeway for witnesses to give testimony remotely.

33, 34, 36. The deadline to respond to written discovery is now the federal 30 days instead of 40. Objections must be specific and any non-objectional portion of a request must still be answered or produced. If a party objects to a request for production but nevertheless produces some material, they must let the other party know if other material is being withheld based on the objection.

Fast Track Trial Pilot Program: This Spring, the Pima County Superior Court plans on testing out a program that gives plaintiffs the option to have a summary jury trial instead of compulsory arbitration for cases with a value lower than $50,000. Plaintiffs who do not specifically opt for arbitration will automatically be entitled to a summary jury trial consisting of less jurors, less discovery, less expenses, shorter deadlines and a shorter trial. Most plaintiffs' lawyers we have been in touch with are in favor of this change for several reasons. Primarily, this will give many lawyers more trial experience (which, because of the current arbitration rules, has been on the decline) and eliminate the tactic from many insurance companies of using compulsory arbitration as a roadblock by adding time and expense to the plaintiff's case. Because compulsory arbitration comes with the right to appeal and go to trial, most insurance companies use that rule as leverage to appeal or threaten to appeal if the arbitration decision is even slightly above where they have evaluated the case. This pilot eliminates that roadblock by automatically giving the plaintiff the right to her day in court if that's what she wants, regardless of how valuable her case is.

LOOK BEFORE YOU LEAP

Dangerous Medical Problems Missed

— Jim Campbell

In many of our medical malpractice cases, the doctor or doctors failed to diagnose in time their patient's life threatening condition. Often, this is because the doctor or doctors missed an opportunity to make the correct diagnosis and save the patient from serious harm. Had the doctors made the diagnosis in time, the patient could have gotten the treatment he required, and serious harm would have been prevented.

In prosecuting these cases, I frequently hear the same general defense: "most of the time, when a patient has XYZ symptom, they do not have a life threatening condition, and so I did not think my patient was that sick." It is true that often times, patients are not suffering from a life threatening condition. As a result, doctors become biased to assume the patient sitting in their office (or Emergency Department or hospital bed) is like many other patients they have seen, and as a result, they fail to consider this patient is suffering from something more dangerous.

This type of thinking is called "anchoring," "premature closure," or "narrow diagnostic focus." The main idea communicated by these labels is the doctor made up her mind her patient is not seriously ill, and as result, she failed to consider the less common, but more serious condition. Also, doctors mistakenly, commonly attribute new symptoms to chronic conditions.

This tendency toward a premature jumping to conclusions is worsened by the fact that modern doctors are pressed for time, and more in depth evaluations to determine whether a patient has a less common, but more serious condition, take more time. This causes patients to back up, increasing frustration in the waiting room or an already long day becoming even longer.

Reasonable medical care requires doctors not to prematurely foreclose that their patient is suffering from a dangerous condition. The system doctors are supposed to use to prevent this type of "narrow diagnostic focus" is called the differential diagnosis system. Under this system, a reasonable doctor must make a mental list of all the conditions that could be caused by the patient's clinical presentation. Then, as they get more information, i.e. test results or scans, then this list is further refined.

On this mental list the doctor is making, some conditions are relatively benign, and some are life threatening. For example, chest pain and shortness of breath are common reasons that patients seek medical care. These same symptoms can be caused by many different conditions. Most often, the conditions that cause chest pain and shortness of breath are relatively common and are not immediately life threatening, i.e. heart burn, an anxiety attack, or an upper respiratory infection.

These same symptoms, however, can also be caused by life threatening conditions, i.e. a heart attack, pulmonary embolism, or rupturing artery in the abdomen or chest. When a doctor evaluates a patient with chest pain and shortness of breath they must not prematurely assume that the patient has the more common, but less dangerous condition. Rather, to avoid failing to act in time, they must assume the patient is experiencing one of these more serious condition (i.e. a heart attack), until they can conclusively determine, through tests, exams, and other procedures, that the patient is not. Then, and only then, should a doctor turn his treatment plan to the more common and less dangerous conditions.

By using this differential diagnosis system, where doctors have a responsibility to pay attention to the most dangerous conditions first, patients have a much better chance of having their dangerous illness timely diagnosed. This is true for many devastating conditions, like cancer, serious infections, pulmonary embolism, or heart attack. Just because a condition is not obvious does not mean that a doctor is excused when he overlooks it. Rather, the differential diagnosis system is an important tool to improve patient safety and assures that the patient receives the timely care he or she requires.

Dev Sethi

Dev Sethi has been invited to Fellowship in the International Society of Barristers. The organization was created in 1965 and is dedicated to preserving trial by jury, the adversary system, and an independent judiciary. Fellows of the Society are committed to the highest of ethical standards and to civility in all their personal and professional relationships. Dev becomes the 13th active Fellow from Arizona.

Ted Schmidt

Ted Schmidt chaired the Arizona State Bar Bench & Bar program last month bringing lawyers and judges from every area of practice together for group discussions on how to improve our legal system here in Pima County.

Matt Schmidt

Matt Schmidt is the President of the Old Pueblo Rugby Football Club, who has recently launched a nonprofit program called Engage. The program is designed to provide more recreational opportunities and resources to underprivileged children. Just this last fall, Matt's club hosted a rugby clinic for the kids and mentors of Big Brothers and Big Sisters of Tucson. Each child received an athletic bag including a rugby ball, water bottle and T-shirt. Engage is currently planning a fundraiser for the spring to raise funds for next year's clinic.

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