

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-22-0048

10 **PETITION TO AMEND RULE**
11 **26(d)(2) OF THE ARIZONA**
12 **RULES OF CIVIL PROCEDURE**

COMMENT

13 This is the State Bar of Arizona’s comment on the above Petition, which
14 would amend Rule 26(d)(2) of the Arizona Rules of Civil Procedure to set a five-
15 day deadline for a party to provide its portion of a joint statement of discovery or
16 disclosure dispute after receiving a draft from the opposing party. After study and
17 discussion by the State Bar’s Civil Practice and Procedure Committee, the State Bar
18 opposes the Petition and submits this Comment based on the issues identified by the
19 Committee and discussed in detail below.
20
21

22 **I. RULE 26(d)(2) AND THE PETITION’S PROPOSED CHANGE**

23 Rule 26(d) is entitled “Expedited Procedure for Resolving Discovery and
24 Disclosure Disputes.” Subsection (d)(2) governs the parties’ “Joint Statement of
25

1 Discovery or Disclosure Dispute.” The Petition proposes a five-day deadline for a
2 party to provide its portion of the joint statement after receiving a draft from the
3 opposing party and would establish a presumption that drafts of the joint statements
4 are received on the dates they are delivered via email to the opposing party or
5 counsel. The Petition asserts that parties sometimes fail to respond to the opposing
6 party or otherwise to cooperate when preparing and filing joint statements, delaying
7 the timeline for presenting the disclosure or discovery dispute to the court. Per the
8 Petition, this delay in turn, delays the court’s resolution of the dispute and increases
9 costs. The Petition postulates that the amendment will resolve these recurrent issues.

12 The Petition recognizes that Ariz. R. Civ. P. 7.4(a) dictates that parties and
13 counsel make themselves “reasonably available to participate in preparing” jointly
14 filed documents and “promptly respond to communications from any other party
15 concerning the document.” Ariz. R. Civ. P. 7.4(a)(1)-(2), but states that in practice,
16 parties and lawyers do not always comply with Rule 7.4(a)(1)-(2) when handling
17 Rule 26(d) joint statements.

20 The Petition cites to the recent change to Rule 76.1, Arizona Rules of Family
21 Law Procedure, which instituted deadlines for when parties must exchange portions
22 of the joint scheduling or pretrial statements. The reasoning for that petition was to
23 be as clear as possible, provide as much direction as reasonable and to protect the
24

1 due process rights of the parties, which the Petition indicates is the same rationale
2 that applies to the amendment at issue.

3 **II. THE COURT SHOULD DENY THE PETITION**

4 **A. On Balance, the Amendment Will Often Increase Delay, Reduce** 5 **Needed Flexibility, and Cause Other Unintended Consequences**

6 While the State Bar recognizes the shared goal of reducing delay and litigation
7 costs, the amendment will not fix the existing issues. Instead, the proposed rule is
8 likely to create more problems for the parties, counsel, and the court, and could lead
9 to additional gamesmanship.
10

11 First, more often than not, the amendment is likely to lengthen the timeline to
12 resolve disputes. To paraphrase an old adage, give a lawyer up to a week and they'll
13 take a week, and give a lawyer up to a month and they'll take a month. The five-day
14 deadline would set a functional baseline for responding to the opposing side, even
15 when the party could have responded sooner and even when the issue is time
16 sensitive. Currently, parties will reasonably request responses in fewer than five days
17 when the issue is straightforward or time sensitive. Under the new proposed rule,
18 parties may use the five-day deadline as the default response time. Although the
19 Petition encourages litigants to respond *no later* than five days after receiving the
20 other side's portion of a joint statement, as a practical matter a party has little
21 incentive to respond sooner if it is the one hoping to avoid discovery.
22
23
24
25

1 For instance, there may be an upcoming deposition where one party is made
2 aware of a dispute shortly before the deposition or a discovery or disclosure dispute
3 that arises shortly before the deadline. The opposing party may not necessarily need
4 the entire five days to respond—and five days might be unreasonable—but the
5 opposing party may not respond until the fifth day, which would make having the
6 dispute heard before the deposition or deadline impossible.
7

8 Exacerbating the problem, the delay is not limited to the *first* exchange of a
9 joint statement. Parties and counsel often exchange multiple drafts of the joint
10 statement before agreeing to its filing. The amendment only specifies that the
11 responding party must submit their portion five days after the receipt of a draft.
12 Therefore, if multiple drafts are necessary, even if the only changes are typos or
13 formatting, each side presumably would have five days to respond, which would
14 lead to even more delay, and in some instances may not be reasonable. At the very
15 least, the possibility of five days per exchange could lead to gamesmanship.
16
17

18 Further, the amendment may create confusion and may be contradictory to
19 Ariz. R. Civ. P. 7.4(a). If the parties exchange multiple drafts and take five days to
20 respond to each, there may be a question of whether a party is “promptly
21 respond[ing] to communication from any other party concerning the document” or
22 whether it is following Rule 7.4(a)’s requirement to “cooperate and make a good
23 faith effort to resolve differences about the document’s content, format, and the
24
25

1 manner in which it will be filed.” Certainly, there is an argument that if there is
2 simply a typo or formatting issue to be resolved, five days may not constitute a
3 prompt response or that waiting the entire five days to respond may not constitute
4 cooperation or good faith. Rule 7.4(c) provides that “if the filing of a joint document
5 becomes impracticable because another party fails to comply with its duties under
6 this rule, a party may prepare and file a document on its own behalf.” Therefore,
7 this would then present a party with a conflict as to whether Rule 26(d) precludes
8 the filing of a document separately before a five-day period is over, even if there is
9 a violation of Rule 7.4.

12 Apart from delay, the proposed rule’s inflexible five-day deadline may also
13 be too *short* in some situations. Some disputes, such as complex e-discovery matters
14 or matters involving multiple discovery requests or multiple parties, are so
15 complicated that more than five days may be required to meaningfully respond. Five
16 days may also be too little if the first drafter (opportunistically or innocently) sends
17 its draft around the holidays or when opposing counsel is traveling or otherwise
18 unavailable. The amendment proposes that the draft is presumed received on the date
19 it is delivered via email, even though a party or counsel may not be in a position to
20 review and act upon an email immediately upon receipt. The inflexible five-day
21 timeline is inconsistent with the goal of a collaborative joint dispute resolution
22 process.
23
24
25

1 Finally, given all of the potential scenarios where a party or counsel may not
2 be able to respond within the five days, needs to file the joint statement sooner given
3 deadlines, or where one party is not acting in good faith in violation of Rule 7.4, the
4 proposed amendment is likely lead to more motion practice, including motions to
5 expedite, for extensions of time, or for leave to file portions of the joint statement
6 after the deadline. It would not necessarily resolve the problem of the filing of two
7 statements since any party could file a separate statement under Rule 7.4(c). The
8 amendment would create more filings and motions for the Court to have to resolve
9 before addressing the actual disclosure or discovery dispute.
10

11
12 Therefore, the proposed amendment will not cure all the existing issues that
13 arise with Rule 26(d) as it currently stands, but will likely lead to more problems,
14 less efficiency, more delay, more litigation, and increased costs overall.
15

16 **B. There Are Better Solutions to the Problems**

17 As the Petition recognizes, Rule 7.4(a) already requires that parties and
18 counsel make themselves “reasonably available to participate in preparing” jointly
19 filed documents and “promptly respond to communications from any other party
20 concerning the document.” The rule also requires parties to “cooperate and make a
21 good faith effort” to resolve issues about the joint filing. *Id.* The Rule goes on to
22 provide that a court may sanction any party who violates any of its duties under the
23 Rule. Ariz. R. Civ. P. 7.4(d). Therefore, there is already a rule in place which gives
24
25

1 the court discretion to address unreasonable delays or lack of cooperation by a party
2 or counsel in failing to submit their portion of the joint statement in a timely manner.

3
4 To the extent parties do not always follow or utilize Rule 7.4, the first step
5 should be to focus on educating lawyers regarding the duties and remedies under
6 Rule 7.4. For example, judges could point out the rule in their individual protocols
7 or minute entries, at case management hearings, or through CLE. The problem is
8 compliance with existing Rule 7.4(a), not the absence of a change to Rule 26(d).
9

10 Perhaps an easier fix would be to reference Rule 7.4 in Rule 26(d). Rule
11 26(d) already requires compliance with Rule 7.1(d) regarding good faith
12 consultation, so it could easily reference Rule 7.4 regarding the expectations of the
13 parties in preparing and filing the joint statement.
14

15 **C. The State Bar Is Currently Considering Other Changes to the Joint**
16 **Dispute Resolution Process**

17 Finally, the State Bar Civil Practice and Procedure Committee has been
18 studying and analyzing the procedures under Rule 26(d) and whether the joint
19 dispute procedures should be expanded to apply to other, non-discovery disputes.
20 This work has been ongoing for multiple years, and the Committee expects to finish
21 its work in the coming year or so, with that work potentially culminating in a separate
22 petition to amend Rule 26(d). Therefore, it may be prudent to wait on any
23
24
25

1 amendments to Rule 26(d) so that the Court can consider this anticipated petition
2 rather than risk piecemeal changes to the same rule.

3
4 **III. CONCLUSION**

5 The State Bar of Arizona respectfully requests that the Court deny the Petition
6 for the foregoing reasons.

7
8 RESPECTFULLY SUBMITTED this 1st day of May, 2023.
9

10 */s/ Lisa M. Panahi*

11 _____
12 Lisa M. Panahi
13 General Counsel

13 Electronic copy filed with the
14 Clerk of the Supreme Court of Arizona
15 this 1st day of May, 2023.

16 by: PSeguin
17
18
19
20
21
22
23
24
25