

Gary J. Cohen
Judge, Division 7
Arizona Superior Court in Pima County
110 West Congress Street
Tucson, AZ 85701

ARIZONA SUPREME COURT

In the Matter of:	)	Supreme Court
	)	No.
PETITION TO AMEND	)	
ARIZONA RULE OF CIVIL	)	
PROCEDURE 7.2	)	

INTRODUCTION

Pursuant to Rule 28 of the Arizona Supreme Court, the Honorable Gary J. Cohen and Mr. Austin Lara petition the Arizona Supreme Court to amend Ariz.R.Civ.P. 7.2.

Ariz. R. Civ. P. 7.2 (also referenced herein as “Rule 7.2”) discusses motions in limine. Such motions endeavor to obtain a pretrial ruling on evidentiary disputes that, hopefully, avoid a mistrial. This rule, like other Arizona Rules, requires parties to “confer” beforehand. This pre-filing requirement is to eliminate the time and expense of unnecessary filings, and to encourage the parties to reach stipulations that streamline matters.¹ Current Rule 7.2, unlike all the other Arizona rules with a pre-filing consultation requirement, does not 1) provide a method for the Court to definitively know if the parties in fact consulted pre-filing, or 2) state that there is a

¹ *Pet. to Am. Ariz. R. of Civ. Pro. by Adding Rule 7.2*, Supr. Ct. No. R-04-0012, pg 2, ln 17-24, (April 29, 2004).

consequence for not consulting pre-filing, or 3) the nature of the consequence for not consulting pre-filing.² This inconsistency results in confusion to both judges and litigants. The simple and straightforward proposed modifications in this Petition simply 1) makes this rule consistent with all the other Arizona rules with a pre-filing consultation requirement, and 2) state that there is – as there logically should be – a consequence for not complying with the pre-filing confer requirement in Rule 7.2(a) and, 3) specifies the nature of that consequence (the denial of the motion).

In accordance, this Petition proposes to incorporate the “good faith consultation” requirement of Rule 7.1(h) into Rule 7.2(a) and eliminate five unnecessary words in Rule 7.1(e) to make the language read simpler and better.

BACKGROUND

For years, motions in limine were a creature of common law. That law developed a procedural device for parties to raise and, hopefully, have significant evidentiary matters addressed before trial instead of at trial in real time on the fly. That common law later devolved into a litigious sword that created a mire of voluminous and unnecessary motions that drained an overburdened judiciary with limited resources.

In 2003, the State Bar of Arizona Civil Practice and Procedure Committee sought improve motion in limine processes. That committee noted several concerns about such motions. First, a rule was needed to “encourage early filing of evidentiary

² The Rule states a consequence for not timely filing a *Motion in Limine* in violation of Rule 7.2(b), but illogically does not state a consequence for violating Rule 7.2(a).

issues that could be resolved before trial” while also “preserv[ing] the rights t[he] parties to raise evidentiary issues at trial.”³ Second, such a rule needed to stop the motion from being used as a cudgel by obliging the parties to “confer” beforehand so they could identify genuine evidentiary issues, ignore unnecessary ones, and stipulate to any agreed upon ones.⁴

Eventually the committee settled on the current Rule 7.2. On October 4, 2004, the Arizona Supreme Court added Rule 7.2 to the ARCPs.⁵

PROPOSED AMENDMENTS TO RULE 7.2

Rule 7.2 currently states as follows:

(a) Obligation to Confer. Within sufficient times to comply with Rule 7.2(b), the parties must confer to identify any disputed evidentiary issue that they anticipate will be the subject of a motion in limine.

(b) Deadline for Filing. Unless a different schedule is ordered by the court, the parties must file all motions in limine for which pretrial rulings are desired no later than 30 days before either a Trial Management Conference or, if no Trial Management Conference is set, the date of the trial.

(c) No Replies Permitted. The moving party may not file a reply in support of its motion in limine.

(d) Pretrial Rulings. All motions in limine submitted in accordance with Rule 7.2(b) must be ruled on before trial unless the court determines the particular issue of admissibility is better considered at trial. The court's denial of a motion in limine preserves the moving party's objection to the evidence for purposes of appeal.

³ *State Bar of Arizona Civil Practice and Procedure Committee – Minutes of September 11, 2003*, pg 6 (2003) (statement by Bill Klain, Committee Member).

⁴ *Pet. to Am. Ariz. R. of Civ. Pro. by Adding Rule 7.2*, Supra.

⁵ Arizona Supreme Court, *Order Promulgating Rule 7.2, Rules of Civil Procedure* (October 4, 2004)

(e) Effect of Noncompliance. Motions in limine not filed in accordance with Rule 7.2(b) will be deemed untimely and will not be ruled on before trial unless good cause is shown. The failure to file a motion in limine in compliance with this rule does not operate as a waiver of the right to object to evidence at trial.

The proposed amendments to Rule 7.2 are demonstrated by “red line/strikeout” below:

(a) ~~Obligation to Confer~~ Certificate of Good Faith Consultation Obligation. Within sufficient times to comply with Rule 7.2(b), the parties must ~~confer~~ consult in good faith as provided in Rule 7.1(h) to identify any disputed evidentiary issue that they anticipate will be the subject of a motion in limine. A Rule 7.1(h) good faith consultation certificate must accompany any motion in limine.

(b) Deadline for Filing. Unless a different schedule is ordered by the court, the parties must file all motions in limine for which pretrial rulings are desired no later than 30 days before either a Trial Management Conference or, if no Trial Management Conference is set, the date of the trial.

(c) No Replies Permitted. The moving party may not file a reply in support of its motion in limine.

(d) Pretrial Rulings. All motions in limine submitted in accordance with ~~Rule~~ Rules 7.2(a) and 7.2(b) must be ruled on before trial unless the court determines the particular issue of admissibility is better considered at trial. The court's denial of a motion in limine preserves the moving party's objection to the evidence for purposes of appeal.

(e) Effect of Noncompliance. Motions in limine not filed in accordance with ~~Rule~~ Rules 7.2(a) and 7.2(b) ~~will be deemed untimely and~~ will not be ruled on before trial unless good cause is shown. The failure to file a motion in limine in compliance with this rule does not operate as a waiver of the right to object to evidence at trial.

GROUNDS FOR APPROVAL OF THE PETITION

Incorporating Rule 7.1(h) into Rule 7.2 brings uniformity to those Arizona Rules of Civil Procedure that have a pre-filing consultation requirement. In

additional the proposal clarifies that there is, as there should be, a consequence for not complying with the “confer” requirement. Finally, the nature of that consequence is explained.

I. THE PROPOSED AMENDMENTS TO RULE 7.2 BRING THAT RULE IN CONFORMITY WITH THE OTHER ARIZONA RULES THAT IMPOSE A PRE-FILING CONSULTATION REQUIREMENT.

Many Arizona rules require the parties to communicate and endeavor to resolve certain issues prior to filing a motion in court. Rule 26 mandates that any motion for discovery or disclosure disputes must be accompanied with a Rule 7.1(h) good faith consultation certificate prior to their filing. *See* Ariz.R.Civ.P. 26(i). The same requirement is also included in its discovery disciplinary counterpart, Rule 37. *See* Ariz.R.Civ.P. 37(a)(1). Rule 11 also requires that prior to filing such a motion the opposing sides must meet and consult in good faith and file a Rule 7.1(h) certificate. *See* Ariz.R.Civ.P. 11(c)(3)(C). Finally, Rule 12(j) imposes a Rule 7.1(h) requirement into all Rule 12(b)(2), 12(b)(6), 12(c), and 12(f) Motions.⁶

Above Rules 11, 12, 26, and 37 all – like Rule 7.2 – intend for the parties to communicate and “hash-out” any issues before seeking court intervention. There is no logical reason for the same pre-filing consultation requirement in Rule 7.2 to differ from these other rules.

Rule 7.1(h) was added to the ARCPs in 2016. Thereafter, Rules 11, 12, 26, and 37 were amended to incorporate the Rule 7.1(h) requirement. Rule 7.2 – which

⁶ Pet. to Am. R. 12 and 8.1 of the Ariz. R. of Civ. Pro., Supr. Ct. No R-20-0028, pg 2, ln 5-16 (Jan. 9, 2020).

preceded Rule 7.1(h) – simply has not been, and needs to be, updated to similarly incorporate Rule 7.1(h). The committee notes and original petition for Rule 7.2 clearly articulate – just like Rules 11, 12, 26, and 37 do – the benefits of a pre-motion good faith meeting. Again, amending Rule 7.2 as proposed simply unifies the same pre-filing consultation requirements contained in the other rules that require the same.

The proposal also brings Rule 7.2 more in line with federal practice. Local Federal Rule 7.2(l) – again adopted before Arizona Rule 7.1(h) – states:

(l) Motions in Limine. No opposed motion in limine will be considered or decided unless moving counsel certifies therein that the movant has in good faith conferred or attempted to confer with the opposing party or counsel in an effort to resolve disputed evidentiary issues that are the subject of the motion. The moving party is not permitted to file a reply in support of its motion in limine.

This local federal rule – unlike current Rule 7.2(a) – 1) requires the movant to “certify” a pre-filing consultation with the opposition, and 2) states a consequence for not so doing. There is no logic for any lesser requirement in current Ariz.R.Civ.P. 7.2.

The chosen amendment language was carefully selected, after much thought and detailed review of Rules 11(c)(2)(A), 11(c)(3)(C), 12(j), 26(i), and 37(a)(1). The amendment language endeavors to be consistent with these other rules and minimize necessary word changes to existing Rule 7.2.

II. THE PROPOSED AMENDMENTS TO RULE 7.2 CLARIFY THAT THERE IS A CONSEQUENCE, AND THE NATURE OF SUCH, FOR VIOLATING 7.2(A).

Current Rule 7.2 “requires that litigants cooperate and communicate with each other so that client funds, judicial resources, and jury time is conserved”⁷ As currently written, however, there is no mechanism by which the Court definitively knows if the “confer” obligation has been met and, more importantly, the rule neither states that there is a consequence for violating this requirement nor the nature of that consequence. As noted above, Rule 7.2 should logically be consistent with the plethora of other Arizona rules that incorporate Rule 7.1(h) into the pre-filing consultation obligation.

For the foregoing reasons, the undersigned respectfully petitions this Court to amend Ariz. R. Civ. P. 7.2 as proposed in this Petition.

RESPECTFULLY SUBMITTED: September 21, 2023.

Gary J. Cohen

Gary Cohen
Judge, Division 7
Arizona Superior Court In Pima County

⁷ See *Pt. to Amend the Ariz. R. Civ. P. Adding 7.2*, Supr. Ct. No. R-04-0012, pg.2, lns 23-24