March 28, 2013

Opposition to Petition to Amend ARCP 16

Preface

I am writing to oppose the current Petition to Amend a variety of Civil Rules having to do with the setting of trials.

I have many years of experience (more than I am now admitting) as trial attorney, trial judge, and Presiding Judge for Alternative Dispute Resolution for Pima County.

I have two primary objections to the proposed rule changes:

1. Pima County's culture and practice, under the current rules, works well. There is no need for rule changes.
2. The State Bar's belief that participation in a settlement conference should be required before a court sets a trial date (see page 18 of Petition) is an unfounded and erroneous belief.

My experience/observation is that deadlines are good and a trial date is the ultimate deadline. The practice in Pima County, under the current rules, follows a relatively simple and straight forward procedure that sets deadlines.

Trial Settings – A Solution in Search of a Problem

On simple and non-complex cases, a party files a Motion to Set. Shortly after the Motion to Set is filed the court issues a Trial Notice, which includes a variety of deadlines set out in the rules (or adjusted by each individual trial judge).

With deadlines set (i.e. time for last disclosure and discovery, dispositive motions, et cetera) and a trial date set approximately 6 months to one year away, cases smoothly progress along with an end goal/deadline of the trial date.

The proposed rule change would provide for setting of a trial date later in the case.

The Petition also notes (page 16):

> With many superior court judges already waiting until later in cases to set trial dates, and with this Petition proposing the formalize that procedure, the State Bar believes that some litigants may try to use the lack of an early trial date setting to abuse the disclosure rules. The State Bar thus proposes additional changes to clarify that the lack of trial date does not give the parties ability to make late disclosures without fear of consequences.

The Petition submits that there are "benefits" to this in that "the parties and court are better able to determine how many trial days are needed, and the trial dates are less likely to be moved." (See page 15 of Petition). This benefit is marginal and illusory.

First, no superior court judge (to my knowledge), in Pima County, waits until "later in a case" to set a trial date.

Second, potential abuse of disclosure rules when there is a late setting of trial (or no setting until discovery is complete) is a real concern because the presence of any prejudice is clearer. One need only review the facts and circumstances under the recent case *Marquez v. Ortega*, 65 Ariz. Adv. Rep. 18 (2/28/13) to see the problems. In *Marquez*, the Plaintiff did not comply with any deadlines, but a trial had not been set. When the Defendant filed a Motion for Sanctions, the Plaintiff argued that because no trial was set, the Defendant did not suffer prejudice.

The *Marquez* opinion noted that there is a real "issue" to the potential claim of lack of prejudice, where trial judges were not setting trial dates until after the expiration of discovery deadlines and that this could lead to abuse and delay.

One of the most difficult decisions trial judges have, and aggravating factors that trial attorney's must deal with, are deadlines and predictable consequences for missed deadlines. The early setting of trial, rather than a proposed later setting of trial, makes a showing of prejudice more readily apparent. As a result, the decisions regarding consequences of missed deadlines more predictable and easy to deal with than when a trial is not yet set, or set later in a case.

The vast majority of civil cases are set and tried as a 2-4 day jury trial. They are not complex nor overly complicated. Except for treating physicians, there are usually no (or limited) "expert" witnesses. Accordingly, the need for scheduling orders of the kind and nature contemplated by the Petition are not necessary. Longer and complex trials have scheduling orders in place.

The current rules acknowledge the benefits of and promote case management and scheduling conferences in the appropriate cases. They are required in medical malpractice cases and may, at the request of any party (or *sua sponte* by a judge), be conducted in any case.

As practical matter, attorneys in Pima County frequently request (and obtain) early comprehensive pretrial management conferences which set deadlines and, importantly, set a trial date. They do so only in cases where they are appropriate, which is not all cases. Many judges (including myself) automatically set them in any case that appears long or complex. There is no need for change.

I join in the opposition filed by the Pima County Bench. If the Arizona State Bar and/or the Maricopa County Bar have issues regarding case management, setting of trials, and enforcement of deadlines, the solution to those issues should not be imposed on counties that do not have those problems.

Requiring settlement conferences prior to a trial setting lacks reality

The Pima County Superior Court has a very active and successful settlement program. It involves the time and effort of both trial judges and the Bar (through the use of pro tems). It is well received and free, with several hundred settlement conferences completed per year saving nearly 500 trial days in 2012.

Each judge assigned with a civil case load is assigned several settlement weeks. During these weeks, these judges do not schedule trials. Instead, they conduct settlement conferences, frequently two per day. In addition, as Presiding ADR Judge, I have been assigned a 75% case load so that I can fill the need for additional requested settlement conferences in both civil and probate cases.

Because of the demand, many cases are also assigned to pro tems who volunteer their time to conduct settlement conferences.[1]

In other words, Pima County's settlement program is very busy. It is difficult to imagine how overburdened it could become if, as mandated by the current proposed rule change, no trial could be set until a settlement conference occurred.

With over 1,000 cases now set for trial in Pima County the rule change would require over 1,000 settlement conferences. Conducting that many would overwhelm our system or require parties to spend money on private mediation.[2] Currently our judges are comfortable in ordering settlement conferences because the parties have a real choice in paying for private mediation or electing to participate in our program. If our program is overwhelmed, I do not believe it is right to require litigants to spend money on a private mediator[3] before a trial can be set.

I am also of the opinion that settlement conferences with no trial set are not as successful. Again, deadlines are good. My observation is based on having conducted hundreds of successful settlement conferences/mediations. Each case has its own unique timing in which settlement should be discussed. It is an unusual case, however, when a case is in the best posture to settle and the parties feel the necessary leverage and/or cost leverage regarding settlement without some impending trial date.

In other words, it is my experience that fewer cases settle when a trial date is not set than cases in which a trial date is set. In fact, frequently, a fast approaching trial date is the best impetus to have a case settled. The proposed rule may have the unintended consequence of

[1] Statistically, a higher percentage of cases settle in judge conducted rather than pro tem conducted settlement conference. Based on my experience, I believe that this is not because of a judge's greater skill set, but because of the greater impact (on the parties or counsel) of a judge's observations rather than of an attorney/pro tem.

[2] This extra burden on the court comes at time when Pima County is examining (and changing) its resources and allocation of judges. With ever increasing family and juvenile case loads, fewer judges may be assigned to the civil case loads. This would mean more trials per judge and fewer judges available to conduct settlement conferences.

[3] I understand that rates are as high as $500.00 per hour.

requiring many unsuccessful settlement conferences, resulting in multiple conferences, and further burdening available resources.

Conclusion

In conclusion, it is my opinion that the proposed rule changes would impose unnecessary burdens and expenses on the parties and the courts. The proposed changes are not needed in Pima County (and likely most other counties). They would cause more harm than good.

Respectfully,
Hon. Carmine Cornelio
ADR Presiding Judge, Pima County