John A. Furlong, Bar No. 018356
General Counsel
STATE BAR OF ARIZONA
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6288
John.Furlong@staff.azbar.org
Telephone: (602) 252-4804
Fax: (602) 271-4930

IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 26(b)(5), ARIZONA RULES OF CIVIL PROCEDURE

Supreme Court No. R-10-0001

Comment of the State Bar of Arizona on Petition to Amend Rule 26(b)(5), Arizona Rules of Civil Procedure

A Petition has been submitted to amend Rule 26(b)(5) of the Arizona Rules of Civil Procedure to alter the standard for obtaining leave to identify non-parties at fault after expiration of the deadline. The proposed change to the Rule is as follows:

> Any party who alleges pursuant to A.R.S. § 12-2506(B) (as amended), that a person or entity not a party to the action was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such nonparty at the time of compliance with the requirements of Rule 38.1(b)(2) of these Rules, or within one hundred fifty (150) days after the filing of that party's answer, whichever is earlier. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any nonparty whose identity is not disclosed in accordance with the requirements of this subpart 5 except upon written agreement of the parties or upon motion establishing a lack of undue delay and unfair prejudice to all other parties. ~~establishing newly discovered evidence of such nonparty's liability which could not have been discovered within the time periods for compliance with the requirements of this subpart 5.~~

Because its members appear to be divided with respect to this proposal,[1] the State Bar does not believe it is appropriate (or accurate) to represent to this Court that its membership either supports or opposes the Petition. Nonetheless, because worthy arguments can be marshaled on both sides of the question, the State Bar believes it would be helpful to the Court to present the opposing viewpoints concerning the proposed rule change. These opposing viewpoints are set forth in the next two sections of this Comment.

In addition, a recent decision out of the United States District Court for the District of Arizona has identified a serious ambiguity in Rule 26(b)(5) as to whether its requirements apply in the context of apportioning fault to former parties. Accordingly, in this Comment the State Bar also proposes a slight revision to the language of Rule 26(b)(5) to clarify that one need only designate as non-parties at fault in compliance with Rule 26(b)(5) those who have never been a party to the action.

THE VIEWPOINT OPPOSING THE PETITION: WHY THE PROPOSED AMENDMENT TO RULE 26(b)(5) SHOULD BE REJECTED

Without taking a position in support of or against the Petition to amend Rule 26(b)(5), the State Bar recognizes that there are arguments against the proposed amendment that are worth serious consideration. That viewpoint is presented below. The following is not intended to present an exhaustive list of the arguments one might present in opposition to the Petition, but is rather an attempt to summarize what appear to be the principal arguments in opposition to the proposed rule change.

[1] The results of a vote taken at the December 2009 meeting of the State Bar's Civil Practice & Procedure Committee illustrate this perceived division. At that meeting, which was held before the Petition at issue was filed with the Court, a motion was made and seconded that the Committee support a change to the standard for allowing untimely naming of non-parties at fault under Rule 26(b)(5). The motion failed, with eight votes in favor and ten opposed.

1. The current standard does permit late designations and is comparable to other standards in the Rules.

The current Rule 26(b)(5) permits a party to designate non-parties at fault after the expiration of the deadline "upon motion establishing newly discovered evidence of such nonparty's liability which could not have been discovered within the time periods for compliance with the requirements of this subpart 5." The Petition takes the position that this standard is inconsistent with and more onerous than the standards set forth in other rules where a party seeks to take untimely action. As observed by the Arizona Court of Appeals in *Soto v. Brinkerhoff*, 183 Ariz. 333, 903 P.2d 641 (App. 1995), however, the "newly discovered evidence" standard of Rule 26(b)(5) is actually similar to the standards of Rule 59(a)(4) for gaining a new trial and Rule 60(c)(2) for gaining relief from a final judgment.[2]

Given Rule 26(b)'s similarity to Rules 59(a)(4) and 60(c)(2), the court in *Soto* turned to case law examining those other two rules in fashioning the standard that now governs untimely designations of non-parties at fault under Rule 26(b)(5). Namely, an untimely non-party at fault designation is permitted upon a showing that (1) the newly discovered evidence was in existence; (2) the evidence was not possessed by the party seeking relief from the non-party at fault deadline; (3) the party seeking relief did not know of the evidence; and (4) the evidence was not available to that party. *Soto*, 183 Ariz. at 336, 903 P.2d at 644.

In addition to Rules 59(a)(4) and 60(c)(2), the standard for the relation back of amendments adding parties under Rule 15(c) is instructive when examining the current standard of Rule 26(b)(5). To have an amendment adding a party relate back to the filing of the original complaint, a plaintiff must show that (1) the claim in the amended pleading arises out of the conduct, transaction or occurrence

[2] The only distinction appears to be that Rule 59(a)(4) includes a "reasonable diligence" component and Rule 60(c)(2) a "due diligence" component.

alleged in the original complaint; (2) within the statute of limitations plus the time for effecting service under Rule 4(i), the new defendant must have received such notice of the institution of the action as to not be prejudiced in maintaining a defense on the merits; and (3) during that same time period, the defendant knew or should have known that but for a mistake concerning the identity of the proper party, it would have been named in the original complaint. The mere fact that the defendant brought in was not prejudiced by the amendment is not enough. *Tyman v. Hint Concrete, Inc.*, 214 Ariz. 73, 148 P.3d 1146 (2005). Rule 15(c) is of particular relevance because it, like Rule 26(b)(5), is intertwined with statutes of limitation.

In sum, a standard does currently exist by which a defendant can gain leave to untimely designate non-parties at fault, and that standard is not only consistent with but actually based upon the standards set forth in other Rules. That standard is also not the only relatively difficult standard governing parties' untimely actions. *See, e.g.*, Ariz. R. Civ. P. 15(c).

2. The current rule serves to avoid gamesmanship and significant changes to the course of litigation to the detriment of judicial efficiency and to the prejudice of plaintiffs.

Rule 26(b)(5)'s "primary purpose" is to identify "for the plaintiff any unknown persons or entities who may have caused the injury in time to allow the plaintiff to bring them into the action before the statute of limitations expires." *Soto*, 183 Ariz. at 337, 903 P.2d at 645 (quoting *LyphoMed, Inc. v. Superior Court*, 172 Ariz. 423, 428, 837 P.2d 1158, 1163 (App. 1992)). If the Rule were to be amended as proposed by the Petition, and late non-party at fault designations became routine, the Rule's primary purpose would be at risk and subject to the possible gamesmanship of defendants claiming they did not engage in undue delay in identifying a non-party.

In addition, even assuming that a plaintiff was able to add as a party an untimely designated non-party at fault or continued on with litigation without that non-party, late designations are likely to lead to inefficiencies in the litigation. For example, if the party were added later in the litigation, a significant risk exists that depositions will have to be re-taken. *See* Ariz. R. Civ. P. 32(a) (depositions may only "be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, and had an opportunity and similar motive to develop the testimony"). Similarly, even if the non-party were not added into the litigation, the scope of discovery might substantially change, with new depositions and other discovery needed to deal with what basically amounts to a new defense theory.

As set forth in the next subsection, a more judicially efficient way of handling situations where a defendant is legitimately unable to identify non-parties by the presumptive deadline is for the defendant to seek an extension of the deadline under Rules 6(b) or 16(b).

3. The Rules permit defendants to gain extension of the non-party at fault deadline before expiration of the deadline.

To the extent a defendant has legitimate concerns that the course of proceedings in a given lawsuit are such that the defendant will be unable to identify non-parties at fault within Rule 26(b)(5)'s deadline, mechanisms already exist for the defendant to gain an extension before expiration of the deadline. Namely, a defendant can seek an extension of the non-party at fault deadline under Rule 6(b) or can seek to set a new non-party at fault deadline as part of an entire pre-trial schedule of discovery and disclosure deadlines under Rule 16.

For example, assume that in a lawsuit due to the existence of multiple defendants and other issues the first-served defendant does not receive the

plaintiffs' disclosure statement until 90 days after the defendant's answer was filed and the disclosure identifies witnesses of which the defendant was unaware and which it needs to interview or depose in order to possibly identify non-parties at fault. If the plaintiff refused to stipulate to extend the non-party at fault deadline, the defendant could move for an extension of the deadline under Rule 6(b)(1), which permits the court "with or without motion or notice [to] order the period enlarged if request therefore is made before the expiration of the period." Ariz. R. Civ. P. 6(b); s*ee also Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d 1021, 1031 (App. 1997) ("Rule 6(b)(1) gives the court wide discretion to grant a request for additional time that is made prior to the expiration of the period originally prescribed") (quoting 4A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1165). Alternatively, the defendant could request a conference under Rule 16(b) (non-medical malpractice cases) or Rule 16(c) (medical malpractice cases) at which time it could seek a new non-party at fault deadline along with other discovery and disclosure deadlines. *See* Ariz. R. Civ. P. 16(b) (stating that court shall schedule a comprehensive pretrial conference upon any party's written request at which time a schedule for "disclosures, discoveries and related activities" can be established); Ariz. R. Civ. P. 16(c) (requiring comprehensive pretrial conference to be set shortly after all defendants have appeared in case).

The Petition's proposed amendment to Rule 26(b)(5) is unnecessary. The current Rules provide courts with the ability to extend the presumptive deadline when presented with a defendant's legitimate inability to timely identify non-parties at fault, and do so in a way that also discourages the gamesmanship, heightened expense and judicial inefficiency that could result from the Petition's proposed amendment to Rule 26(b)(5).

THE VIEWPOINT SUPPORTING THE PETITION: WHY THE PROPOSED AMENDMENT TO RULE 26(b)(5) SHOULD BE ADOPTED

Again, without taking a position in support of or against the Petition to amend Rule 26(b)(5), the State Bar recognizes that there are also arguments in support of the proposed amendment that are worth serious consideration. That viewpoint is presented below. The following is not intended to present an exhaustive list of the arguments one might present in support of the Petition, but is rather an attempt to summarize what appear to be the principal arguments in favor of the proposed rule change.

1. The harsh standard in the current rule often thwarts the public policy of comparative negligence that was the reason Rule 26(b)(5) was created, and is inconsistent with other disclosure rules.

In 1987, the Arizona Legislature abolished joint and several liability in most instances, and instead imposed several-only liability, with each party to be responsible for the damages that they caused. *Church v. Rawson Drug & Sundry Co.,* 173 Ariz. 342, 345, 842 P.2d 1355, 1358 (App. 1992). Rule 26(b)(5) was enacted as part of that statutory change, in order to implement the procedural mechanism for naming non-parties at fault. A.R.S. § 12-2506 provides in relevant part: "Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, *in accordance with requirements established by court rule,* that a nonparty was wholly or partially at fault." (Emphasis added).

As our courts have recognized, a procedural rule such as Rule 26(b)(5) cannot affect the substantive rights granted by the statute:

> Rules promulgated by the Arizona Supreme Court, such as Rule 26(b)(5), can only affect procedural matters and cannot abridge, enlarge, or modify substantive rights created by statute. If a rule and a statute appear to conflict, the rule is construed in harmony with the statute. The procedural law found in Rule 26(b)(5) merely prescribes the method by which § 12-2506 is implemented and

> effectuated. To find otherwise would allow the rule to affect substantive rights prescribed by statute.

Rosner v. Denim & Diamonds, Inc., 188 Ariz. 431, 433, 937 P.2d 353, 355 (App. 1996) (citations omitted).

Unfortunately, the harsh standard of Rule 26(b)(5) *does* "affect substantive rights prescribed by statute." This is because the rule as written and interpreted makes it nearly impossible to use late evidence of a non-party at fault, requiring in essence that a party prove that there is no conceivable way the evidence could have been obtained earlier. *See, e.g., Soto v. Brinkerhoff,* 183 Ariz. 333, 903 P.2d 641 (App. 1995), discussed above.

In fact, Arizona courts have held that this standard is different than the standard normally applicable to disclosure matters, where by rule and by common law the purpose is to provide the parties "a reasonable opportunity to prepare for trial or settlement." *Bryan v. Riddel,* 178 Ariz. 472, 476 n.5, 875 P.2d 131, 135 n.5 (1994); Ariz. R. Civ. P. 37(c)(1) (prohibiting use of undisclosed evidence "unless such failure is harmless"). The recent Court of Appeals decision in *Scottsdale Insurance Co. v. Cendejas,* 220 Ariz. 281, 205 P.3d 1128 (Ct. App. 2009), illustrates this very real conflict.

In that case, the trial court found that the defendant's notice of a non-party at fault was untimely, and granted the plaintiff's motion for summary judgment, because "there was no need for a trial, and no facts were in dispute once the nonparty at fault had been eliminated." *Cendejas*, 220 Ariz. at 285, 205 P.3d at 1132. The Court of Appeals found that the notice was in fact timely, but inadequate. The defendant in that case argued that the exclusion of its non-party at fault designation amounted to striking its answer and entering default judgment, and that the trial court should have considered lesser sanctions. *Id.* at 287, 205 P.3d at 1134. The defendant's argument is well-supported in the context of other

disclosure issues, where a trial court cannot enter default or dismissal as a discovery sanction without considering lesser sanctions. *See, e.g., Montgomery Ward & Co., Inc. v. Superior Court,* 176 Ariz. 619, 622, 863 P.2d 911, 914 (App. 1993) ("the trial court struck Defendants' Answer without first making adequate inquiry and findings regarding whether the discovery process had been abused and, if so, the degree of the abuse, whether the abuse was the fault of Defendants or of Defendants' lawyers, and whether lesser sanctions would have been appropriate.").

But, in *Cendejas,* the Court of Appeals held that the trial court was required to apply the sanctions set forth in Rule 26(b)(5), and had no discretion to apply a lesser sanction:

> When interpreting a statute, if the language is unambiguous, we give effect to the language as written. We apply the same standard when interpreting a procedural rule. Section 12-2506(B) authorizes consideration of a nonparty's fault "if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault." Rule 26(b)(5) directs that "[t]he trier of fact shall not be permitted to allocate or apportion any percentage of fault to any nonparty" not identified in accordance with the Rule. Because Appellants did not comply with the Rule, the statute and Rule bar consideration of any nonparty's fault in the allocation of damages, and neither gives the trial court discretion to fashion another sanction.

Cendejas, 220 Ariz. at 287-88, 205 P.3d at 1134-35 (citations and footnote omitted).

In fact, the Court specifically held that the entire Rule 37(c) scheme of discovery sanctions did not apply to notices of non-parties at fault under Rule 26(b)(5):

> Although Appellants cite cases holding that a trial court must consider lesser sanctions than one that results in dismissal when imposing sanctions for a discovery violation, those cases do not concern notices of nonparties at fault. Rule 37(b) allows a trial court to make "such orders as are just" when a party has failed to obey an order to provide or permit discovery; Rule 37(c) allows a court "for good cause" to permit use of untimely disclosed

> information. But Rule 26(b)(5) does not give a court discretion to overlook a defendant's noncompliance with the Rule.

Cendejas, 220 Ariz. at 288 n.6, 863 P.3d at 1135 n.6.

Imposing standards on Rule 26(b)(5) that are much harsher than any other disclosure or discovery sanction (the examples discussed above do not relate to disclosure or discovery) improperly impedes the statutory command "to divide damages between the parties who are at fault based on each party's degree of fault." *Church,* 173 Ariz. at 350, 842 P.2d at 1363. Conforming the standards in Rule 26(b)(5) to other discovery and disclosure standards is required to implement the Legislature's directive, over twenty years ago, to abolish joint and several liability.

2. No reported decisions address whether Rule 6(b) applies to the deadline set forth in Rule 26(b)(5).

One of the arguments against changing the Rule is that a party can always seek an extension under Rule 6(b) of the 150-day deadline of Rule 26(b)(5). It is true that Rule 6(b) does not explicitly exclude the Rule 26(b)(5) deadlines from its reach (as it does with deadlines such as the Rule 59 deadline to file a motion for new trial), but the State Bar is unaware of any reported appellate decisions supporting the use of Rule 6(b) to extend the deadline for naming non-parties at fault. In fact, one could imagine a strong argument that the deadline cannot be extended (except by consent of the parties) for all of the reasons that supporters of the current Rule 26(b)(5) argue that those deadlines are important to protect the rights of plaintiffs and to ensure the timely processing of cases. It is also possible that a court could decide that the standard for extending the Rule 26(b)(5) deadline is the same as the standard for considering an untimely disclosure of a non-party at fault.

3. Naming of non-parties at fault should be subject to the same standards as amending a pleading to add a new party.

This is one of the principal arguments in the Petition, so the State Bar will not discuss it further, except to note the argument here.

4. Case management does not require rigid deadlines for naming non-parties at fault.

Many of the arguments against amending Rule 26(b)(5) assume that an untimely notice of non-party at fault will cause significant problems and delays with processing the litigation. This is not always true. For example, if the parties are well-aware that a non-party is claimed to be at fault, a formal designation may not change anything in the case. At least one Court of Appeals decision recognized this fact:

> Whether A.P.S. strictly complied with Rule 26(b)(5) is not relevant. The purpose of [Rule 26(b)(5)] is to deal with situations where the plaintiff is unaware of a nonparty's fault. Here, the Naranjos were fully aware of Bridgestone's identity, involvement, and potential liability, and they clearly agreed on the record that Bridgestone should be treated as a nonparty at fault.

Bridgestone/Firestone North America Tire, L.L.C. v. Naranjo, 206 Ariz. 447, 451, 79 P.3d 1206, 1210 (App. 2003) (citation and internal quotation marks omitted). But, the State Bar would submit that this is an exception, and that the majority of decisions follow the harsh standard in *Cendejas*.

As noted in the Petition, it is altogether reasonable in the context of a particular case that certain evidence of non-parties at fault would not be discovered within the 150-day deadline of Rule 26(b)(5), even though it conceivably could have been discovered earlier. It is not reasonable to establish a harsh and immovable deadline based on assumptions that are not true in all, or maybe even in most, cases.

A CLARIFICATION THAT FORMER PARTIES NEED NOT BE DESIGNATED AS NON-PARTIES AT FAULT UNDER RULE 26(b)(5) IS APPROPRIATE

In an April 2010 decision out of the United States District Court for the District of Arizona, *Valles, et al. v. Pima County, et al.*, Case No. CV-08-09-TUC-FRZ (JCG) (attached in Appendix A), the court was presented with a situation where defendant Pima County designated as non-parties at fault former co-defendants after they had been dismissed from the case without prejudice (due to lack of jurisdiction). The plaintiffs objected to the designation of these former parties as non-parties at fault on the ground that the notice was untimely.

The Court in *Valles* analyzed the issue under Rule 26(b)(5), but with some hesitancy because it noted that the Rule did "not apply neatly" to the case, given that the alleged non-parties at fault were parties to the action during the time period set out in Rule 26(b)(5) (*i.e.*, 150 days after Pima County filed its answer); and thus Pima County did not have a legal basis for naming them as non-parties at fault during the time period contemplated by the Rule. The court ultimately rejected the plaintiffs' motion to strike Pima County's designation of the non-parties at fault, reasoning that the purpose of Rule 26(b)(5) (ensuring that plaintiffs are aware of the claimed fault of non-parties) was met because plaintiffs themselves had named them as defendants and that Pima County's failure to comply with Rule 26(b)(5) was excusable because such compliance was impossible given the terms of the Rule and the facts of the case.

The *Valles* decision raises a question as to whether there is a lack of clarity in Rule 26(b)(5), when read in conjunction with A.R.S. § 12-2506, as to its applicability in the case of allocating fault to ***former*** parties. Under A.R.S. § 12-2506(B), the trier of fact is to consider and allocate fault among the parties and any non-parties who either entered into a settlement agreement with the plaintiff

or whom the defending party gave notice of "in accordance with requirements established by court rule." Rule 26(b)(5) then provides the method and timing for designating "a person or entity not a party to the action" as a non-party at fault.

Given the *Valles* decision and the language of Rule 26(b)(5), as read in conjunction with A.R.S. § 12-2506, it appears to leave open whether former parties who were dismissed from the action without prejudice and for some reason other than a settlement agreement (*e.g.*, a dismissal due to lack of jurisdiction as occurred in *Valles*), must be designated as non-parties at fault in accordance with Rule 26(b)(5). As the court in *Valles* noted, such a requirement would not fit within the terms of Rule 26(b)(5) given that in many such circumstances a defendant could not possibly comply with the Rule's time deadline because dismissal of the co-defendant occurs after the passing of that deadline. In addition, to require the designation of such former parties as non-parties at fault does not serve the purpose of Rule 26(b)(5), namely "to identify for the plaintiff any unknown persons or entities who may have caused the injury in time to allow the plaintiff to bring them into the action before the statute of limitations expires." *LyphoMed, Inc. v. Superior Court*, 172 Ariz. 423, 428, 837 P.2d 1158, 1163 (App. 1992).

The State Bar accordingly believes that a slight revision to Rule 26(b)(5) clarifying its inapplicability in the case of ***former*** parties would be appropriate and helpful in clearing up an area of potential confusion for litigants. The State Bar proposes the following revision to the Rule:

> Any party who alleges, pursuant to A.R.S. § 12-2506(B) (as amended), that a person or entity not currently or formerly named as a party to the action was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such nonparty at the time of compliance with the requirements of Rule

> 38.1(b)(2) of these Rules, or within one hundred fifty (150) days after the filing of that party's answer, whichever is earlier. . . .[3]

It is worth emphasizing that this clarification to Rule 26(b)(5) would not excuse a party from disclosing any claim it may have that a party or former party should have fault allocated to it under A.R.S. § 12-2506. In particular, Rule 26.1 requires a party to disclose both the factual bases and legal theories of its defenses, which would include a defense that fault should be allocated to another person, whether a party or former party. To ensure that the proposed revision to Rule 26(b)(5) does not have the unintended effect of leading litigants to believe they do not have to meet these disclosure obligations, the State Bar also proposes the adoption of the following comment to the proposed rule change, which would clarify that a party is still obligated to meet its Rule 26.1 disclosure obligations: "This revision to the rule is intended to clarify that a party does not need to designate a former party as a non-party at fault in compliance with the rule. That clarification, however, is not intended to suggest that a party is excused from meeting its disclosure obligations under Rule 26.1 with respect to any defense that fault should be allocated or apportioned to another."

Conclusion

As discussed above, the State Bar believes that there are grounds weighing both in favor of and against the Petition's proposed amendment to Rule 26(b)(5). Because it believes that its membership is divided on the issue, the State Bar takes no position in favor of or against the Petition's proposed amendment to Rule 26(b)(5). The State Bar, however, hopes that the above discussion provides the Court with some guidance on the question.

---

[3] Please note: This slight revision or proposal, based upon the issues raised in the *Valles* decision, is not meant to alter the State Bar's neutral position regarding the original proposal.

In addition, the State Bar believes that the current language of Rule 26(b)(5) creates confusion as to its applicability in the case of allocation of fault to ***former*** parties. Because the designation of former parties as non-parties at fault under Rule 26(b)(5) would oftentimes conflict with the timing requirements of the Rule and because such a requirement would not serve the Rule's purpose, the State Bar believes that it is appropriate to revise Rule 26(b)(5) to clarify that former parties need not be identified in a non-party at fault notice.

RESPECTFULLY SUBMITTED this 20th day of May, 2010.

John A. Furlong
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this 20th day of May, 2010.

A copy was mailed to:
James K. Cross, Esq.
2929 N. Central Ave. Ste. 1700
Phoenix AZ 85012-2761
this 20th day of May, 2010

By: Kathleen Lundgren