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ARIZONA SUPREME COURT

PETITION TO AMEND ARIZONA RULE OF CIVIL PROCEDURE RULE 26(d)(4)	Supreme Court No. ______________ Petition to Amend Arizona Rule of Civil Procedure 26(d)(4)

Pursuant to Arizona Supreme Court Rule 28, petitioner respectfully asks the Court to amend Arizona Rule of Civil Procedure 26(d)(4) as it relates to the discoverability of communication with testifying expert witnesses. This change will help reduce unnecessary litigation expenses by largely eliminating the need for parties to take elaborate steps to avoid creating discoverable communication (whether hardcopy or electronically-stored); it also can eliminate the need to retain separate litigation consultants with whom trial counsel consult, sometimes doubling the costs of expert assistance. The attached Exhibit 1 reflects in redline format the proposed changes to the rule.

Discussion

The reality of ever-increasing litigation expenses is painfully evident when dealing with expert witnesses. Understandably, parties attempt to gather as much information as possible regarding opposing experts' opinions and the bases for them. This includes serving subpoenas on the expert for his/her entire file and serving requests for production on opposing parties seeking all communication with the experts. Often, the hope is to obtain communication regarding opposing counsels' strategy or showing that opposing counsel has engaged in a dialogue with the expert shaping his/her opinions. This leads careful counsel to

take elaborate and expensive steps to ensure that such discoverable communication never exists. The authors of the Federal Rules of Civil Procedure recognized these problems and amended Federal Rule of Civil Procedure 26(a)(2) and (b)(4) to address such concerns. Arizona parties, practitioners, and courts would benefit from a similar rule amendment.

The first method that counsel often use to avoid creating discoverable materials is to severely limit written communication with trial experts. As the authors of the 2010 amendment to the federal rule noted, this has a deleterious effect: "attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work." Fed. R. Civ. P. 26 Advisory Comm. Notes 2010 Amendments. Thus, rather than succinct emails back and forth, the expert and the lawyer wait to speak on the telephone or in person. When preparing reports or disclosures, the expert and lawyer often work together in person at the same computer to avoid exchanging discoverable draft reports. This increases expenses and impedes the free flow of ideas and information between the expert and the lawyer.

The second common method of avoiding creating discoverable communication is that "[a]ttorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses." Id. Of course, hiring a second expert with whom the lawyer communicates more freely to explore ideas and hypotheses dramatically increases those costs. Parties that cannot afford to retain a litigation consultant may, therefore, be disadvantaged when compared to an opponent with more significant resources.

The proposed amendments to the rule, like the recent amendments to the federal rule, provide work-product protection for drafts of expert reports and communication with experts. Following the federal amendment, this proposal "is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." Id. Like the federal amendment,

this proposal also does not prevent discovering information about the opinions or the development, foundation, or bases of those opinions; for example, an expert's tests and underlying data remain discoverable. "Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed." Id.

The proposed amendment also continues to allow discovery regarding the expert's compensation, the facts or data provided to the expert, and the assumptions provided by the lawyer and on which the expert relied. Even as to materials that the proposed amendment protects as work product, the communication between a lawyer and the expert is discoverable if the opposing party demonstrates a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. See Ariz. R. Civ. P. 26(b)(3) (discussing discoverability of trial preparation materials).

Admittedly, this proposal eliminates a party's ability to obtain a draft expert disclosure and to confront that expert at deposition when the final disclosure varies substantively from the draft. Indeed, petitioner is aware of anecdotal reports of lawyers obtaining drafts that contained opinions opposite of those found in the final disclosure. Those very rare instances, however, do not outweigh the substantial benefits that parties will enjoy through the proposed amendment. After all, the expert must still be able to cogently defend his/her opinions, explain how the data underlying those opinions are relevant, and discuss why contrary opinions should be rejected. The proposed amendment does not impede a lawyer's ability to test the opposing expert in this manner.

Conclusion

For the foregoing reasons, petition respectfully asks the Court to amend Arizona Rule of Civil Procedure 26(d)(4) so that communication with testifying expert witnesses generally is protected as trial preparation material. A redline version of that rule reflecting the proposed changes is attached as Exhibit 1.

DATED this 6th day of April, 2011.

/s/ James D. Smith
James D. Smith
Arizona State Bar No. 016760

Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this 6th day of April, 2011.

By: /s/ James D. Smith

Exhibit 1

Proposed amendment to Arizona Rule of Civil Procedure 26(b)(4). Additions are shown underlined and deletions are shown as ~~stricken~~.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(B) A party may through interrogatories or by deposition discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects drafts of any report or disclosure required under Rule 26.1(a)(6), regardless of the form in which the draft is recorded.

1 (E) Rule 26(b)(3) protects communications between the party's
2 attorney and any witness required to be disclosed under Rule
3 26.1(a)(6), regardless of the form of the communications,
4 except to the extent that the communications:
5 (i) relate to compensation for the expert's study or
6 testimony;
7 (ii) identify facts or data that the party's attorney
8 provided and that the expert considered in forming the
9 opinions to be expressed; or
10 (iii) identify assumptions that the party's attorney provided
11 and that the expert relied on in forming the opinions to be
12 expressed.
13 (F) In all cases, including medical malpractice cases, each
14 side shall presumptively be entitled to only one independent
15 expert on an issue, except upon a showing of good cause. Where
16 there are multiple parties on a side and the parties cannot
17 agree as to which independent expert will be called on an
18 issue, the court shall designate the independent expert to be
19 called or, upon the showing of good cause, may allow more than
20 one independent expert to be called.
21 In medical malpractice cases, each party shall presumptively be
22 entitled to only one standard-of-care expert. A defendant may
23 testify on the issue of that defendant's standard-of-care in
24 addition to that defendant's independent expert witness and the
25 court shall not be required to allow the plaintiff an
26 additional expert witness on the issue of the standard-of-care.
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