

1 Jessica J. Fotinos, Bar No. 019777  
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-26-

10 **PETITION TO AMEND RULE 51**  
11 **OF THE ARIZONA RULES OF**  
12 **FAMILY LAW PROCEDURE**

13 **STATE BAR OF ARIZONA**  
14 **PETITION**

15 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar  
16 of Arizona (the “State Bar”) hereby petitions the Court to amend Rule 51 of the  
17 Arizona Rules of Family Law Procedure. This proposed amendment to Rule 51 is  
18 designed to conform family law practice under Arizona state law, with civil law  
19 practice under Arizona state law, regarding work-product protection for draft  
20 versions of testifying expert witness reports and some communications between  
21 testifying expert witnesses and legal counsel.

22 The Issue

23 Under Arizona state law, there is a distinction – between family law practice  
24 and civil law practice – regarding the discoverability of draft versions of testifying  
25 expert witness reports and communications between testifying expert witnesses and  
legal counsel. For example, under the current Arizona Rules of Family Law

1 Procedure, *all* draft versions of a testifying expert witness’ report, and *all*  
2 communications between a testifying expert witness and legal counsel, are  
3 discoverable, and no work-product protection is available for draft expert witness  
4 reports or expert-attorney communications. *See* Rule 51(b)(1)(A), Ariz. R. Fam. L.  
5 P.; *Compare, Emergency Care Dynamics, Ltd. v. Superior Court In & For the*  
6 *County of Maricopa*, 188 Ariz. 32, 36, 932 P.2d 297, 301 (App. 1997).  
7

8  
9 Yet, based on the Arizona Rules of Civil Procedure, work-product protection  
10 applies to *all* draft versions of a testifying expert witness’ report and to some, but  
11 not all, communications between a testifying expert witness and legal counsel. *See*  
12 Rule 26(b)(4)(B) and Rule 26(b)(4)(C), Ariz. R. Civ. P. In light of the distinction  
13 under Arizona state law – between family law practice and civil law practice –  
14 regarding the discoverability of draft versions of a testifying expert’s reports and  
15 communications between a testifying expert and legal counsel, and based on the  
16 other reasons discussed herein, this Court is urged to consider adopting the proposed  
17 amendment to Rule 51 of the Arizona Rules of Family Law Procedure discussed  
18 herein.  
19  
20  
21

### 22 Background

23 In 2010, the United States Supreme Court adopted the current version of Rule  
24 26(b)(4) of the Federal Rules of Civil Procedure. The current version of Rule  
25 26(b)(4) of the Federal Rules of Civil Procedure provides work-product protection

1 for all draft versions of a testifying expert’s report and for some, but not all,  
2 communications between a testifying expert witness and legal counsel. *See* Rule  
3 26(b)(4)(B) and Rule 26(b)(4)(C), Fed. R. Civ. P.  
4

5 Rule 26(b)(4)(B) and Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure  
6 provide the following:

7 (B) *Trial-Preparation Protection for Draft Reports or*  
8 *Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of  
9 any report or disclosure required under Rule 26(a)(2),  
10 regardless of the form in which the draft is recorded.

11 (C) *Trial-Preparation Protection for Communications*  
12 *Between a Party's Attorney and Expert Witnesses.* Rules  
13 26(b)(3)(A) and (B) protect communications between the  
14 party's attorney and any witness required to provide a  
15 report under Rule 26(a)(2)(B), regardless of the form of  
16 the communications, except to the extent that the  
17 communications:

18 (i) relate to compensation for the expert's study or  
19 testimony;

20 (ii) identify facts or data that the party's attorney provided  
21 and that the expert considered in forming the opinions to  
22 be expressed; or

23 (iii) identify assumptions that the party's attorney provided  
24 and that the expert relied on in forming the opinions to be  
25 expressed.

26 In 2011, and again in 2017, petitions were filed with the Arizona Supreme  
27 Court proposing to amend Rule 26(b)(4) of the Arizona Rules of Civil Procedure –

1 so it would conform with the language of its federal counterpart at Rule 26(b)(4) of  
2 the Federal Rules of Civil Procedure. The Arizona Supreme Court denied each of  
3 those petitions.  
4

5 However, in 2018, Petition No. R-18-0007 was filed with the Arizona  
6 Supreme Court, and that Petition is incorporated herein. The petitioners who  
7 submitted Petition No. R-18-0007 also proposed to amend Rule 26(b)(4) of the  
8 Arizona Rules of Civil Procedure to include language so it conforms with the  
9 language of its federal counterpart at Rule 26(b)(4) of the Federal Rules of Civil  
10 Procedure. Namely, the petitioners of Petition No. R-18-0007 proposed to amend  
11 Rule 26(b)(4) of the Arizona Rules of Civil Procedure to include the following  
12 language:  
13  
14

15 (B) Trial-Preparation Protection for Draft Reports or  
16 Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of  
17 any report or disclosure required under Rule 26.1(d),  
18 regardless of the form in which the draft is recorded.

19 (C) Trial-Preparation Protection for Communications  
20 Between a Party's Attorney and Expert Witnesses. Rules  
21 26(b)(3)(A) and (B) protect communications between the  
22 party's attorney and any expert witness regardless of the  
23 form of the communications, except to the extent that the  
24 communications:

25 (i) relate to compensation for the expert's study or  
testimony;

(ii) identify facts or data that the party's attorney provided

1 and that the expert considered in forming the opinions to  
2 be expressed; or

3 (iii) identify assumptions that the party's attorney provided  
4 and that the expert relied on in forming the opinions to be  
5 expressed.

6 In support of their Petition No. R-18-0007, the petitioners there offered  
7 various reasons in support of their proposed amendments to Rule 26(b)(4). Among  
8 the reasons cited by the petitioners were the following:  
9

10 A number of practical factors weigh in favor of Arizona's  
11 adoption of federal expert work product protections. First,  
12 maintaining this distinction runs contrary to recent efforts  
13 to harmonize the federal and Arizona civil rules absent  
14 advancement of some overriding policy objective served  
15 by procedural divergence. Second, the proposed  
16 amendments preserve parties' abilities to examine and  
17 evaluate expert bias and the reliability of their  
18 methodologies and opinions. Third, as had become  
19 common under federal practice before amendment to  
20 federal Rule 26(b)(4) in 2010, informed Arizona litigators  
21 and experts have become skilled at avoiding creation of  
22 drafts or discoverable communications, often at great  
23 expense to the litigants.

24 Petition No. R-18-0007, at page 2, line 23, through page 3, line 8. A number of the  
25 arguments cited by petitioners in Petition No. R-18-0007 apply equally here and  
support the proposed amendment to Rule 51 of the Arizona Rules of Family Law  
Procedure set forth herein.

Also of note, in 2018, Comments to Petition No. R-18-0007 were submitted

1 by Mutual Insurance Company of Arizona (“MICA”) and the State Bar of Arizona  
2 (the “State Bar”). Those Comments are incorporated herein.

3  
4 In MICA’s Comment to Petition No. R-18-0007, it supported the proposed  
5 revisions to Rule 26(b)(4). However, MICA also proposed to include an additional  
6 sentence to Rule 26(b)(4). Namely, MICA proposed that the following sentence  
7 would be inserted immediately after the proposed language for Rule 26(b)(4)(C)(i-  
8 iii): “The dates upon which the expert received facts or data from the party’s attorney  
9 that the expert considered in forming the opinions to be expressed, and any portions  
10 of communications between the party’s attorney and the expert which evidence those  
11 dates, are discoverable.” See MICA’s Comment to Petition No. R-18-0007, at page  
12 2, lines 26 through 28.

13  
14  
15 In support of its Comment to Petition No. R-18-0007, MICA offered the  
16 following:

17  
18 An effective medical malpractice defense often hinges on  
19 the evolution of the plaintiffs’ experts’ opinions, which  
20 can change depending on what information the expert  
21 considers and when the consideration takes place.  
22 Although this information can be requested during expert  
23 depositions, these witnesses rarely recall with specificity  
24 the dates upon which they were provided facts and data by  
25 counsel. To date, the only effective way to ascertain that  
information has been to require production of the draft  
reports through discovery along with correspondence  
between the expert and counsel.

1 See MICA's Comment to Petition No. R-18-0007, at page 2, line 11 through 18.

2 Several points cited by MICA in support of its proposal to include an  
3 additional sentence to Rule 26(b)(4) generally apply here and further support the  
4 proposed amendment to Rule 51, Ariz. R. Fam. L. P.  
5

6 In the State Bar's Comment to Petition No. R-18-0007, it supported the  
7 proposed changes to Rule 26(b)(4), including the additional sentence proposed by  
8 MICA. The State Bar offered various reasons to support the proposed changes to  
9 Rule 26(b)(4). Among the reasons cited by the State Bar were the following:  
10

11 Reducing expenses and redirecting limited resources to  
12 focus on the primary merits of a claim rather than on  
13 marginal issues.

14 Affirming the commitment to proportionality in expert  
15 discovery.

16 Eliminating discovery disputes over attorney-expert  
17 communications and draft reports.

18 Allowing free and frank discussions between attorney and  
19 expert that allow for information flow in both directions.

20 Eliminating the need to hire a second expert for the  
21 attorney's consultation purposes and all associated  
22 expenses.

23 Permitting the expert to obtain the attorney's assistance  
24 with understanding applicable legal concepts and the  
25 overall legal process as it applies to the expert.

Ensuring that experts need not defend their drafting

1 processes or preliminary thoughts and opinions if the final  
2 report differs from earlier versions.

3 Reducing unnecessary barriers for potential new expert  
4 witnesses who are otherwise qualified but unfamiliar with  
5 legal processes, which effectively incentivize the use of  
6 so-called “professional” expert witnesses.

7 Eliminate discovery-avoidance practices related to expert  
8 communications and drafts that violate the spirit and  
9 possibly the letter of existing rules.

10 Making the treatment of expert discovery more uniform  
11 with federal practice, thereby preventing attorneys from  
12 inadvertently waiving work product protection if they  
13 forget which rules apply.

14 *See* State Bar’s Comment to Petition No. R-18-0007, at page 17, line 17, through  
15 page 18, line 23. The reasons cited by the State Bar in 2018, in support of the  
16 proposed changes to Rule 26(b)(4), generally apply here and support the proposed  
17 amendment to Rule 51.

18 In 2018, the Arizona Supreme Court adopted the proposed amendments to  
19 Rule 26(b)(4), including the additional sentence proposed by MICA; and Rule  
20 26(b)(4) now conforms with its federal counterpart at Rule 26(b)(4) of the Federal  
21 Rules of Civil Procedure and also includes the additional sentence proposed by  
22 MICA. A copy of Rule 26(b)(4), Ariz. R. Civ. P, as approved by the Arizona  
23 Supreme Court in 2018, is attached hereto as Appendix A.

24 Based on the foregoing, this Court is urged to consider adopting the proposed  
25

1 amendment to Rule 51 of the Arizona Rules of Family Law Procedure – as set forth  
2 in the revised version of Rule 51 attached hereto as Appendix B – so that work-  
3 product protection is available in Arizona state family law practice regarding draft  
4 versions of testifying expert witness reports and some communications between  
5 testifying expert witnesses and legal counsel. Appendix C is a clean version of what  
6 Rule 51 would like as amended.  
7

8  
9 **CONCLUSION**

10 The State Bar of Arizona respectfully requests that the Court approve the  
11 modified changes to Rule 51 of the Arizona Rules of Family Law Procedure found  
12 in the attached Appendix B.  
13

14 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of January, 2026.

15 *Jessica J. Fotinos*

16 \_\_\_\_\_  
17 Jessica J. Fotinos  
18 General Counsel

19 Electronic copy filed with the  
20 Clerk of the Supreme Court of Arizona  
21 this 12<sup>th</sup> day of January, 2026.

22 by: PSeguin  
23  
24  
25

# APPENDIX A

## APPENDIX A

### Arizona Rules of Civil Procedure

#### Rule 26. General Provisions Governing Discovery

\* \* \*

##### (b) Discovery Scope and Limits.

\* \* \*

##### (4) *Expert Discovery.*

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been disclosed as an expert witness under [Rule 26.1\(d\)\(1\)](#).

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under [Rule 26.1\(d\)](#), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert witness regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

The dates on which the expert received facts or data from the party's attorney that the expert considered in forming the opinions to be expressed, and any portions of communications between the party's attorney and the expert that evidence those dates are discoverable.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not

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. A party may discover such facts or opinions only:

(i) as provided in [Rule 35\(h\)](#); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D), including the time the expert spends testifying in a deposition; and

(ii) for discovery under Rule 26(b)(4)(D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including--in the court's discretion--the time the expert reasonably spends preparing for deposition.

(F) Number of Experts Per Issue.

(i) Generally. Unless the parties agree or the court orders otherwise for good cause, each side is presumptively entitled to call only one retained or specially employed expert to testify on an issue. When there are multiple parties on a side and those parties cannot agree on which expert to call on an issue, the court may designate the expert to be called or, for good cause, allow more than one expert to be called.

(ii) Standard-of-Care Experts in Medical Malpractice Actions. Notwithstanding the limits of Rule 26(b)(4)(F)(i), a defendant in a medical malpractice action may--in addition to that defendant's standard-of-care expert witness--testify on the issue of that defendant's standard of care. In such an instance, the court is not required to allow the plaintiff an additional expert witness on the issue of the standard of care.

# APPENDIX B

## APPENDIX B - Redline

Additions to the text of a rule are shown by underscoring and deletions are shown by ~~strike-through~~.

### Rule 51. General Provisions Governing Discovery

(a) [No change]

(1) – (6) [No change]

**(b) Discovery Scope and Limits.** Unless the court orders otherwise in accordance with these rules, the scope of discovery is as follows:

(1) – (3) [No change]

(4) *Expert Discovery.*

(A) [No change]

~~(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not 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. A party may discover such facts or opinions only: Trial-Preparation Protection for Draft Reports or Disclosures. Rules 51(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 49(j), regardless of the form in which the draft is recorded.~~

~~(i) as provided in Rules 63(e); or~~

~~(ii) on showing exceptional circumstances that make it impracticable for the party to obtain facts or opinions on the same subject by other means.~~

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 51(b)(3)(A) and (B) protect communications between the party's attorney and any expert witness regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. The dates on which the expert received facts or data from the party's attorney that the expert

considered in forming the opinions to be expressed, and any portions of communications between the party's attorney and the expert that evidence those dates are discoverable.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not 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. A party may discover such facts or opinions only:

(i) as provided in Rules 63(e); or

(ii) on showing exceptional circumstances that make it impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 51(b)(4)(A) or (B), including the time the expert spends testifying in a deposition; and

(ii) for discovery under Rule 51(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including—in the court's discretion—the time the expert reasonably spends preparing for the deposition.

(5) [No change]

(c) – (f) [No change]

# APPENDIX C

## APPENDIX C - Clean

### Rule 51. General Provisions Governing Discovery

(a) [No change]

(1) – (6) [No change]

**(b) Discovery Scope and Limits.** Unless the court orders otherwise in accordance with these rules, the scope of discovery is as follows:

(1) – (3) [No change]

(4) *Expert Discovery.*

(A) [No change]

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 51(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 49(j), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 51(b)(3)(A) and (B) protect communications between the party's attorney and any expert witness regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. The dates on which the expert received facts or data from the party's attorney that the expert considered in forming the opinions to be expressed, and any portions of communications between the party's attorney and the expert that evidence those dates are discoverable.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not 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. A party may discover such facts or opinions only:

(i) as provided in Rules 63(e); or

(ii) on showing exceptional circumstances that make it impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 51(b)(4)(A) or (B), including the time the expert spends testifying in a deposition; and

(ii) for discovery under Rule 51(b)(4)(B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions, including—in the court's discretion—the time the expert reasonably spends preparing for the deposition.

(5) [No change]

(c) – (f) [No change]