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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 26(b)(4), ARIZONA RULES OF CIVIL PROCEDURE	Supreme Court No. R-11-0017 **Comment of the State Bar of Arizona on Petition to Amend Rule 26(b)(4), Arizona Rules of Civil Procedure**

A petition has been submitted to amend Rule 26(b)(4) of the Arizona Rules of Civil Procedure to create work-product protection for certain communications between experts and attorneys. The proposed change to the rule would add the following subsections, with renumbering of the remaining subsections to conform to this proposal:

> (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.
>
> (E) Rule 26(b)(3) protects communications between the party's attorney and any witness required to be disclosed under Rule 26.1(a)(6), 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 proposed changes are identical to the changes that were made to the corresponding section of Rule 26, Federal Rules of Civil Procedure, which became effective December 1, 2010.

The State Bar's Civil Practice and Procedure Committee considered pursuing a similar amendment to Arizona's Rule 26 in 2010, while the change to the federal counterpart was pending. On a close vote, the committee rejected the pursuit of such an amendment to Rule 26.

The State Bar opposes the petition, although, as in 2010, the vote was very close in the Civil Practice and Procedure Committee, with a narrow majority in favor of the petition. The State Bar recognizes that there are worthy arguments on both sides of the question, and therefore believes it would be helpful to the Court to present the opposing viewpoints concerning the proposed rule change, which are set forth in the next two sections of this comment.

THE VIEWPOINT OPPOSING THE PETITION: WHY THE PROPOSED AMENDMENT TO RULE 26(b)(4) SHOULD BE REJECTED

The State Bar has identified at least six principal arguments in opposition to the Petition.

1. The proposed change is inconsistent with the broad disclosure requirements of Rule 26.1, which have no federal counterpart.

The State Bar understands that there are many who support conforming Arizona's procedural rules to their federal counterparts, unless there are substantive reasons for retaining a different rule. With respect to Rule 26(b)(4), there is a substantive reason for retaining a different rule; namely, that state courts

in Arizona have a far greater presumption of disclosure in civil litigation than is present in the federal system. The federal rules simply have no counterpart to the extensive disclosure requirements of Rule 26.1, Arizona Rules of Civil Procedure; and federal discovery practice thus more readily shields information from disclosure and discovery, consistent with proposed Rule 26(b)(4).

Critics of the proposed change to Rule 26(b)(4) understood that the spirit that animated the recent changes to the Arizona Rules of Evidence was that conformity with the federal rules is generally beneficial, but not where there are particular reasons for Arizona to retain distinctive features of its system of rules. The proposed change to Rule 26(b)(4), in the view of many, is directly contrary to the expansive disclosure requirements of Rule 26.1 (an instance of a special, distinctive and preferable feature of Arizona's civil practice culture), and should be rejected on that basis.

2. The proposed rule change shields useful information from discovery and prevents cross-examination that will help the trier of fact assess the expert's credibility.

Experts usually do not enter a case with fully formed opinions, but instead are given certain information by the attorneys who retain them as the case progresses. During that process, the experts formulate preliminary opinions, draft reports, and make other tentative conclusions before delivering a final report.

If the petition is adopted, much of the information relating to the formulation of an expert's opinion will become privileged and undiscoverable. Such information can give valuable insights into how the expert developed his or her final opinion, including what influence the attorney had in that process and the sincerity of the expert's adherence to the opinion, and thus the expert's very credibility. Shielding this information from discovery will hinder the truth-

seeking process of the court system, and again disserve the openness promoted by Arizona's system of liberal disclosure.

3. Adopting the proposed changes will lead to additional litigation as to the boundaries between discoverable and privileged information.

The proposed changes to Rule 26(b)(4) do not provide complete protection for attorney-expert communications, but instead allow discovery into three specified areas; namely, an expert's compensation, the "facts or data" given to the expert upon which the expert relied, and the "assumptions" given to the expert, again to the extent the expert relied on those assumptions to formulate that expert's opinion. There is a substantial likelihood, if the petition is adopted, of expensive and time-consuming disputes as to what constitutes "facts or data" and whether an expert "relied" on facts, data, or assumptions in formulating the final expert opinion. Such litigation is not required under the current rule because that rule, as interpreted by the case law, allows for discovery of an expert's file and the attorney's communications with the expert with virtually no exceptions. The current bright-line rule would be lost if the petition is granted.

4. Technical advances reduce the burden and expense of working with experts while still avoiding the creation of a discoverable paper trail.

One objection to the current version of Rule 26(b)(4) is that a great deal of time and effort are wasted on artificial constructs to avoid creating a paper trail of the communications between attorneys and testifying experts. Recent advances in technology, however, make it far easier for attorneys and experts to work together without creating discoverable records. For example, attorneys and experts can participate in web conferences, where draft reports can be shared, reviewed, and edited without creating any paper records of the intervening drafts.

5. The suggestion that Rule 26(b)(4) should be amended to avoid the supposed necessity of lawyers or law firms hiring two sets of experts is an invalid reason to revise the current rule.

One frequently advanced justification for amending Rule 26(b)(4) is that some litigants feel the need to hire two sets of experts, one to consult with beyond the reach of discovery, and another whose work product can be discovered. Critics of the proposed amendment believe it would be improper to amend the rule to recognize the supposed need to circumvent the clear obligation to disclose otherwise expert-attorney communications. These critics regard this argument as begging the question posed in Objection 1 above, as to whether the purpose of disclosure is well served by the proposed amendment to Rule 26(b)(4). Since the "two experts" argument is another means of avoiding the obligation to disclose clearly discoverable expert work, the critics contend that it is not a persuasive reason to amend Rule 26(b)(4).

6. Granting the petition encourages lawyers to improperly influence experts' opinions.

Experts should be witnesses, not additional advocates for their clients. If the petition is granted, attorneys will be free to shape an expert's opinion to be the most favorable to the client, as opposed to being the most faithful to the truth.

THE VIEWPOINT SUPPORTING THE PETITION: WHY THE PROPOSED AMENDMENT TO RULE 26(b)(4) SHOULD BE ADOPTED

The State Bar believes that the arguments in the petition in favor of the proposed change are well stated and present that position fairly and accurately. The State Bar submits that there are at least four additional arguments in favor of the petition that are not referenced therein.

1. The fact that useful information might be protected does not end the inquiry.

The State Bar recognizes that over the years many practitioners have obtained highly relevant information contained in communications between attorneys and testifying experts, including instances where attorneys have instructed experts to alter or even reverse their opinions. Nevertheless, the State Bar notes that any privilege, by definition, will exclude otherwise admissible, and often quite useful, evidence. The question is not merely whether useful information will be lost, but whether the probative value of that information outweighs the cost. In some instances, such as with attorney-client communications, the decision was made that the benefit of shielding that information outweighs the benefit of obtaining that information – even though one can imagine that such communications would likely be extremely helpful to the other side in litigation. In other instances, presumptive limitations were placed on discovery (such as the four-hour limit on depositions) that unquestionably limit discovery of information; but practitioners have adapted to those limitations.

Thus, the State Bar suggests that any examination of this issue consider the likely probative value of the information that would be shielded by the proposed rule change not in isolation, but compared to the benefits of erecting such a shield.

2. Focusing on attorney-expert communications is a time-consuming and expensive distraction.

One cost of allowing basically unfettered discovery into attorney-expert communications is that the parties may focus on such discovery to the exclusion of other, more fruitful, avenues of inquiry. More than a few practitioners relate stories of finding the draft report that reached the exact opposite conclusion as

was found in the expert's final report, or some directive from an attorney for an expert to change his or her unfavorable opinion.

Many believe, however, that the likelihood of actually finding such evidence is far lower than the anecdotal stories indicate, such that the pursuit of this evidence may blind practitioners to more mundane but likely more productive areas of inquiry, such as how the expert developed his or her opinion, or what grounds support the opinion.

3. Recent changes to Rule 702, Ariz. R. Evid., make discovery of attorney-expert communications less important.

This Court recently amended Rule 702, Arizona Rules of Evidence, to track the language of Rule 702, Federal Rules of Evidence, which is seen as having codified the requirements for admissibility of expert opinion in the *Daubert* decision.[1] One argument is that this rule change will provide more substantive grounds for challenges to expert testimony, such that the drafting process will prove less important in evaluating the testimony than examinations directed to the methods employed by the expert or the reliability of the expert's conclusions.

4. Granting the petition will allow experts to educate the attorneys who have retained them.

As noted in the petition, limiting the discoverability of attorney-expert communications will permit experts to have more free and frank discussions with attorneys. Not noted in the petition as a benefit of more open communications is that attorneys, who are often unfamiliar with the expert's area of expertise, can obtain valuable background information on the subject area without fear that those communications could be used against the expert or the client at trial.

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[1] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Conclusion

Although the State Bar opposes the petition, it believes that there are grounds weighing both in favor of and against the petition's proposed amendment to Rule 26(b)(4), and hopes that this discussion of both sides of the question will provide the Court with additional information to assist its decision-making process.

RESPECTFULLY SUBMITTED this 5th day of April, 2012.

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Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
5th day of April, 2012,

By: Kathleen A. Lundgren