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Spencer G. Scharff
(602) 682-6113
sscharff@thorpeshwer.com

March 25, 2016

William G. Klain and David B. Rosenbaum
TASK FORCE ON THE ARIZONA RULES OF CIVIL PROCEDURE
1501 West Washington Street, Ste. 410
Phoenix, Arizona 85007

Re: *Proposed Amendments to the Arizona Rules of Civil Procedure*

Dear Mr. Klain and Mr. Rosenbaum:

I applaud the Task Force's diligent and thoughtful efforts to implement Administrative Order 2014-116's charge "to identify possible changes to conform to modern usage, to clarify and simplify language, and to avoid unintended variation from language in counterpart federal rules." Wishing to make a small contribution to these efforts, I respectfully submit this brief comment on the proposed amendments to Rules 16(d) and 26.1(a) of the Arizona Rules of Civil Procedure ("ARCP").

Rather than adopt the expert report requirement contained in Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure ("FRCP"), the Task Force proposes to amend ARCP 16(d)(4) to allow the parties to agree to, or the court to order, an exchange of expert reports. The Task Force explained:

> The Task Force determined that given the differences in cases filed in federal court versus our state courts, a rule generally requiring such expert reports in all cases was unwise. In many cases, the added cost of requiring expert reports would not make sense. The Task Force, however, believes there are some cases where expert reports may be appropriate, and that the Rules should thus explicitly allow the parties to agree to, or the court to order, the exchange of such reports.

I appreciate the Task Force's compromise approach, but I believe it misses an opportunity to close the gap between ARCP 26.1(a)(6) disclosure requirements and the admissibility standards of Rule 702 of the Arizona Rules of Evidence.

For example, ARE 702(b) requires expert testimony to be "based on sufficient facts or data," yet ARCP 26.1(a)(6) does not even reference the disclosure of "data." *Cf.* ARCP 16(d)(4) ("the facts or data considered by the expert in forming the opinions") (as proposed by the Task Force). Similarly, ARCP 26.1(a)(6) requires a party to disclose "a summary of the grounds for

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3200 North Central Avenue, Suite 1560 | Phoenix, Arizona 85012 | www.thorpeshwer.com

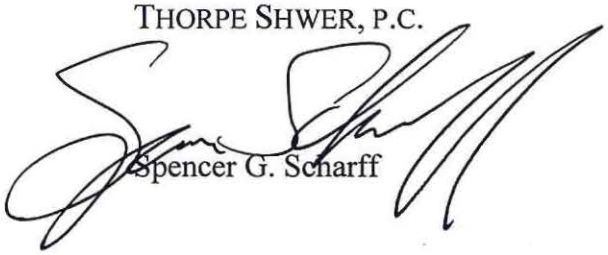
each opinion," but does not specifically require a party to describe the "principles and methods" employed to reach each opinion. *Cf.* ARE 702(c) ("the testimony is the product of reliable principles and methods"); (d) ("the expert has reliably applied the principles and methods to the facts of the case").

Simply restyling ARCP 26.1(a)(6)'s language to conform more closely to ARE 702 would facilitate more efficient and effective Rule 702 evaluations without significantly increasing the burden on the disclosing party. For example, expressly requiring a party to disclose a description of an expert's methodology should improve pre-deposition preparations and sharpen deposition questions, which in turn would provide greater clarity to a trial court tasked with evaluating the admissibility of the expert opinion. This is certainly in line with the Task Force's charge to promote "the resolution of cases without unnecessary cost, delay, or complexity." Administrative Order 2014-116. Therefore, I urge the Task Force to consider revising ARCP 26.1(a)(6) to promote more detailed and clearer expert disclosures.

I thank the Task Force for the remarkable work it has done, for the opportunity to submit this comment, and for its consideration of my remarks.

Sincerely,

THORPE SHWER, P.C.



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