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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 26(b)(4), ARIZONA RULES OF CIVIL PROCEDURE**	Supreme Court No. R-18- **PETITION**

Pursuant to Arizona Supreme Court Rule 28(A), William G. Klain, David B. Rosenbaum, Patricia Lee Refo, and the Hon. Peter B. Swann, each acting in their individual, private capacities and not on behalf of any firm, organization, or

other institution, petition the Court to amend Rule 26(b)(4), Ariz. R. Civ. P., to conform state practice with federal practice on the discoverability of draft expert reports and communications between parties' attorneys and experts. The text of the proposed amendments appears in the appendixes to this Petition (a clean version at Appendix A and a redlined version at Appendix B).

INTRODUCTION

Significantly departing from its federal counterpart, Rule 26(b)(4), Ariz. R. Civ. P., presently affords no explicit work product protections to draft expert reports or communications between experts and counsel. Three of the four petitioners are experienced litigators who practice in both the federal and Arizona courts, representing defendants and plaintiffs alike. The fourth petitioner practiced in both Arizona and federal courts before appointment to the bench. Given this background, petitioners have been able to evaluate through personal experience the contrasts between federal Rule 26(b)(4) and its Arizona analogue, which practice-based experience informs their belief in the advantages of the former and detractions of the latter.

A number of practical factors weigh in favor of Arizona's adoption of federal expert work product protections. First, maintaining this distinction runs contrary to recent efforts to harmonize the federal and Arizona civil rules absent advancement of some overriding policy objective served by procedural

divergence. Second, the proposed amendments preserve parties' abilities to examine and evaluate expert bias and the reliability of their methodologies and opinions. Third, as had become common under federal practice before amendment to federal Rule 26(b)(4) in 2010, informed Arizona litigators and experts have become skilled at avoiding creation of drafts or discoverable communications, often at great expense to the litigants.

For these reasons, petitioners request amendment of Rule 26(b)(4), Ariz. R. Civ. P., to adopt the federal rule that protects from discovery draft expert reports and some, but not all, communications between experts and counsel.

I. ADOPTION OF THE PROPOSED AMENDMENTS WILL ENHANCE UNIFORMITY BETWEEN ARIZONA AND FEDERAL CIVIL PROCEDURE.

Arizona's civil rulemaking has historically demonstrated and been guided by the principle that, to the extent possible and absent some countervailing policy interest, Arizona's civil rules should mirror their federal counterparts. Indeed, in its Administrative Order that formed the recently-concluded Task Force on the Arizona Rules of Civil Procedure, the Court directed the Task Force in part to identify changes to "avoid unintended variation from language in counterpart federal rules." Arizona Supreme Court, Administrative Order No. 2014-116. While the differences between the federal and Arizona versions of Rule 26(b)(4) could certainly be viewed as intended variation, they nevertheless create traps for

counsel and parties accustomed to practicing in federal courts who find themselves litigating in our Superior Court. In actions that can be brought in either state or federal court, the venue choice should not be affected by substantive differences in the work-product rule, nor should governing work product principles flip as a case is removed or remanded to or from federal court.

For those mindful of current distinctions, the divergence between Arizona and federal Rule 26(b)(4) procedure requires adoption of very different approaches to expert-counsel communications and expert report preparation. Adoption of the proposed amendments would largely harmonize Arizona and federal civil procedure with respect to this subject and eliminate the present trap for the unwary.

II. EXTENDING WORK PRODUCT PRIVILEGE AS PROPOSED WILL STILL ALLOW FOR FULSOME EXAMINATIONS OF EXPERTS AND THEIR OPINIONS.

Patterned as they are after federal Rule 26(b)(4), the proposed amendments do permit inquiry into certain types of communications between experts and counsel, namely those that (1) relate to an expert's compensation, (2) identify facts or data supplied to the expert by counsel and that the expert considered, and (3) identify assumptions supplied to the expert by counsel and that the expert considered. Discovery into communications falling within these categories, together with the opportunity for meaningful questioning of experts as to their

qualifications and applied methodologies, ensures that the opposing party can fully explore the extent to which counsel has influenced an expert's opinion by focusing upon the data, facts, and assumptions furnished.

Petitioners submit that, at its core, examination and evaluation of expert opinions should focus on the opinions themselves and their reliability under Rule 702, not on the un-adopted, preliminary thoughts that might be found in non-final drafts. Meaningful, focused examination and evaluation remain permissible under the proposed amendments. As observed in the Advisory Committee Note to the 2010 federal Rule 26(b)(4) amendments:

> [Federal] Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert, or the development, foundation, or basis of those opinions. . . . . 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.

Advisory Committee Note to 2010 amendment to Fed. R. Civ. P. 26(b)(4).

The goal of expert discovery should be to afford parties the opportunity to evaluate the strengths and identify the weaknesses of any given expert's opinions, no more and no less. To the extent opinions are properly exposed as resulting from bias attributable to expert compensation, the product of flawed or unaccepted methodologies, or counsel's attempts to shape the opinions by furnishing selective or unwarranted facts, data, or assumptions, the proposed

amended Rule provides ample means to discover and demonstrate the same. What would no longer be permitted is discovery about drafts – which do not represent experts' final offered opinions in any event – and communications not falling within the above-identified categories and unlikely to bear upon the soundness of experts' final opinions, assumptions, and methodologies.

For these reasons, several of the petitioners have taken to stipulating with opposing counsel in matters pending in the Superior Court to restrict expert discovery consistent with recognition of federal Rule 26(b)(4)'s work product protections, a practice that was apparently prevalent under the pre-2010 federal Rule. *See* May 8, 2009 Report of the Civil Rules Advisory Committee at 3 (available at http://www.uscourts.gov/sites/default/files/fr_import/CV05-2009.pdf) ("Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.") Petitioners respectively suggest that when experienced attorneys regularly agree to stipulate to the applicability of procedures from other jurisdictions in Arizona's courts, reconsideration of the desirability of the Arizona procedure is warranted.

III. ARIZONA COUNSEL ARE ADEPT AT AVOIDING THE CREATION OF DISCOVERABLE EXPERT DRAFT REPORTS AND MEMORIALIZING COMMUNICATIONS WITH EXPERTS.

As noted by the federal Civil Rules Advisory Committee in its May 8, 2009 report addressing, in part, the then-proposed amendments to federal Rule 26(b)(4),

the reasons for extending work product protection to draft expert reports and some attorney-expert communications were "profoundly practical." May 8, 2009 Report of the Civil Rules Advisory Committee at 3. The Committee explained:

> It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert's opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted making the attempt in expert depositions, reducing the time available for more useful discovery inquires.

Id.

Indeed, consistent with the manner in which federal practice had developed prior to amendment of the federal Rule in 2010, Arizona attorneys routinely employ a number of techniques that minimize the creation of discoverable draft expert reports and expert-counsel communications. These techniques include engaging separate consulting experts whose communications with counsel and reports are not discoverable, the use of technologies which allow counsel and experts to collaborate on preparation of reports in real-time without leaving any discoverable evidence of the communications, the practice of experts "saving over" continually evolving reports such that no drafts are ever printed or maintained in the experts' files, and conducting expert communications via video

conference, telephonically, or in-person to minimize the memorialization of the substance of such communications.

In the shared experience of three of the four petitioners, the result of wide-spread use of these techniques is two-fold. First, it is the exceedingly rare case in which draft expert reports or meaningful evidence of communications between counsel and an expert are discovered, rendering time and resources expended pursing them wasted. Second, use of these practices increases costs both in accessing the referenced technologies and, in some cases, engaging consulting experts to assist counsel in understanding the substance of the subject of expert testimony and analyzing it relative to the case in question in a manner that does not leave a discoverable trail. Regrettably, parties of limited financial means are often at a disadvantage relative to well-financed litigants because they may be unable to afford these techniques, a dynamic likewise observed by the federal Civil Rules Advisory Committee. *See* May 8, 2009 Report of the Civil Rules Advisory Committee at 3 ("A party who cannot afford this expense may be put at a disadvantage").

CONCLUSION

The changes proposed by this Petition will promote uniformity between the Arizona and federal civil rules, preserve the ability of parties to fully examine and assess the reliability of experts and their opinions, and eliminate the need for

costly techniques currently used by counsel in communicating with experts and the development of expert reports. Petitioners therefore respectfully ask the Court to adopt the proposed amendments to Rule 26(b)(4), Ariz. R. Civ. P., set forth in the attached appendixes.

RESPECTFULLY SUBMITTED this 9th day of January, 2018.

/s/ William G. Klain
William G. Klain

/s/ Patricia Lee Refo
Patricia Lee Refo

/s/ David B. Rosenbaum
David B. Rosenbaum

/s/ Hon. Peter B. Swann
Hon. Peter B. Swann

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 9th day of January, 2018.

By: */s/ William G. Klain*