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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-18-0007

COMMENT OF THE STATE BAR OF ARIZONA

Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its Comment to the above-captioned Petition. The State Bar supports Petition, which proposes amending Arizona Rule of Civil Procedure 26(b)(4) to adopt the language used in its federal counterpart by eliminating discovery of most attorney-expert communications and draft expert reports. Arizona needs to change its treatment of expert drafts and communications to bypass minimally relevant discovery and wasteful disputes by adopting changes to Rule 26(b)(4) that have proven successful in the federal court system at redirecting litigants to the speedy and just resolution of substantive disputes—the whole purpose of the civil justice system. Petition R-18-0007 puts expert drafts and attorney-expert communications squarely at issue.

The State Bar appreciates that the proposed rule changes were included in the Committee on Civil Justice Reform's ("CCJR") proposed rules changes just last year. However, the large number of other proposals included with the CCJR's petition prevented detailed explanation of the changes to Rule 26(b)(4). Indeed, among the various petitions, comments, and replies submitted last year, only two paragraphs discussed Rule 26(b)(4) in any detail. Helpfully, the one commenter which explicitly opposed changing Rule 26(b)(4) last year now supports the Petition subject to a minor addition for clarification, which the State Bar also supports. With no apparent opposition remaining among the stakeholders, and with significant efficiencies to be gained in litigation, and the opportunity to align Arizona with a successful federal practice that continues to spread, the State Bar respectfully suggests that this Court give this issue another, close look, and adopt the proposed rule change with the proposed clarification.

I. BACKGROUND OF FEDERAL RULE 26(b)(4).

In considering this Petition, it is helpful to review the history of the federal rules changes that resulted in the current language of Federal Rule of Civil Procedure 26(b)(4). Before 1993, no rule expressly controlled the treatment of communications between and expert and attorney. At that time, Rule 26 only required expert reports to disclose "data or facts relied on by the expert in

formulating his or her opinion." A majority of courts, relying on language from *Hickman v. Taylor*, 329 U.S. 495 (1947), afforded work product protection to most attorney-expert communications, at least until the expert provided formal testimony. Other courts held that attorney-expert communications were discoverable. *See Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 34-35, 932 P.2d 297, 299-300 (App. 1997) (discussing conflicting interpretations under the pre-1993 federal rule).

In the 1993 amendments to the federal rules, new language made the "information considered" by experts discoverable, and most courts found this new language included experts' communications with attorneys. *See In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001). The 1993 amendments also imposed a requirement for independently retained experts to draft expert reports, and the drafts of such reports were also discoverable. Those changes prompted many attorneys to engage in complex acrobatics in an effort to allow frank exchange between attorneys and their experts while shielding communications and drafts from discovery. Attorneys nationwide recognized the practical failures and limitations of the rule and panned the all-too-frequent fighting over ancillary discovery disputes that diverted attention from the substance of experts' opinions.

In 2006, the Federal Practice Task Force of the ABA's Section of Litigation compared the federal rules' treatment of expert communications and drafts to procedures used in various state courts. It ultimately concluded that the harms imposed by making all expert communications and drafts discoverable outweighed any corresponding benefits and recommended amending federal and state rules to make attorney-expert communications and experts' draft reports nondiscoverable. *See* Am. Bar Assoc. Section of Litigation, *Expert Alert* 1, 4-5 (Winter 2007). Several states, but not Arizona, adopted the proposed changes.

In 2009, consistent with the ABA's recommendations, the Judicial Conference of the U.S. Courts' Committee on Rules of Practice and Procedure ("Federal Rules Committee") proposed modifying the rules governing expert discovery to their present form. The Federal Rules Committee's proposal—widely supported by the ABA, the Department of Justice, and specialty groups representing the plaintiffs' bar, the defense bar, and federal judges, among others—was intended to fix the practical problems experienced since the 1993 amendments took effect. *See* Summary Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2009), at 10-11.[1] Its proposal came on the heels

[1] http://www.uscourts.gov/sites/default/files/fr_import/Combined_ST_Report_Sept_2009.pdf.

of three days of substantive testimony from attorneys, hundreds of written comments from various interested groups, and the practical experiences of states that had already implemented the ABA's recommendations.

The Federal Rules Committee noted the "artificial and wasteful discovery-avoidance practices" attorneys resorted to under the 1993 rules, such as hiring a consulting expert to pair with each testifying expert and handling all communications through the consulting expert or directing experts to refrain from taking notes or preparing drafts of the expert report. *Id.* at 11. Those discovery-avoidance practices "add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work." *Id.* Either in spite, or as a result, of the efforts to shield attorney-expert communications and experts' drafts, many attorneys testified about their costly and usually fruitless pursuit of evidence, often unrelated to the expert's substantive opinions, that an attorney had influenced the final expert reports. Fear of such discovery impaired frank communication between expert and attorney and

caused some potential experts to forego providing expert opinions at all. *Id.* at 11-12; *see also* Report of the Civil Rules Advisory Committee (May 8, 2009), at 3-5.[2]

Opposition to the 2009 federal rules changes came primarily from academics who worried that shielding attorneys' communications and expert drafts would prevent parties from exposing experts who were unduly influenced by the retaining attorney. The Federal Rules Committee found this concern unsubstantiated in practice and concluded that "the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues." Federal Rules Committee Summary Report at 13.

The U.S. Supreme Court ultimately adopted the Federal Rules Committee's proposal in the form of current Federal Rule of Civil Procedure 26(b)(4), which went into effect December 1, 2010. Arizona attorneys now have the benefit of over seven years' experience working within the confines of the new federal rule and the side-by-side comparison of the federal rule to Arizona's current version of Rule 26(b)(4).

[2] http://www.uscourts.gov/sites/default/files/fr_import/CV05-2009.pdf.

II. BACKGROUND OF RULE 26(b)(4) IN ARIZONA.

Arizona courts have long treated communications between attorneys and testifying experts as discoverable and not subject to work product protection. *See Emergency Care Dynamics*, 188 Ariz. at 35-36, 932 at 300-01. The historical purpose of this position has been to "support[] free-ranging, skeptical cross-examination of expert witnesses and open discovery to probe the groundwork for their opinions." *Id.* at 36, 932 at 301. The *Emergency Care Dynamics* Court did not address the countervailing considerations at play except to state that trial lawyers who needed to consult with an expert to prepare themselves for trial could hire a consulting expert in addition to the testifying expert. *Id.* While hiring two experts instead of just one would be costly, the *Emergency Care Dynamics* Court reasoned, they could mitigate those costs by not exposing their testifying experts to attorney work product and risking more expensive discovery battles over expert witness files. *Id.* This rationale sounds hollow in real-life practice. Having two sets of experts is not a practical solution for protecting work product while adequately preparing counsel for trial. And retaining a consulting expert rarely prevents expensive disputes over testifying experts' files. The *Emergency Care Dynamics* theories supporting the current rule do not work in practice.

Because Arizona only adopted a requirement for formal expert reports effective July 1, 2018, there is no Arizona case law discussing the discoverability of draft expert reports. Adopting the Petition now will prevent future disputes over experts' drafts at inception.

III. PRIOR ATTEMPTS TO AMEND ARIZONA RULE 26(b)(4).

The Supreme Court has considered similar petitions to amend Rule 26(b)(4) on at least two previous occasions. The first time was in 2011, shortly after the federal rule went into effect. A private attorney submitted Petition R-11-0017, which was substantially similar to the Petition at issue now. The only two formal comments filed in response to the 2011 petition came from the State Bar, which opposed federalizing Rule 26(b)(4), and one other private attorney, who favored the proposed amendment. Even though the State Bar opposed the petition, it noted the State Bar's Civil Practice and Procedure Committee recommended by a narrow majority rejecting the petition. In recognition of the worthy arguments on both sides, the State Bar's comment outlined six arguments against the change and four arguments for it.

Most of the State Bar's opposing arguments at that time matched arguments considered and rejected by the Federal Rules Committee, or else they emphasized the unique nature of Arizona's broad disclosure rules. *See* State Bar of Arizona

Comment to Petition R-11-0017 at 2-5 (including, among others, Arizona's broader presumption of disclosure, limitations on discovery needed to cross-examine experts, increasing litigation disputes over what constitutes "facts or data," and encouraging attorneys to influence expert's opinions). Tellingly, though, one of the State Bar's opposing arguments acknowledged and essentially condoned expert discovery-avoidance strategies: "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 created any paper records of the intervening drafts." *Id.* at 4. In short, the State Bar partly justified its opposition because technology made it easier for attorneys to skirt the same rules it wanted left in place. Another opposing argument downplayed the costs associated with hiring a second set of experts for consulting purposes, stating it was an "invalid reason" because hiring consulting experts was just another discovery-avoidance tactic. *Id.* at 5.

On the supporting argument side of the State Bar's comment, it listed four reasons to change the rule, including the limited probative value of the discovery that the modified rule would prohibit, the "time-consuming and expensive distraction" of discovery into attorney-expert communications, the additional

grounds available under revised Arizona Rule of Evidence 702 to challenge the substance of expert opinions, and the need for attorneys and experts to have free and frank discussions with each other. *Id.* at 5-7. While the Arizona Supreme Court ultimately agreed with the State Bar and rejected the change, no one at that time could refer to more than seven years of positive, nationwide experience under the federal rule that now informs the present Petition.

Most recently, in last year's comprehensive proposal by the CCJR, an amendment of Rule 26(b)(4) was just one of a host of other proposed changes. With a 20-page petition limit, the CCJR devoted the majority of its petition limits to discussing the new case tiering system, and other important discovery reforms concerning motions to compel and ESI. The Rule 26(b)(4) change, harmonizing with the federal rules and supported by the State Bar and the vast majority of commenters, received little explanation from the CCJR or the State Bar. Even in the CCJR's reply comment, most of its arguments focused on other issues, with only one paragraph devoted to Rule 26(b)(4) (discussed below). This necessarily gave short shrift to the proposed change to Rule 26(b)(4), which in fairness should not have been space-limited by the fact that it was combined with the important but separate and distinct case management reforms this Court enacted. For these understandable reasons that were the fault of no stakeholder or institutional actor,

this proposed change did not receive the degree of scrutiny the State Bar believes it deserves,

Thus, despite the Arizona Supreme Court's rejection of the same rule change last year, the State Bar believes the proposed amendment merits reconsideration through Petition R-18-0007. Underscoring the reasonability of revisiting this issue, this Court has not refrained from approving other rules changes that recently had been rejected in other petitions, such as the rule governing whether parties to a forcible entry and detainer action are entitled to a change of judge as a matter of right. Over a five-year period, the Supreme Court considered and rejected this change twice before adopting it on an experimental basis and finally adopting it on a permanent basis. *See* Rules Petitions R-13-0047, R-15-0015, R-16-0022.

Reconsideration makes sense at this time because the State Bar fully supports this Petition now, and has finally had the opportunity to weigh in in detail, which was not true last year during the CCJR project. The posture now is entirely unlike that in 2011, when Rule 26(b)(4) was novel and split the State Bar. It no longer does. It is noncontroversial and well-received over seven plus years. Notably, the Petition would advance the same goals from the last two major rounds of rules changes – improving access to justice and reducing unnecessary expense

in civil litigation, and conforming Arizona's rules to match the federal rules unless there is a substantial reason justifying a deviation.

IV. THE PROPOSED RESTRICTIONS ON CERTAIN EXPERT DISCOVERY REDUCE LITIGANTS' EXPENSES WITHOUT SUBSTANTIALLY IMPAIRING THEIR ABILITY TO CHALLENGE AND TEST EXPERT OPINIONS.

Under the proposed changes, experts are still subjected to the crucible of cross-examination. The Petition itself astutely notes attorney-expert communications and draft reports are not necessary for a party to fully and fairly cross-examine an opposing party's expert. In exchange for avoiding such minimally relevant discovery, all parties stand to save substantial fees and expenses for experts' and attorneys' time that otherwise might be spent avoiding the creation of a document trail or fighting over discovery into communications and draft reports. Nevertheless, the main countervailing argument against the proposed change remains a concern that limiting discovery will impair parties' ability to cross-examine opposing experts.

Opponents of the proposed rule change sometimes forget that an expert qualified under the rules of civil procedure need not have any expertise in law or the rules that apply to experts. A forensic engineer, for example, has expertise in forensic engineering and supporting disciplines, but an engineer should not be

required to receive legal training before offering expert testimony or drafting an expert report. Ideally, one would hope any additional training time would be devoted to expanding knowledge within the expert's own field of expertise rather than in learning how to tiptoe through legal requisites and landmines. Eliminating the confidential nature of communications and drafts serves as an added barrier to experts offering their opinions in legal settings. The results harm the pursuit of truth in several ways. Potential new experts may be scared off by the complex requirements for expert testimony, and attorneys will be less likely to provide necessary guidance to those experts on how to comply with their report writing and disclosure obligations. This in turn leads to the concentrated use of a smaller number of experts, with focus being on whether a particular expert has previous experience and understanding of the legal process to help reduce attorney-expert communications and not on whether the expert has the best qualifications or uses the strongest evidence and analysis to support the expert's opinions.

Other critiques of changing Rule 26(b)(4) fail. While some might argue that the amendment would limit cross-examination, and turn experts into mere mouthpieces, those two positions work against each other. The requirement for expert reports in the most complex cases helps contain expert testimony to the bounds contemplated by the expert report and effectively increases the amount of

relevant information disclosed in advance of trial. By way of example, all medical malpractice cases presumptively fall into Tier 3, so this requirement encourages earlier, complete disclosure. Expert reports can be costly to prepare, but the costs are offset by reducing the need for expert depositions to probe the extent and bases of every possible opinion an expert may have. Reports eliminate many surprises. The proposed amendment to Rule 26(b)(4) helps mitigate those increased expenses without sacrificing meaningful discovery.

The State Bar recognizes that the proposed rule change does create a limitation on the truth-finding function of the civil justice system by preventing some discovery into attorney-expert communications and draft reports, while correlatively, it saves litigants time and money. This is precisely the trade-off made by the 2018 amendments this Court made to the Arizona Rules of Civil Procedure, which aim to make litigation more vital and accessible by reasonably limiting its scope (largely by managing discovery limits, and also deadlines). The theory of those changes is the same as that of the instant petition – that justice unlimited in amount is so burdensome as to be inaccessible to most, thus reducing the amount of justice truly available for normal litigants. Put another way, limitations on discovery promote access to justice more than they limit the achievement of substantive justice.

That analysis bears on when one considers the operation of this particular rule. The State Bar believes that the information protected from discovery under the proposed change is of minimal evidentiary value to opposing parties and that discovery into this information poses an offsetting burden on the civil justice system's other goals. As stated in Arizona Rule of Civil Procedure 1, the overarching purpose of the civil rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Having access to every minute bit of information concerning an expert might, in some cases, expand knowledge and result in a more "just" outcome, but it comes at the price of slowing down litigation and driving up the expenses involved.

Adopting the proposed change to Rule 26(b)(4) honors proportionality. The rising costs of using experts should color the balance this Court strikes. In 2002, the Federal Judicial Center listed the "[e]xcessive expense of party-hired experts" as the second most frequently reported expert problem from a survey of judges and attorneys. Carol Krafka, et al., Fed. Judicial Ctr., *Judge & Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials* 21 (2002). Third-party expert witness placement companies such as Saponaro, Inc. and SEAK, Inc. report that non-medical experts' hourly fees average more than $350 per hour (more if testifying in a deposition or at trial), and medical experts'

hourly fees typically run between $550-780 per hour. According to SEAK, Inc., experts nationwide are increasing their fees at rates exceeding inflation. Bearing in mind steep expert fees and expenses, along with the collateral fees incurred for attorney time devoted to expert discovery, the current rule keeps expert costs at the forefront of parties' concerns, prices some litigants out of retaining experts, and begs the question, "How much justice can you afford?" With trials diminishing in number and discovery costs spiraling ever upward, the State Bar respectfully requests that this Court revisit the desirability of this particular change.

To stay relevant to users of the system, the practice of law needs to continue streamlining where it is possible and fair. This is one such area.

V. MICA NO LONGER OPPOSES THIS RULE CHANGE.

According to the comment MICA filed on March 21, 2018, MICA worked with the Petitioners to resolve each side's concerns, and MICA and the Petitioners reached an agreement to support a modified version of the originally proposed Rule 26(b)(4) language. The agreed language adds a sentence clarifying that, where an attorney has provided facts or data to an expert, the opposing party is entitled to discover the dates when the attorney provided the facts or data. The State Bar believes that the originally proposed language impliedly permits discovery into the dates when an attorney provides facts or data to an expert. MICA's proposed

change transforms this implicit understanding into an explicit rule but results in no substantive change to the scope of permissible discovery. The resulting deviation from the counterpart federal rule is cosmetic only. The benefit of obtaining unanimous support for the change outweighs the countervailing value of complete facial uniformity with the federal rule. Accordingly, the State Bar recommends adopting the proposed rule change with MICA's added language, and suggests that with MICA in agreement, there is a real consensus around this Petition which further justifies this Court's reconsideration of it.

VI. THE PROPOSED AMENDMENT PROVIDES AN ASSORTMENT OF MEANINGFUL BENEFITS AND GENERALLY FURTHERS THE INTERESTS OF JUSTICE.

The benefits gained from adopting the Petitioners' proposed amendment are numerous:

- Reducing expenses and redirecting limited resources to focus on the primary merits of a claim rather than on marginal issues;
- Affirming the commitment to proportionality in expert discovery;
- Eliminating discovery disputes over attorney-expert communications and draft reports;
- Allowing free and frank discussions between attorney and expert that allow for information flow in both directions;

- Eliminating the need to hire a second expert for the attorney's consultation purposes and all associated expenses;
- Permitting the expert to obtain the attorney's assistance with understanding applicable legal concepts and the overall legal process as it applies to the expert;
- Ensuring that experts need not defend their drafting processes or preliminary thoughts and opinions if the final report differs from earlier versions;
- Reducing unnecessary entry barriers for potential new expert witnesses who are otherwise qualified but unfamiliar with legal processes, which effectively incentivize the use of so-called "professional" expert witnesses;
- Eliminating discovery-avoidance practices related to expert communications and drafts that violate the spirit and possibly the letter of existing rules; and
- Making the treatment of expert discovery more uniform with federal practice, thereby preventing attorneys from inadvertently waiving work product protection if they forget which rules apply.

The State Bar believes these benefits justify another close look at this issue.

VII. THIS COURT SHOULD GIVE WEIGHT TO THE NATIONAL TREND TOWARD ADOPTING THE CHANGE THE PETITION PROPOSES.

This Court sometimes looks to national trends in fashioning rules of law. There is a notable one here. Many states have adopted parallel amendments to their own civil rules to shield attorney-expert communications and draft reports from discovery. *See* Colo. R. Civ. P. 26(b)(4)(D); Del. R. Civ. P. Super. Ct. 26(b)(5)-(6); Idaho R. Civ. P. 26(b)(4)(B)-(C); Iowa Code Ann. § 1.508(1)(d)-(e); Kan. Stat. Ann. § 60-226(b)(5)(B)-(C); La. Code Civ. Proc. art. 1425(E)(1); Me. R. Civ. P. 26(b)(4)(C); N.J. Ct. R. 4:10-2(d)(1); N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(d)-(e); Ohio R. Civ. P. 26(b)(5)(c)-(d); Okla. Stat. Ann. tit. 12, § 3226(B)(4)(b) (communications only); 231 Pa. Cons. Stat. § 4003.5(a)(4); S.D. Codified Laws § 15-6-26(b)(4)(B)-(C); Utah R. Civ. P. 26(b)(7); Vt. R. Civ. P. 26(b)(5)(B)-(C); Wy. R. Civ. P. 26(b)(4)(B)-(C).

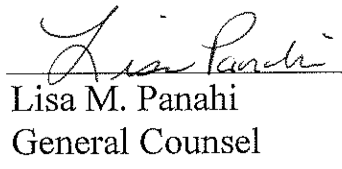
Meanwhile, the State Bar is unaware of any court system reversing course to reopen attorney-expert communications and drafts to discovery. This one-way trend in other jurisdictions reinforces the conclusion that the proposed amendment will improve Arizona's civil procedure rules. Arizona has innovated with the Zlaket Rules, mandatory arbitration, and now with tiering. There is no reason here

that Arizona should fall behind the leading edge of reform, as our state's legal culture strives to reduce burdens and to keep civil litigation relevant.

CONCLUSION

For the above reasons, the State Bar respectfully urges this Court to adopt the changes proposed in Petition R-18-0007, with the addition of the language proposed in MICA's comment.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.



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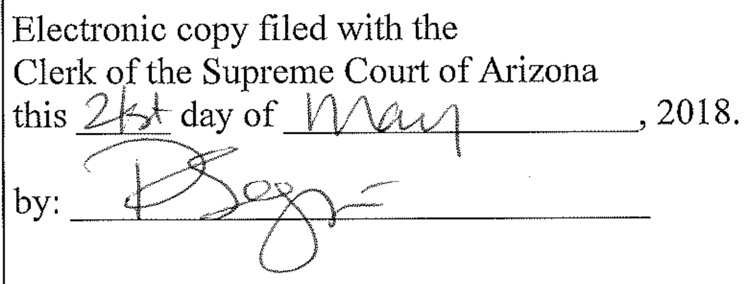
this 21st day of May, 2018.



by: ______________________