

1 Joseph A. Kanefield (015838)
kanefieldj@ballardspahr.com
2 BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
3 Phoenix, AZ 85004-2555
Telephone: 602.798.5400
4 Facsimile: 602.798.5595
Attorney for Mutual Insurance Company of
5 *Arizona*

6
7 IN THE SUPREME COURT

8 STATE OF ARIZONA

9 In the Matter of:

NO. R-18-0007

10 PETITION TO AMEND RULE 26(b)(4),
ARIZONA RULES OF CIVIL
11 PROCEDURE,

**COMMENT REGARDING PETITION
TO AMEND RULE 26(b)(4),
ARIZONA RULES OF CIVIL
PROCEDURE**

12
13 Undersigned counsel, on behalf of Mutual Insurance Company of Arizona
14 (“MICA”), files this comment in support of Petition No. R-18-0007 to Amend Rule
15 26(b)(4) (the “Petition”), with the attached, proposed amendment.

16 MICA is a physician-owned and directed medical professional liability company
17 insuring the majority of physicians in private practice in the State of Arizona. Medical
18 malpractice claims make up less than 1% of all civil actions filed in Arizona, and yet they
19 are some of the more complex claims flowing through Arizona’s court system, frequently
20 including multiple defendants, requiring specialized knowledge, involving high alleged
21 damages, and implicating professional licensure. Thus, the Rules of Civil Procedure
22 should acknowledge the unique realities and complexities of medical malpractice claims.
23 The Petition along with the attached amendment will help ensure medical malpractice
24 cases protect the rights of all parties.

25 MICA previously opposed Petition No. R-17-0010, which like the Petition here,
26 sought to conform Rule 26(b)(4) with federal Rule 26, to protect from discovery draft
27 expert reports and communications between experts and the lawyers who retain them.
28 The Court rejected this proposed change in its August 31, 2017 order. The Petition

1 essentially asks the Court to reconsider its decision rejecting the proposed change
2 involving draft expert reports in Petition No. R-17-0010. The Petitioners, however,
3 provide more analysis, argument and explanation supporting the proposed change than
4 was offered in Petition No. R-17-0010.

5 After the Petition was filed, MICA reached out to Petitioners through its counsel
6 to discuss its prior objection to Petition No. R-17-0010, and its similar concerns
7 regarding the Petition. MICA expressed how critically important it is for medical
8 practice defendants to know the dates upon which plaintiffs' experts receive facts or data
9 from plaintiffs' counsel that the expert considered in forming the expert's opinion, and
10 any portions of communications between the party's attorney and the expert which
11 evidence those dates. An effective medical malpractice defense often hinges on the
12 evolution of the plaintiffs' experts opinions, which can change depending on what
13 information the expert considers and when the consideration takes place. Although this
14 information can be requested during expert depositions, these witnesses rarely recall with
15 specificity the dates upon which they were provided facts and data by counsel. To date,
16 the only effective way to ascertain that information has been to require production of the
17 draft reports through discovery along with the correspondence between the expert and
18 counsel.

19 The Petitioners understood the concern and worked closely with MICA's counsel
20 to address the issue with specific language in Rule 26(b)(4), which would make clear that
21 the dates upon which an expert receives facts and data from counsel are discoverable.
22 This would not require the draft report to be produced, however. The attached
23 amendment is the result of this dialogue with Petitioners, who we understand will file a
24 separate comment indicating their support for the following language as an addition to
25 Petitioners' proposed amendment to Rule 26(b)(4)(C):

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

1 Note that, as shown on attached Appendix A, this additional language would be
2 added after the text of proposed Rule 26(b)(4)(C)(i)-(iii) as opposed to creating a new
3 stand-alone subsection. This was done to assure that the changes proposed in the Petition
4 mirror the federal rule for ease of reference and comparison. Although very few medical
5 malpractice cases are filed in federal court, MICA understands that parity between the
6 state and federal rules is one of the primary reasons Petitioners are proposing these
7 changes to Rule 26(b)(4), and therefore had no objection to inserting the language into
8 Rule 26(b)(4)(C) in the manner suggested by Petitioners.

9 **CONCLUSION**

10 For the aforementioned reasons, MICA supports Petition No. R-18-0007 to
11 Amend Rule 26(b)(4), with the addition of the attached, proposed amendment.

12 RESPECTFULLY SUBMITTED this 21st day of March, 2018.

13 BALLARD SPAHR LLP

14
15 By: /s/ Joseph A. Kanefield
16 Joseph A. Kanefield
17 1 East Washington Street, Suite 2300
18 Phoenix, AZ 85004-2555
19 *Attorneys for Mutual Insurance Company*
20 *of Arizona*
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1 **CERTIFICATE OF SERVICE**

2 I certify that on the 21st day of March, 2018, I electronically transmitted a PDF
3 version of this document to the Clerk of the Arizona Supreme Court.

4 Further, I caused a copy of this document to be sent via U. S. First Class Mail to
5 the following recipient(s):

6 William G. Klain
7 LANG & KLAIN, PC
8 8767 E. Via de Commercio, Suite 102
9 Scottsdale, AZ 85018
10 wklain@lang-klain.com

11 Patricia Lee Refo
12 SNELL & WILMER, LLP
13 400 E. Van Buren St., #1900
14 Phoenix, AZ 85004-2202
15 prefo@swlaw.com

16 David B. Rosenbaum
17 OSBORN MALEDON
18 2929 North Central Ave, 21st Floor
19 Phoenix, AZ 85012-2793
20 drosenbaum@omlaw.com

21 Hon. Peter B. Swann
22 Arizona Court of Appeals, Division One
23 1501 W. Washington St.
24 Phoenix, AZ 85007
25 pswann@appeals.az.gov

26 By: /s/ Lisa Black

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone 602.798.5400

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone 602.798.5400

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Appendix A

1 **Rule 26. General Provisions Governing Discovery**

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3 **(b) Discovery Scope and Limits.**

4 * * * *

4 (4) *Expert Discovery.*

5 (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).

6 (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.

7 (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:

- 8 (i) relate to compensation for the expert's study or testimony;
- 9 (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- 10 (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

11 The dates upon 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 which evidence those dates, are discoverable.

12 (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:

- 13 (i) as provided in Rule 35(d); or
- 14 (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.

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

- 16 (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
- 17 (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

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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.