

1 William G. Klain, Bar No. 15851
2 LANG & KLAIN, PC
3 8767 E. Via de Commercio, Suite 102
4 Scottsdale, AZ 85018
5 (480) 947-1911
6 wklain@lang-klain.com

7 Patricia Lee Refo, Bar No. 17032
8 SNELL & WILMER, LLP
9 400 E. Van Buren St., #1900
10 Phoenix, AZ 85004-2202
11 (602) 382-6290
12 prefo@swlaw.com

13 David B. Rosenbaum, Bar No. 9819
14 OSBORN MALEDON
15 2929 North Central Ave, 21st Floor
16 Phoenix, AZ 85012-2793
17 (602) 640-9345
18 drosenbaum@omlaw.com

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

24 **IN THE SUPREME COURT**
25 **STATE OF ARIZONA**

26 In the Matter of:

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

Supreme Court No. R-18-0007

**REPLY IN SUPPORT OF
PETITION**

27 Pursuant to Arizona Supreme Court Rule 28(D)(2), William G. Klain,
28 Patricia Lee Refo, David B. Rosenbaum, and the Hon. Peter B. Swann
29 (collectively “Petitioners”), each acting in their individual, private capacities and
30 not on behalf of any firm, organization, or other institution, reply to the three

1 comments filed with respect to their Petition seeking amendment of Rule
2 26(b)(4), Ariz. R. Civ. P. The Mutual Insurance Company of Arizona (“MICA”)
3 and State Bar of Arizona (“SBA”) each filed comments supporting the
4 amendment sought by the Petition and the additional inclusion of language
5 proposed by MICA to clarify a single aspect of the proposed amendment. The
6 Committee on Superior Court (“COSC”) filed a comment opposing the Petition.
7 This Reply addresses those comments and urges the Court to amend Rule 26(b)(4)
8 as proposed by the Petition and supplemented by the MICA comment.
9
10
11

12 **I. The MICA and SBA Comments.**

13 On March 21, 2018, MICA filed a comment supporting the Petition and
14 proposing the additional inclusion in Rule 26(b)(4) of the following language to
15 more fully describe information which would remain discoverable under the Rule
16 notwithstanding the proposed amendment:
17

18 The dates upon which the expert received facts or data from the party’s
19 attorney that the expert considered in forming the opinions to be expressed,
20 and any portions of communications between the party’s attorney and the
21 expert which evidence those dates, are discoverable.

22 As correctly noted by MICA, upon the filing of the Petition, its representatives discussed
23 the proposed amendment with Petitioners and worked with Petitioners to develop the
24 above-quoted language in order to alleviate MICA’s concerns specific to medical
25 malpractice litigation. *See* MICA Comment at 2. Petitioners believe this language to be
26 consistent with the manner in which federal Rule 26(b)(4) has been interpreted.

1 Moreover, given the importance of the information which is the subject of this language
2 to medical malpractice litigation as articulated in MICA’s comment, Petitioners support
3 MICA’s proposed supplemental language notwithstanding that its inclusion will result in
4 variation between the verbiage of Arizona’s Rule 26(b)(4) and its federal counterpart.
5

6 The SBA filed its comment supporting the Petition on May 21, 2018. By that
7 comment, the SBA furnished analysis and argument demonstrating the desirability of the
8 proposed amendment beyond that set forth in the Petition. Petitioners agree with the
9 additional reasoning supplied by the SBA and submit that the SBA’s endorsement of the
10 Petition, after vetting through the SBA’s rules processes and bodies, reflects the
11 proposed amendments’ wide-spread support across the SBA’s diverse membership.
12

13 **II. The COSC Comment.**

14
15 The single comment filed in opposition to the Petition was submitted by the
16 COSC.¹ That comment, filed with respect to all civil rules petitions pending
17 before the Court, urges “the Supreme Court [to] refrain from amending civil rules
18 this year in order to allow the bench and bar time to assimilate the very substantial
19 changes that were made last year and the year before.” Petitioners generally agree
20 with this sentiment. To be sure, the civil rules amendments adopted by this Court
21 in response to the petitions filed by the Task Force on the Arizona Rules of Civil
22
23
24
25

26

¹ Petitioner William Klain is a member of COSC but did not participate in the vote which led to the filing of the COSC comment.

1 Procedure and Civil Justice Reform Committee have significantly altered
2 Arizona's civil rules and will drastically affect civil practice in many respects.

3
4 Petitioners respectfully submit, however, that the specific, narrow
5 amendment to Arizona's Rule 26(b)(4) they have proposed is not of a nature as
6 implicates the concern expressed by the COSC. First, attorneys who practice in
7 federal court presumably are already experienced with the expanded protections
8 afforded by federal Rule 26(b)(4) such that the proposed amendment would not
9 introduce unfamiliar subject matter to them. Second, adoption of the amendment
10 will simplify practice for attorneys who represent parties in both Arizona and
11 federal court by eliminating the divergent treatment of expert communications
12 between those courts. Third, delaying consideration of the amendment to
13 accommodate the need of the bench and bar to familiarize themselves with other
14 recent civil rules amendments would merely serve to perpetuate litigants'
15 exposure to the costs and risks identified in the Petition and SBA comment as
16 defining the current state of practice under Arizona's Rule 26(b)(4).

17
18
19
20
21 **CONCLUSION**

22 As noted in the Petition, the changes sought by the proposed amendment
23 will promote uniformity between the Arizona and federal civil rules, preserve the
24 ability of parties to fully examine and assess the reliability of experts and their
25
26

1 opinions, and eliminate the need for costly techniques currently used by counsel
2 in communicating with experts and the development of expert reports.

3
4 Amendment to Arizona’s Rule 26(b)(4) is supported by MICA and the
5 SBA, and no comments opposing the Petition were filed by any attorneys or legal
6 associations, suggesting widespread support among our state’s practitioners for
7 the proposed change. The sole comment opposing the Petition, that filed by the
8 COSC in response to every pending civil rule petition, expresses general concern
9 with respect to the pace of recent civil procedural reform not specific to the
10 proposed amendment.
11
12

13 Petitioners therefore respectfully ask the Court to adopt the proposed
14 amendments to Rule 26(b)(4), Ariz. R. Civ. P., set forth in the appendixes to the
15 Petition with the additional inclusion of the language proposed by MICA in its
16 comment.
17

18 RESPECTFULLY SUBMITTED this 7th day of June, 2018.
19
20

21 /s/ William G. Klain
22 William G. Klain

23
24 /s/ Patricia Lee Refo
25 Patricia Lee Refo
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

/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 7th day of June, 2018.

By: /s/ William G. Klain