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7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

10 Supreme Court No. R-19-

11 **PETITION TO AMEND RULE**  
12 **26(c), ARIZONA RULES OF CIVIL**  
13 **PROCEDURE**

14 **PETITION**

15 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar  
16 of Arizona (the “State Bar”) respectfully petitions this Court to adopt one clarifying  
17 amendment to the Arizona Rules of Civil Procedure as recently amended effective  
18 July 1, 2018. The amendment proposes to clarify Rule 26(c) of the Arizona Rules of  
19 Civil Procedure (entitled, “General Provisions Governing Discovery”) to add a new  
20 subsection (5) (entitled, “Sealing Orders”), providing that any request for, or order  
21 permitting, documents to be filed under seal is subject to the requirements of Rule  
22 5.4 of the Arizona Rules of Civil Procedure (entitled, “Sealing and Unsealing Court  
23 Records”).

24 The proposed amendment is attached to this Petition as **Appendix “A”** (clean  
25

1 version) and **Appendix “B”** (a blackline version). The discussion below explains  
2 the basis for the requested clarifying amendment.

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4 **PROPOSED CLARIFYING AMENDMENT TO RULE 26(c) OF THE**  
5 **ARIZONA RULES OF CIVIL PROCEDURE**

6 In 2017, this Court approved new Rule 5.4, which took effect on January 1,  
7 2018. Rule 5.4 provides both substantive standards and procedures governing the  
8 sealing and unsealing of documents in unsealed civil actions. It applies both to  
9 requests to seal individual documents in whole or in part, and to requests to seal  
10 categories of documents. *See* Ariz. R. Civ. P. 5.4(c)(3)(A) through (C). Before the  
11 adoption of Rule 5.4, there was no uniform statewide procedure governing the  
12 sealing or unsealing of documents in civil actions.

13  
14 Separately, Rule 26(c) addresses the issuance of protective orders by the court.  
15 In some circumstances, a protective order issued under Rule 26(c) may provide or  
16 require that certain documents or categories of documents must be filed under seal.  
17 In that limited circumstance, there is an obvious interplay between Rule 26(c) and  
18 Rule 5.4, which contains standards applicable to sealing orders. *See* Ariz. R. Civ. P.  
19 5.4(c)(3). Although Rule 5.4 applies on its face to any sealing or unsealing order  
20 issued in an unsealed civil action (with limited exceptions, including where sealing  
21 is authorized by statute), Rule 26(c) does not cross-reference Rule 5.4, creating an  
22 ambiguity and potential confusion.  
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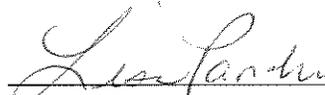
1 The proposed amendment clarifies this by adding a new subsection (5) to Rule  
2 26(c), which reads: “*Sealing Orders*. Any request under Rule 26(c) for an order to  
3 file a document under seal must clearly state the facts and law justifying filing the  
4 document under seal, including, if applicable, why the request satisfies the  
5 requirements of Rule 5.4(c)(2). Any sealing order issued under this rule is subject to  
6 the requirements of Rule 5.4(c)(3).”  
7

8 The State Bar believes that the proposed amendment will provide clarity and will  
9 forestall unnecessary confusion, by expressly requiring that any request under Rule  
10 26(c) that seeks permission to file documents under seal, and any order under Rule  
11 26(c) permitting documents to be filed under seal, must satisfy Rule 5.4’s standards  
12 where those are applicable.  
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### 15 CONCLUSION

16 For the foregoing reasons, the State Bar respectfully petitions this Court to  
17 adopt the clarifying amendment set forth in Appendix A.  
18

19 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of January, 2019.  
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22 Lisa M. Panahi  
23 General Counsel  
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1 Electronic copy filed with the  
2 Clerk of the Supreme Court of Arizona  
3 this 10<sup>th</sup> day of January, 2019.

4 by: 

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**Appendix A**  
**Clean Copy of Rules 26(c) with Proposed Changes**

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**(c) Protective Orders.**

- (1) **Generally.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or alternatively, on matters relating to a deposition, the court in the county where the deposition will be taken. A person receiving a request to preserve electronically stored information may move for a protective order in the court in the county where the action is pending, as provided in Rule 45.2(d)(2). Subject to Rule 26(c)(4), the court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (A) forbidding the discovery;
  - (B) specifying terms and conditions, including time and place, for the discovery;
  - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
  - (D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;
  - (E) designating the persons who may be present while the discovery is conducted;
  - (F) requiring that a deposition be sealed and opened only on court order;
  - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
  - (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
- (2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on terms that are just, order that any party or person provide or permit discovery.

**(3) *Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses on a motion for a protective order.

**(4) *Confidentiality Orders.***

**(A) *Burden of Proof.*** Before the court may enter an order that limits a party or person from disclosing information or materials produced in the action to a person who is not a party to the action and before the court may deny an intervenor's request for access to such discovery materials: (i) the party seeking confidentiality must show why a confidentiality order should be entered or continued; and (ii) the party or intervenor opposing confidentiality must show why a confidentiality order should be denied in whole or in part, modified, or vacated. The burden of showing good cause for an order remains with the party seeking confidentiality.

**(B) *Findings of Fact.*** When ruling on a motion for a confidentiality order, the court must make findings of fact concerning any relevant factors, including but not limited to: (i) any party's or person's need to maintain the confidentiality of such information or materials; (ii) any nonparty's or intervenor's need to obtain access to such information or materials; and (iii) any possible risk to the public health, safety, or financial welfare to which such information or materials may relate or reveal. No such findings of fact are needed if the parties have stipulated to such an order or if a motion to intervene and to obtain access to materials subject to a confidentiality order is unopposed. A party moving for entry of a confidentiality order must submit with its motion a proposed order containing proposed findings of fact.

**(C) *Least Restrictive Means.*** An order restricting release of information or materials to nonparties or intervenors must use the least restrictive means necessary to maintain any needed confidentiality.

**(5) *Sealing Orders.*** Any request under Rule 26(c) for an order to file a document under seal must state clearly the facts and law justifying filing the document under seal, including, if applicable, why the request satisfies the requirements of Rule 5.4(c)(2). Any sealing order issued under this rule is subject to the requirements of Rule 5.4(c)(3).

## Appendix B

### Blackline of Rule 26(c) with Proposed Changes (Additions Shown by Underscoring and Deletions Shown by ~~Strike-Through~~)

#### Rule 26. General Provisions Governing Discovery

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##### (c) Protective Orders.

- (1) **Generally.** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or alternatively, on matters relating to a deposition, the court in the county where the deposition will be taken. A person receiving a request to preserve electronically stored information may move for a protective order in the court in the county where the action is pending, as provided in Rule 45.2(d)(2). Subject to Rule 26(c)(4), the court may, for good cause, enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
- (A) forbidding the discovery;
  - (B) specifying terms and conditions, including time and place, for the discovery;
  - (C) prescribing a discovery method other than the one selected by the party seeking discovery;
  - (D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;
  - (E) designating the persons who may be present while the discovery is conducted;
  - (F) requiring that a deposition be sealed and opened only on court order;
  - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
  - (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) **Ordering Discovery.** If a motion for a protective order is wholly or partly denied, the court may, on terms that are just, order that any party or person provide or permit discovery.

(3) **Awarding Expenses.** Rule 37(a)(5) applies to the award of expenses on a motion for a protective order.

(4) **Confidentiality Orders.**

(A) **Burden of Proof.** Before the court may enter an order that limits a party or person from disclosing information or materials produced in the action to a person who is not a party to the action and before the court may deny an intervenor's request for access to such discovery materials: (i) the party seeking confidentiality must show why a confidentiality order should be entered or continued; and (ii) the party or intervenor opposing confidentiality must show why a confidentiality order should be denied in whole or in part, modified, or vacated. The burden of showing good cause for an order remains with the party seeking confidentiality.

(B) **Findings of Fact.** When ruling on a motion for a confidentiality order, the court must make findings of fact concerning any relevant factors, including but not limited to: (i) any party's or person's need to maintain the confidentiality of such information or materials; (ii) any nonparty's or intervenor's need to obtain access to such information or materials; and (iii) any possible risk to the public health, safety, or financial welfare to which such information or materials may relate or reveal. No such findings of fact are needed if the parties have stipulated to such an order or if a motion to intervene and to obtain access to materials subject to a confidentiality order is unopposed. A party moving for entry of a confidentiality order must submit with its motion a proposed order containing proposed findings of fact.

(C) **Least Restrictive Means.** An order restricting release of information or materials to nonparties or intervenors must use the least restrictive means necessary to maintain any needed confidentiality.

(5) **Sealing Orders.** Any request under Rule 26(c) for an order to file a document under seal must state clearly the facts and law justifying filing the document under seal, including, if applicable, why the request satisfies the requirements of Rule 5.4(c)(2). Any sealing order issued under this rule is subject to the requirements of Rule 5.4(c)(3).