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

10 PETITION TO ADOPT RULE 502
11 ARIZONA RULES OF EVIDENCE

Supreme Court No. R-_____

12 Pursuant to Rule 28, Rules of the Supreme Court of Arizona, Petitioner Patricia
13 Lee Refo respectfully petitions the Court to adopt the new Rule 502 of the Federal Rules
14 of Evidence (“FRE 502”), which will substantially reduce the cost of civil litigation in
15 Arizona by creating clear guidelines for waiving the privilege of attorney-client
16 communication or work product protection. The proposed Arizona Rule 502 is attached
17 to this Petition as Exhibit A, and the enacted FRE 502 is attached to this Petition as
18 Exhibit B.

19 **GROUND FOR APPROVAL OF PETITION**

20 **I. BACKGROUND: THE RECENT ADOPTION OF FEDERAL RULE OF**
21 **EVIDENCE 502**

22 In September of 2008, Congress enacted the new FRE 502 to provide a predictable,
23 uniform set of standards for determining the consequences of a disclosure of a
24 communication or information covered by the attorney-client privilege or work product
25 protection. The new federal rule has resolved disputes concerning inadvertent disclosures,
26 voluntary disclosures, and subject matter waiver and will significantly reduce the cost of
litigation in federal courts.

1 **A. Changes in the Scope of Discovery Warrant Evidentiary Guidelines for**
2 **Waiving Privilege**

3 The cost of discovery in civil litigation has increased dramatically in recent years
4 with the increased use of email correspondence and electronic record-keeping systems.
5 Because electronic information is more voluminous and dispersed than traditional record-
6 keeping methods, electronic discovery in complex civil litigation may encompass millions
7 of documents. With millions of documents to review and tight discovery deadlines, even
8 competent attorneys may inadvertently disclose a privileged document. In all civil cases,
9 litigants incur significant expenses performing detailed privilege review and retention.

10 Before the enactment of FRE 502, antiquated federal evidentiary case law allowed
11 the inadvertent or voluntary production of a single privileged document to result in a
12 broad “subject matter waiver” of all related materials to any future litigant or adversary.
13 *See, e.g., In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994). This risk caused litigants
14 to spend significant time and resources protecting privileged documents that were usually
15 only tangentially related to the subject of litigation.

16 Antiquated federal evidentiary case law also deterred litigants from voluntarily
17 making a limited disclosure of privileged material to reduce litigation costs and court
18 resources. Before FRE 502’s adoption, a number of federal courts held that, although a
19 non-waiver agreement for a limited disclosure of privileged material was binding on the
20 parties to the litigation, the agreement was not binding on third parties in other
21 proceedings. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d
22 1414, 1426-27 (3d Cir. 1991). The risk of a third party gaining access to the previously
23 disclosed privileged material caused litigants to vigorously protect all privileged
24 materials, even at the expense of expediting litigation and reducing costs.

25 FRE 502 resolves the privilege review problem by, among other things: (1)
26 substantially reducing the risk of waiver from inadvertently producing privileged or
attorney work product material in federal judicial proceedings and federal investigations;

1 (2) protecting voluntary agreements for a limited production of privileged or attorney
2 work product material in a federal judicial proceeding; and (3) substantially reducing the
3 cost of litigation by preventing broad “subject matter” waivers from disclosures in federal
4 judicial proceedings.

5 1. Inadvertent Disclosures

6 FRE 502 resolves conflicts in federal case law over whether an inadvertent
7 disclosure of a communication or information protected as privileged or work product
8 constitutes a waiver of the privilege in federal courts. FRE 502(b) provides that an
9 inadvertent disclosure of protected communications or information in connection with a
10 federal proceeding or to a federal office or agency does not constitute a waiver if the
11 holder took reasonable steps to prevent disclosure and also promptly took steps to rectify
12 the error. This provision protects litigants from the occasional inadvertent disclosure, but
13 still requires litigants to take reasonable steps to prevent and promptly correct any error in
14 producing privileged documents.

15 2. Voluntary Disclosures

16 Confidentiality orders protecting agreements for voluntary disclosure of privileged
17 or work-product material are becoming increasingly important in limiting the costs of
18 privilege review and retention. Before FRE 502 was enacted, the utility of such a
19 confidentiality order in reducing discovery costs was limited because it provided no
20 protection outside the particular litigation in which the order was entered. FRE 502(d)
21 solves this problem by allowing federal courts to order that a disclosure of privileged or
22 protected information in connection with a federal proceeding does not result in a waiver.
23 This allows the reviewing federal court to control whether a voluntary disclosure will
24 waive the privilege or work product protection in any subsequent proceeding.

25 3. Subject Matter Waiver

26 Before FRE 502 was enacted, the most significant risk for both inadvertent and

1 voluntary disclosures of privileged or work product material was the risk of a broad
2 “subject matter” waiver of related, but undisclosed, materials. FRE 502(a) has
3 significantly reduced this subject matter waiver risk in two ways. First, FRE 502(a) limits
4 subject matter waiver in this context to intentionally disclosed materials. This completely
5 eliminates the possibility of an inadvertent disclosure resulting in a broad subject matter
6 waiver of privileged or work product material.

7 Second, FRE 502(a) limits the subject matter waiver of voluntarily disclosed
8 materials to the unusual situation in which fairness requires a further disclosure of related,
9 protected information to prevent a selective and misleading presentation of evidence to the
10 disadvantage of the adversary. Thus, subject matter waiver is limited to situations in
11 which a party intentionally puts protected information into the litigation in a selective,
12 misleading, or unfair manner.

13 **II. THE PROPOSED ARIZONA RULE OF EVIDENCE 502**

14 Petitioner submits that this Court should adopt FRE 502 to resolve disputes about
15 inadvertent or voluntary waivers of privilege or work product protection in Arizona courts
16 and to reduce litigation costs.

17 **A. Arizona Case Law Generally Supports the Adoption of FRE 502**

18 Because Arizona case law provides little guidance on waiver of privileged or work
19 product material through inadvertent or voluntary disclosure, adoption of the proposed
20 Arizona Rule of Evidence 502 will neither overturn nor support existing Arizona case law.
21 However, Arizona courts tend to favor protecting privileged material in these situations.
22 *See, e.g., Ulibarri v. Superior Court*, 184 Ariz. 382, 385-86, 909 P.2d 449, 452-53 (Ariz.
23 Ct. App. 1995) (limiting a voluntary waiver of attorney-client privilege “only to those
24 communications concerning the specific condition which petitioner has placed at issue”);
25 *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 318-19, 812 P.2d 1129, 1136-
26 37 (Ariz. Ct. App. 1991) (holding that production of privileged material for *in camera*

1 review did not inadvertently or voluntarily waive privilege); *Tucson Med. Ctr. Inc. v.*
2 *Rowles*, 21 Ariz.App. 424, 429-30, 520 P.2d 518, 523-24 (Ariz. Ct. App. 1974) (refusing
3 to allow a physician to waive privilege to a third party’s medical records during a
4 deposition). Arizona courts also agree with the FRE 502(a) provision for subject matter
5 waiver of voluntarily-disclosed material, holding that waiver of privileged material is
6 appropriate when a litigant “places a claimant in such a position, with reference to the
7 evidence, that it would be unfair and inconsistent to permit the retention of the privilege.”
8 *Flores v. Cooper Tire and Rubber Co.*, 218 Ariz. 52, 178 P.3d 1176, 1182 (Ariz. Ct. App.
9 2008) (quoting *Throop v. F.E. Young & Co.*, 94 Ariz. 146, 158, 382 P.2d 560, 568
10 (1963)). Thus, the proposed Arizona Rule of Evidence 502 generally supports Arizona
11 case law on waiver of privilege.

12 **B. Adoption of Arizona Rule of Evidence 502 Will Expedite and Reduce**
13 **the Cost of Civil Litigation in Arizona Courts**

14 Adoption of the proposed Arizona Rule of Evidence 502 will expedite and reduce
15 the cost of civil litigation in Arizona courts. By codifying and clarifying Arizona law on
16 inadvertent and voluntary disclosures of privileged and work product material, Arizona
17 can bypass the significant evidentiary dispute that occurred in the federal courts. With the
18 adoption of clear guidelines on how to protect privileged material, Arizona state court
19 litigants will be more likely to avoid evidentiary disputes and expedite discovery with the
20 use of court orders. Arizona state court litigants will also save time and resources
21 performing reasonable, but not overburdensome, privilege review and retention. In the
22 unusual instance where an inadvertent disclosure arises from a wholly inadequate
23 privilege review or where a litigant makes an intentional, selective, and unfair disclosure,
24 the new Rule 502 will permit an appropriate finding of waiver of the privilege or work
25 product protection.

26 **III. CONCLUSION**

The Court should adopt the proposed Arizona Rule of Evidence 502 to conform

1 with the form of the rule as set forth in Exhibit A.

2 RESPECTFULLY SUBMITTED this 10th day of January, 2009.

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Exhibit A

1 **PROPOSED RULE 502**

2 **ARIZONA RULES OF EVIDENCE**

3 **Rule 502. Attorney-Client Privilege and Work Product; Limitations on**
4 **Waiver**

5 The following provisions apply, in the circumstances set out, to disclosure of a
6 communication or information covered by the attorney-client privilege or work product
7 protection.

8 **(a) Disclosure made in an Arizona proceeding; scope of a waiver.**

9 When the disclosure is made in an Arizona proceeding and waives the attorney-
10 client privilege or work-product protection, the waiver extends to an undisclosed
11 communication or information in an Arizona proceeding only if:

- 12 (1) the waiver is intentional;
- 13 (2) the disclosed and undisclosed communications or information concern the
14 same subject matter; and
- 15 (3) they ought in fairness to be considered together.

16 **(b) Inadvertent disclosure.**

17 When made in an Arizona proceeding, the disclosure does not operate as a waiver
18 in an Arizona proceeding if:

- 19 (1) the disclosure is inadvertent;
- 20 (2) the holder of the privilege or protection took reasonable steps to prevent
21 disclosure; and
- 22 (3) the holder promptly took reasonable steps to rectify the error, including (if
23 applicable) following Arizona Rule of Civil Procedure 26.1(f)(2).

24 **(c) Disclosure made in a proceeding in another state.**

25 When the disclosure is made in a proceeding in another state and is not the subject
26 of a state-court order concerning waiver, the disclosure does not operate as a waiver in an

1 Arizona proceeding if the disclosure:

2 (1) would not be a waiver under this rule if it had been made in an Arizona
3 proceeding; or

4 (2) is not a waiver under the law of the state where the disclosure occurred.

5 **(d) Controlling effect of a court order.**

6 An Arizona court may order that the privilege or protection is not waived by
7 disclosure connected with the litigation pending before the court -- in which event the
8 disclosure is also not a waiver in an Arizona proceeding.

9 **(e) Controlling effect of a party agreement.**

10 An agreement on the effect of disclosure in an Arizona proceeding is binding only
11 on the parties to the agreement, unless it is incorporated into a court order.

12 **(f) Definitions.**

13 In this rule:

14 (1) “attorney-client privilege” means the protection that applicable law provides
15 for confidential attorney-client communications; and

16 (2) “work-product protection” means the protection that applicable law provides
17 for tangible material (or its intangible equivalent) prepared in anticipation of litigation or
18 for trial.

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Exhibit B

1 **ENACTED FEDERAL RULE OF EVIDENCE 502**

2 **Rule 502. Attorney-Client Privilege and Work Product; Limitations on**
3 **Waiver**

4 The following provisions apply, in the circumstances set out, to disclosure of a
5 communication or information covered by the attorney-client privilege or work product
6 protection.

7 **(a) Disclosure made in a federal proceeding or to a federal office or agency;**
8 **scope of a waiver.**

9 When the disclosure is made in a federal proceeding or to a federal office or
10 agency and waives the attorney-client privilege or work-product protection, the waiver
11 extends to an undisclosed communication or information in a federal or state proceeding
12 only if:

- 13 (1) the waiver is intentional;
14 (2) the disclosed and undisclosed communications or information concern the
15 same subject matter; and
16 (3) they ought in fairness to be considered together.

17 **(b) Inadvertent disclosure.**

18 When made in a federal proceeding or to a federal office or agency, the disclosure
19 does not operate as a waiver in a federal or state proceeding if:

- 20 (1) the disclosure is inadvertent;
21 (2) the holder of the privilege or protection took reasonable steps to prevent
22 disclosure; and
23 (3) the holder promptly took reasonable steps to rectify the error, including (if
24 applicable) following Fed. R. Civ. P. 26(b)(5)(B).

25 **(c) Disclosure made in a state proceeding.**

26 When the disclosure is made in a state proceeding and is not the subject of a state-

1 court order concerning waiver, the disclosure does not operate as a waiver in a federal
2 proceeding if the disclosure:

3 (1) would not be a waiver under this rule if it had been made in a federal
4 proceeding; or

5 (2) is not a waiver under the law of the state where the disclosure occurred.

6 **(d) Controlling effect of a court order.**

7 A federal court may order that the privilege or protection is not waived by
8 disclosure connected with the litigation pending before the court – in which event the
9 disclosure is also not a waiver in any other federal or state proceeding.

10 **(e) Controlling effect of a party agreement.**

11 An agreement on the effect of disclosure in a federal proceeding is binding only on
12 the parties to the agreement, unless it is incorporated into a court order.

13 **(f) Controlling effect of this rule.**

14 Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to
15 federal court-annexed and federal court-mandated arbitration proceedings, in the
16 circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if
17 state law provides the rule of decision.

18 **(g) Definitions.**

19 In this rule:

20 (1) “attorney-client privilege” means the protection that applicable law provides
21 for confidential attorney-client communications; and

22 (2) “work-product protection” means the protection that applicable law provides
23 for tangible material (or its intangible equivalent) prepared in anticipation of litigation or
24 for trial.

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