

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-18-0007
RULE 26(b)(4), ARIZONA)
RULES OF CIVIL PROCEDURE) **FILED 8/28/2018**
)
)
)
_____)

**ORDER
AMENDING RULE 26(b)(4) OF
THE ARIZONA RULES OF CIVIL PROCEDURE**

A petition having been filed proposing to amend Rule 26(b)(4) of the Arizona Rules of Civil Procedure, and having considered the petition and comments,

IT IS ORDERED that Rule 26(b)(4) be amended in accordance with the attachment to this Order, effective January 1, 2019.

DATED this 28th day of August, 2018.

_____/s/_____
SCOTT BALES
Chief Justice

TO:

Rule 28 Distribution
William G. Klain
Patricia Lee Refo
David B. Rosenbaum
Hon. Peter B. Swann
Hon. David L. Mackey
Joseph A. Kanefield
Lisa M. Panahi

ATTACHMENT¹

ARIZONA RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery

* * *

(b) Discovery Scope and Limits.

* * *

(4) *Expert Discovery.*

(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).

(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.

(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:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

The dates on 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 that evidence those dates are discoverable.

~~(B)~~ *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:

(i) as provided in Rule 35(d); or

¹ Additions to text of the rule are shown by underscoring and deletions of text are shown by ~~strike-through~~.

(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.

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

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (~~B~~D), including the time the expert spends testifying in a deposition; and

(ii) for discovery under Rule 26(b)(4)(~~B~~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 the expert reasonably spends preparing for deposition.

(~~D~~E) *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)(~~D~~E)(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.