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February 13, 2007

Noel K. Dessaint, Clerk Of Court
ARIZONA SUPREME COURT
1501 West Washington St., Room 402
Phoenix, Arizona 85007

Re: OBJECTION TO PETITION TO AMEND THE RULES OF CIVIL PROCEDURE, SECTION IX. COMPULSORY ARBITRATION RULES 72 - 76

Dear Justices:

We write this letter to voice our opposition to the proposed rule change in mandatory civil arbitration cases (Rules 72-76) that would require personal injury victims to provide the defense with HIPAA compliant medical record release authorizations, unless the plaintiff can state a good reason to object. The proposed rule would violate a plaintiff's privacy rights, Arizona law, Federal law and the Rules of Civil Procedure.

Arizona law does not require a plaintiff to provide medical record release authorizations in non-medical malpractice cases. A plaintiff's attorney has an obligation to protect the plaintiff's potentially privileged medical records from being improperly disseminated. It goes without saying that to assert a privilege, a plaintiff must be permitted to first screen her medical records for potentially privileged documents **prior** to producing the medical records to a defendant.

Under Arizona law an individual's communications with his/her physician are privileged. See A.R.S. § 12-2235. Such records are also privileged under Federal law. See 45 C.F.R. 164.508. Like other statutory privileges, the physician/patient privilege may be waived. See Bain v. Superior Court, 148 Ariz. 331, 333, 714 P.2d 824 (1986). However, the burden of demonstrating a waiver of the physician/patient privilege is on the party seeking to overcome the privilege. State v. Miles, 211 Ariz. 475, 123 P.3d 669 (App. 2005) at p.2 n.4, citing Alcon v. Spicer, 113 P.3d 735, 739 (Colo. 2005).

In the Bain case, the Supreme Court discussed the circumstances and manner in which the physician/patient privilege may be waived. First, the court in Bain held that a patient may expressly waive the privilege by voluntarily testifying about communications with his/her

physician. Bain, *supra*, 148 Ariz. at 334 citing A.R.S. § 12-2236. Secondly, the court in Bain held that a patient may impliedly waive the physician/patient privilege by "placing a particular medical condition at issue by means of a claim or affirmative defense." Id. The court in Bain emphasized, however, that the scope of an implied waiver is limited to the specific condition put at issue by the patient.

> The scope of an implied waiver of a statutory privilege only extends to privileged communications concerning the specific condition which has been voluntarily placed at issue by the privilege holder.

Id. at 335.

In specific, the court in Bain noted by placing the medical condition of "conversion reaction" at issue, Ms. Bain had not waived the privilege regarding treatment for other psychological conditions. Id.

In many non-medical malpractice cases, defendants argue that by filing a lawsuit, the plaintiff waives the physician/patient privilege with respect to all medical treatment he or she has ever received, not just the treatment related to the condition at issue in the lawsuit. Not only is this position unsupported by any legal authority, it is contrary to the Arizona Supreme Court's holding in Bain and the subsequent Court of Appeals holding in Duquette v. Superior Court, 161 Ariz. 269, 275, 778 P.2d 634, 640 (App. 1989). Indeed, in describing the scope of an implied waiver, the court in Duquette quoted directly from the Supreme Court's holding in Bain.

> Arizona has recognized the concept of implied waiver. In Bain v. Superior Court, the Arizona Supreme Court stated that when a plaintiff 'places a particular medical condition at issue by means of a claim or affirmative defense, then the privilege will be deemed waived with respect to that particular medical condition.'

Duquette, *supra*, 161 Ariz. at 272 (emphasis added).

Common sense dictates that to assert a privilege, or to know whether to assert a privilege, a plaintiff must first have the opportunity to screen the records for "intimate facts of the patient which are unrelated and irrelevant to the mental or physical condition placed at issue in the lawsuit." Duquette at 275, 778 P.2d at 640; Bain at 335, 714 P.2d at 828.

In a recent opinion regarding the applicability of the physician/patient privilege in criminal cases, the Court of Appeals cited to the Colorado Supreme Court's opinion in the Alcon case. See State v. Miles, *supra*. In Alcon, the Colorado Supreme Court discussed the scope of the implied waiver of the physician/patient privilege in personal injury lawsuits. Like our Supreme Court in Bain, the Colorado Supreme Court in Alcon ruled that the implied waiver of the physician/patient privilege in a personal injury lawsuit extends only to the condition put at issue by the plaintiff. Alcon, *supra*, 113 P.2d at 730. The court in Alcon stated:

> When the privilege holder pleads a physical or mental condition as the basis of a claim or as an affirmative defense, the only reasonable conclusion is that he thereby impliedly waives any claim of confidentiality *respecting that same condition*.

Id. (emphasis in the original).

The court in Alcon made clear that the test for an implied waiver of the physician/patient privilege was not whether the medical records in question were relevant to the issues in the lawsuit. Rather, the issue is whether the specific medical condition had been put at issue by the patient, thus allowing disclosure of the patient's medical records.

> Although [defendant] is correct that some information in Dr. Aschenbrenner's records may be relevant in this manner, the tangential relevance of this information is not enough to make the records 'related to the injuries and damages claimed' such that they come within the waiver. We have repeatedly stated that relevance alone cannot be the test for a waiver of the physician/patient or psychotherapist/patient privilege.

Id. at p. 741 (emphasis added).

The court in Alcon emphasized that by filing a personal injury lawsuit, a plaintiff does not give up his/her privacy interest in his/her medical records; rather, the implied waiver extends only to those records related to the injuries claimed in the lawsuit.

> We have acknowledged that, by making [a claim] for injury, [plaintiff] impliedly made a limited release of medical records relating to the cause and extent of the injuries and damages sustained as a result of the defendant's claimed negligence. This waiver, however, does not amount to a complete release of [plaintiff's] prior medical history.

Id. at p 740.

Under Blazek v. Superior Court, 177 Ariz. 535 (App. 1994), it was determined that unlimited discovery of plaintiff's records without first determining whether all of the information contained in the records is related to the medical condition at issue is improper.

Finally, the Arizona Rules of Civil Procedure do not require a party to sign releases in non-medical malpractice cases. Rule 16(c)(1) of the Arizona Rules of Civil Procedure, provides that a defendant in a medical malpractice case may seek a court order requiring the plaintiff to sign a medical authorization. Rule 16(c)(1), however, is limited to medical malpractice cases. The inclusion of the provision regarding medical authorization in Rule 16(c)(1), and its exclusion from Rule 16(b) (which deals with non-medical malpractice cases), indicates that the so-called "right" to compel medical authorizations is limited to medical malpractice cases.

As the foregoing authorities make clear, the filing of a personal injury lawsuit does not waive all claims to the physician/patient privilege, thereby requiring a plaintiff to sign authorizations. Rather, the implied waiver resulting from the filing of a lawsuit is limited to the medical condition put at issue by the plaintiff.

Defendants typically argue that the medical authorizations are required because the plaintiff might not have produced all relevant records. This theory could be true of any disclosure, yet the plaintiff's attorney does not get to go search through the defendants' offices (or the insurance adjusters' offices) to make sure they complied with the disclosure rules. Absent some reasonable belief that there has been a non-disclosure, mandating a release so that the defendants can "check" on the completeness of the plaintiff's disclosure is a one-sided and unnecessary and potentially very prejudicial rule. The defendant may then come into possession of documents that are irrelevant and thus privileged.

In summary, the Arizona Rules of Civil Procedure were designed to work as follows:

1. Both sides produce all relevant records as mandated by the rules.[1]

2. The plaintiff produces a privilege log for all records that aren't produced.

3. The defendant sends interrogatories asking for the names of doctors for a reasonable period of time and the medical condition treated. The plaintiff answers with basic information -- name of doc and type of treatment, e.g., "colds, flus, and other minor conditions; GYN care, asthma care, etc."

4. If the defendant believes that there is some reasonable connection between those records and the case, he can request the plaintiff to obtain the records. The plaintiff then screens the records and produces the relevant and non-privileged records and a privilege log for all non- relevant and privileged records.

5. If the defendant wants more scrutiny, then the plaintiff files all retained records under seal to the court for an in camera review. If the court sustains the claim of privilege/lack of relevance, the defendant pays for all costs of production, including the court's time in reviewing the records (to the general fund).

[1] We have no objection to mandating that plaintiffs "disclose" the names of their treating doctors in the disclosure or that uniform interrogatories be answered and produced with the disclosure, in an effort to expedite the disclosure of this information.

6. Under no circumstances can a plaintiff's medical records go to the defense first. If the court does not think it is fair for the plaintiff to prescreen the records (which is what the law mandates always), then the records can be produced under seal to the court.

A defendant's dislike of the procedures set forth in the Arizona Rules of Civil Procedure is not grounds to violate a plaintiff's privacy rights. Rules should not be propagated that would prevent a plaintiff from maintaining his or her right of privacy. Arizona law is clear that the implied waiver of the physician/patient privilege is limited to the medical condition put at issue by the plaintiff. The proposed rule would not provide any mechanism by which a plaintiff could exercise her or her right to object on the grounds of physician/patient privilege. Accordingly, the undersigned urge the Supreme Court to reject the proposal that would require plaintiffs to provide HIPAA compliant medical release authorizations in mandatory arbitration cases.

Sincerely,

Anthony J. Palumbo Elliot G. Wolfe Scott A. Sahlman Scott I. Palumbo

SIP/slh

cc: Mike Baumstark, Chair
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