

RECEIVED

Amy G. Langerman
(State Bar No. 009174)
Amy Langerman P.C.
951 Coronado Avenue
Coronado, CA 92118

APR - 3 2007

R V M

March 31, 2007

The Justices of the Supreme Court
State of Arizona
1501 W. Washington
Phoenix, AZ 85007

Dear Justices:

Re: Public Comment Concerning Proposed Amendments to the Rules for
Arbitration – Comment to Proposed Amendment to Rule 75(a)

I am an attorney licensed to practice law in the State of Arizona. I am a former president of the Arizona Trial Lawyers Association (AzTLA), Former Governor to the Association of Trial Lawyers of America (ATLA), president elect of the Arizona Employee-Attorneys' Association (AzELA), former judge pro tem and a former member of court committees that are too numerous to mention. I have tried many lawsuits, in state and federal court, appeared in every appellate court in Arizona, and was previously a member of the Civil Rules Committee for many years. I was certified with the original group of PI attorneys and twice recertified as a specialist in personal injury and wrongful death. I provide my background even though you all know me as this comment will be posted on the Rules Forum¹. The viewing public has a right to know who is commenting and what their background on this issue might be. Today, I write to you in my individual capacity.

I write to express my opposition to part of the proposed amendments to Rule 75 (a), concerning arbitration procedure, specifically those provisions that will now mandate that personal injury plaintiffs voluntarily produce a HIPAA compliant medical authorization in addition to their relevant medical records. Such a provision flies in the face of the disclosure provisions imposed upon all parties, separates out one class of plaintiffs for separate treatment, and will result in an increase in motions and court/arbitrator involvement in many cases without a demonstrated need for such procedures. Costs of litigation will increase in a system designed to streamline cases and reduce costs. Finally, there is a real and present danger of the potential for disclosure of privileged information directly to the defense. For all of these reasons, I urge this court to delete the provisions.

¹ I was unable to post this with my limited technical knowledge and thus file it "the old fashioned way" and request that your tech staff post this in the forum.

At the current time, all plaintiffs in personal injury cases are required to “disclose”, pursuant to the timelines imposed by court rule, relevant medical records. Uniform interrogatories exist that ask plaintiffs to further disclose the names of all doctors who have treated them in the last 5 years. It is up to the plaintiff to identify those “medical issues in controversy” and to produce evidence to support those issues.

If there is a dispute over the scope or extent of disclosure under the present rules, a defendant is required to make a good faith effort to resolve the dispute without court intervention. Typically, a defendant will seek ALL records from ALL doctors, regardless of whether they may be relevant. In such cases, the defense attorney will argue that there may be some mention of accident related conditions in unrelated medical records which may require them to be produced.

A reasonable plaintiff’s attorney would thereafter obtain the requested medical records, review them to see if there are any references to accident related conditions, and produce those sections that do. A privilege log would be produced for all other pages not disclosed. If the defense doesn’t like this procedure, and files a motion (or if the plaintiff refuses to comply with this procedure), the records can and should be produced, either by plaintiff or via subpoena, to the judge for an in camera inspection. The defendant is NEVER in the loop until and unless a judge determines that a claim of privilege is unfounded.

Defendants are unhappy with this procedure, not because it is unfair or doesn’t work, but because it obstructs defense attorneys from seeing ALL records and making the determination themselves whether the records are relevant. Defense attorneys want to see the records themselves and want to get them directly from the doctor via subpoena because, in truth, they are suspicious of plaintiffs’ lawyers, and suspect that they are intentionally not disclosing harmful evidence.

Of course, defense attorneys don’t argue that they are suspicious of plaintiffs’ lawyers. Such an argument would likely NOT be successful as the rules work on a system where the burden of production is on the party in control of the evidence and there are serious sanctions if the party intentionally fails to disclose relevant but harmful evidence. There is no provision in the rule to allow the opponent “self help” to obtain potentially privileged records on their own in order to “check up” on their adversary as a matter of routine.

Thus, defense attorneys have come up with alternate arguments to justify their asserted need to obtain the documents directly from the doctor. They argue that the plaintiffs’ attorney may not have gotten all the records because doctors may produce fewer records in response to a letter request than they might produce in response to a subpoena. While providing no data to support such arguments, defense lawyers proffer it as a justification for their need to subpoena the documents. Of course, the rules do not require any party to obtain documents via subpoenas. If there was a belief that custodians of records will produce more with a subpoena than a private request, then it should apply to all records, not just medical records. The added expense to litigation, of course, can

not be underscored. We require both sides to investigate before filing a complaint/answer. A plaintiff has no power to subpoena before a suit is filed. So, plaintiffs request records from various sources, and pay significant sums of money to obtain them.² Under the “we need to subpoena to check the completeness of all pre-suit requests for documents” arguments raised herein, the court will now be adding additional costs to every litigation – the cost to issue and serve a subpoena, the cost for a court reporter, if the custodian appears, and the additional cost of duplicating records which have already been produced.

Of course, if there really was a need to subpoena records to ensure the veracity of one party’s disclosure, why then do they need to be produced to the defense? Plaintiffs’ lawyers in personal injury litigation have been fighting this (successfully) for years. They have creatively proposed, as alternatives to the defense procedure, production of the records directly to the court for in camera inspection, to a master, or to a court reporter for labeling, numbering and comparison. These procedures are uniformly rejected because the defense lawyer wants to look. They are desperate to look, hoping to find the one “jewel” of dirt that is not relevant, but is damaging. Examples of this abound. Indeed, I will posit the following examples from personal experience in the last 25 years:

- Personal injury plaintiff involved in a motor vehicle accident and sustained soft tissue injuries to her neck. No other injuries claimed. All relevant medical records were produced to the insurer pre-suit in an effort to settle the case. Upon receipt of the complaint, after negotiations failed, defense counsel had his insurance company run plaintiffs’ name through the insurance data bank to find out if any claims had ever been filed. Defense attorney learned that plaintiff had been raped and had been seen in an emergency room for a rape examination years earlier. He subpoenaed the records without any effort to discuss with plaintiffs’ counsel the relevance of them. He was hoping the provider would produce the records by mistake, without a consent. An immediate motion was filed. Defense counsel objected to any procedure that had a “middle man” screen the records before he did as he had a RIGHT to see for himself whether there was any alternate explanation for any emotional suffering caused by the car wreck. Court ultimately screens records and holds that NONE of them are relevant, that plaintiffs appropriately refused to produce them, and that the mere filing of a lawsuit did not allow defense attorneys and their insurers to wholesale invasion into the lives of the injured, even their medical and emotional lives.
- Employment discrimination plaintiff files claim. Defense sends interrogatories and learns that she has seen a marriage counselor years earlier in her first year of marriage. Plaintiff’s counsel obtains the records and produces a privilege log and offers to file the undisclosed records, in camera,

² Some hospitals use record production companies who charge as much as \$1.00 a page to obtain records; attempts to amend the subpoena production statute which sets fees at a much more reasonable rate to apply to production of all records, both before and after suit, have been blocked by these FOR PROFIT companies.

if defense counsel wanted to argue that they were relevant. Defense counsel files motion and claims that there is an absolute right for the defense to obtain the records without any middle man, including the court, because the court is not uniquely suited to know what actually might be relevant in this case. The court ultimately screens the records, upholds the procedure suggested by plaintiff, and finds that NONE of the records have ANYTHING to do with the claimed damages in the lawsuit.

- Personal injury plaintiff involved in a motor vehicle accident and sustained fractured clavicle. Plaintiff produces all medical records. Interrogatories are propounded and no additional medical providers are listed. Defense asked for signed consents to subpoena records to “insure” that all records were actually produced to plaintiffs counsel from doctor. Defense counsel refuses any alternative offer to have a court reporter or the judge review records for completeness. Defense counsel has no evidence that the records are incomplete but wants to check, “just to make sure” because he asserts that in other cases doctors have not produced all the records to plaintiffs counsel pre-suit.

These are just a few examples. The point of the above is to establish that what the defense claims is the problem is NOT the problem. The defense assumes that the plaintiff isn't forthcoming and has created a palpably benign reason to check for themselves. This has never been the law. Plaintiffs are required to comply with the law and produce all relevant medical records. It is initially for the plaintiff to determine relevance. If there is a dispute, the next person who should be involved in the judge – not the defense attorney looking at the records to see if the plaintiff is being fair.

If the defense was correct, then where is the similar rule for plaintiffs? The defense has an obligation to produce relevant records as well. Let's assume it isn't an automobile case but an employment case that is being arbitrated. The plaintiff is the employee and the defendant is the employer. The defendant has control over the employment records. What procedures are in place for a plaintiff to obtain “self help” to check the veracity of the defendants' disclosures? There are NONE. If a plaintiff thinks that a defendant has not been forthcoming, a motion is filed and again, the next person in the chain to decide is the judge. The defense files the documents and the judge looks at them. Plaintiff can't look at them and decide if the defense attorney “got it right.” We have to rely on the court.

Moreover, there is a potential, when medical records are involved, of an inadvertent disclosure of privileged information directly to the defense. Defendants counter this concern by arguing that the privilege has been waived upon the filing of a lawsuit so any records obtained would not be privileged. This

rebuttal fails to consider both the law of privilege and the rules designed to provide for the discovery/disclosure of discoverable information.

Simply because the privilege may be waived as to some (but likely not all) medical records, has nothing to do with the procedures that the rules provide for discovery/disclosure. With respect to medical records, the plaintiff is obligated to disclose all relevant medical records. This rule was created years ago to expedite litigation and reduce costs. Plaintiffs had to immediately produce the records with the first disclosure and there was no additional cost of a custodial deposition. Thus, the rules provided for a precise method to expeditiously and economically process claims. This new proposed rule adds yet another hurdle. In addition to the otherwise existing mandatory disclosure provisions, now we add yet another cost, the cost for the defense to recreate the discovery that has already been disclosed. These become taxable costs and if a plaintiff does not succeed or does not “beat” an offer of judgment, the plaintiff is now doubly penalized (potentially triply penalized if it is an offer of judgment situation). They paid for the records up front at huge expense to comply with rule 11, and now get to pay one or two more times for the defense to check on whether they did a good job in their original production. Nowhere do you see any argument that these costs should be born exclusively by the defense and not permitted as taxable costs, even though they are duplicating what has already been done. And, if they want the HIPAA release NOT to issue a subpoena but simply to obtain the records via request, in an effort to reduce taxable costs, why are we requiring it? The records have already been obtained via request and produced. The proffered explanation for needing the HIPAA release was because a subpoena was more effective than a release and might produce something more.

More importantly, the obligation to screen for privilege rests exclusively and always on the plaintiffs’ attorneys. If plaintiffs’ counsel has obtained the records, for example, and has seen, buried in one note for chiropractic treatment, that plaintiff has previously been treated for a sexually transmitted disease, a plaintiffs’ attorney should redact that out, should mark that the documents have been redacted in a privilege log, and should volunteer to file the document in camera for the court to determine if it needs to be produced. The defense HATES this procedure because they KNOW some dirt has been redacted and they are desperate to see it, regardless of its relevance and discoverability because it is dirt and they can use dirt to embarrass and humiliate the plaintiff. They want the power to issue a subpoena with their HIPAA release, now mandated, in order to get the dirt.

Yes, there is an exception to the proposed rule. A plaintiff can refuse to provide the release if the records are not discoverable. But, in the example above, the records are discoverable. They are clearly relevant and were disclosed because of their relevance. A medical doctor is NOT going to protect privilege the way a plaintiff’s attorney does. This same example applies to the plaintiff who has a long time family doctor who she sees for colds, flues, and pap smears.

She then gets in a car wreck and sees the doctor once and is referred to a physical therapist. Plaintiffs' counsel obtains the records, produces the one relevant page and a privilege log for the rest. Under this proposed rule, a HIPAA release would be mandated and the defense obtains privileged records.

Well, the defense will argue, the court can fashion relief to protect these situations. My point is that this has always been true. If there is an issue about the disclosure of any information, go to the court. But don't create rules that give one side the power to check on the veracity of another's disclosure when there is no basis to believe that there has not been adequate disclosure.

When I have faced this issue before, I have argued (and every time I have been successful) that if there was some basis to believe that the records were incomplete, all the defense needed to do was tell me. I would go and check. But that is NEVER the case. On their face, the records appear complete because they are exactly what the doctor sent me. Now, could a doctor have missed a page? Sure. A copy machine may have done so inadvertently. But, to give wholesale license to the defense bar to "double check", just in case there was a copying mistake, is contrary to the way the rules have always worked. If there is a note that stops in mid sentence and the next page starts with something else, it will be obvious. The defense attorney can call, tell me about it, and I can call the doctor and figure it out. Isn't that how we want the rules to work? Do we really want to create rules whose sole purpose is to engender disbelief about our adversary and risk the possibility of inadvertent disclosure of something privileged? And, do we really want to create rules that permit such suspicion but only allow ONE side in the litigation to check?

I will posit one last hypothetical. Assume the family doctor situation. He has treated the patient for years. He keeps notes of office visits on one page for each visit. He has 20 pages of pre-accident notes, representing 20 office visits. He has one office note for the car wreck. He gets the request for records from the plaintiff, for a "complete copy of your chart, cover to cover". He looks over the notes and he sees one note, from years earlier, where he treated the patient for a sexually transmitted disease. It was before the patient was married. He knows it isn't relevant and is very embarrassing so HE makes the decision not to produce it. Plaintiff has long ago forgotten about this and plaintiffs' counsel has no idea that the record exists and has been intentionally excluded by a well intentioned doctor who actually was protecting the privacy of his patient. Plaintiff's counsel produces the records in the initial disclosure and now has to produce a HIPAA release to allow her adversary to get the same records. With the subpoena, the doctor does exactly what the defense claims – sends more records than he sent before and sends the embarrassing and irrelevant and very prejudicial lab results showing the sexually transmitted disease. For the rest of the case, no matter what she does, the plaintiff will know that her adversary knows her secret, regardless of how irrelevant it might be.

Why do we need a procedure that allows this, even if there are limited examples where a doctor may not have produced 100% of the records, either by mistake or design? If the defense suspects an omission, the appropriate way to resolve it is to pick up the phone and let the plaintiffs' counsel go and look. If an omitted document is discovered, it can be promptly produced or filed under seal for an in camera inspection. But there is no basis to simply dispense with rules that are working and allow defense attorneys carte blanche to duplicate discovery on the chance that something might be out there.

The rules of disclosure work on the honor system. All lawyers are sworn to be honest and to promptly and completely disclose all relevant documents. Yes there are those who abuse on both sides and the rules provide for serious sanctions if that happens. But the rules should not allow a procedure that allows one side to duplicate what the other side is already required to do either to check on the veracity of the opponent or to make sure that the disclosure really was complete. It is unnecessary, inefficient, costly, and potentially prejudicial.

Finally, there is the suggestion that this procedure will expedite the process by "front end loading" the disclosure of relevant documents. This presupposes that the defense EVER had a right to a release. It is one thing to require early and prompt disclosure of relevant documents as a matter of course, instead of only if requested, as we previously experienced years ago. It is another thing to add a new procedure, for which there never was a right, and then claim that this will expedite matters. While defense attorneys often asked for a release or try to issue subpoenas without them, in violation of federal confidentiality provisions, there was no duty for a plaintiff to produce a release nor any right of the defense to subpoena them. The duty was on the plaintiff to produce the medical records that are relevant. Respectfully, the "we want to make the system more efficient and the process more expeditious" is simply pretext for the underlying truth: the defense wants to see the records before the plaintiff or the court can pre-screen them for privilege.

There is no evidence that the system is broken. The defense is unhappy because judges in personal injury cases have routinely refused these requests in large part because the rules do not mandate the production of a release; the rules mandate the production of records. So, they want to change the rules. Insofar as there was already a committee to look at arbitration cases, and there is a need to change some of those procedures, this was included in their amendment, buried in the middle.

I believe that this provision of Rule 75(a) should be stricken from the proposed rule.

Very Truly Yours,


Amy G. Langerman