April 19, 2007

Rachelle M. Resnick, Clerk Of Court
ARIZONA SUPREME COURT
1501 West Washington St., Room 402
Phoenix, Arizona 85007

Re: Comment to Proposed Amendment to Rule 75(a), Ariz.R.Civ.Proc.

Dear Justices:

Our firm has been practicing law in Arizona for nearly 30 years. In our personal injury practice we generally limit our representation to plaintiffs personal injury and wrongful death claims. By way of some background, both of the undersigned are currently Directors of the Arizona Trial Lawyers Association, partners in the law firm and Mr. Cohen is certified by the State Bar as a specialist in this area.

We are writing to express our opposition to the proposed amendments to Rule 75(a), Arizona Rules of Civil Procedure, which we understand would require in all compulsory arbitration cases that personal injury plaintiffs voluntarily waive their rights to privacy and privilege as to their medical records by requiring plaintiffs to sign HIPAA-compliant medical authorizations. Existing Arizona law relating to the physician-patient privilege, as discussed by this Court in *Bain v. Superior Court*, 148 Ariz. 331, 334, 712 P.2d 824, 827 (1996), is that a personal injury plaintiff impliedly waives the physician-patient privilege only to the extent that such a plaintiff "places a particular medical condition at issue by means of a claim or affirmative defense." This existing rule is fair and reasonable. It protects a plaintiff's rights to privacy as to particular medical and psychological conditions, treatment and history which have nothing to do with the claims or affirmative defenses in litigation relating to personal injuries.

The benefits of the proposed "automatic waiver" rule will come at an immeasurable price to personal privacy and may be an unconstitutional denial of equal protection since it will effectively prevent certain persons with valid claims from seeking justifiable redress. To be sure, under the proposed rule, an innocent tort victim's entire medical history will automatically be made public by a defendant whose only "right" to that information is that such defendant is involved in defending a claim arising from his own misconduct. *See, e.g., San Jose Mercury News, Inc. v. United States Dist. Court N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999) ("It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public.").

As a result, defendants will become automatically entitled to obtain and disseminate highly personal, private, and currently privileged information relating to irrelevant and sensitive matters. For example, many medical records contain details of unrelated sexually transmitted diseases, crimes, marital infidelity, drug use, psychological disorders, sexual orientation, erectile dysfunction, and embarrassing physical conditions or deformities completely unrelated to the claimed injuries.

The proposed rule automatically eliminates any protection over such matters. Under such circumstances, it would not be unusual for an injured person to abandon their injury claim rather than permit strangers to broadly delve into one of the most private relationships -- *i.e.*, the relationship between a physician and a patient. Such a proposed rule is simply unfair and unreasonable and we respectfully urge the Court to consider the implications.

Respectfully,

LEVENBAUM & COHEN

Steven A. Cohen

Geoffrey M. Trachtenberg

cc: Mike Baumstark, Chair
Committee on Compulsory Arbitration
1501 W. Washington, Suite 410
Phoenix, Arizona 85007